



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. E027 OF 2020**

**WILLIAM MOKAYA MOGERE.....1<sup>ST</sup> APPELLANT/APPLICANT**

**EPCO BUILDERS LIMITED.....2<sup>ND</sup> APPELLANT/APPLICANT**

**-VERSUS-**

**JOSEPH KIRATHI RUKUNGA.....1<sup>ST</sup> RESPONDENT**

**STELLA KAIMURI KENDI.....2<sup>ND</sup> RESPONDENT**

*(Suing as the Legal Representatives of the Estate of JACKLINE KENDI KIRATHI - deceased)*

**RULING**

1. Before the Court is an application dated 27<sup>th</sup> July, 2020, seeking leave to appeal out of time against the judgment and decree in **Milimani CMCC 228 of 2018 - Joseph Kirathi Rukunga & Another v William Mokaya Mogere & 2 Others** delivered on 29<sup>th</sup> May, 2020. The motion is premised on the provisions of Sections 79G and 95 of the Civil Procedure Act primarily.
2. The motion is supported by the affidavit of supported by affidavit sworn by **William Mokaya Mogere** on behalf of his co-Applicant **EpcO Builders Limited** (hereafter the Applicants) wherein it is deposed that being aggrieved by the judgment of the lower court the Applicants desire to appeal therefrom; that the delay in filing the intended appeal was occasioned by the virtual delivery of the judgment in the absence of the Applicants; and that having only obtained details of the judgment on 18<sup>th</sup> June, 2020, the Applicants were unable to file the memorandum of appeal within the stipulated time. It is further deposed that a request was made for a certified copy of the proceedings with a view to expediting the appeal and that the intended appeal is arguable with high chances of success and the present motion was brought without unreasonable delay.
3. **Joseph Kirathi Rukunga** and **Stella Kaimuri Kendi** (hereafter the Respondents) opposed the motion by filing grounds of opposition. To the effect that, the motion is misconceived, frivolous and vexatious there being no memorandum of appeal filed, and that the motion is devoid of merit, was filed to buy time, is bad in law and an abuse of the court process and the Applicants guilty of laches.
4. On 10<sup>th</sup> February, 2021 the court issued directions that the motion be canvassed by way of written submissions and oral highlighting. The parties duly complied by filing their respective submissions however opting not to highlight.
5. Counsel for the Applicants reiterated the Applicants' affidavit material and submitted that the Respondents did not controvert the same. He argued that the delay of 59 days, running from the date of delivery of the impugned judgment to filing of the present motion is not inordinate and has been well explained. He based his submissions on several decisions including **Civicon Group Limited v Express DDB Kenya Limited [2017] eKLR**, and **Phillip Keipto Chemwolo & Another v Augustine Kubede [1986] KLR 495**. It was contended that the Applicants' intended appeal was arguable but asserting on the authority of **Kenya Power & Lighting Company Limited v George Joseph Kang'ethe & Another [2020] eKLR** that an arguable appeal is not one that will necessarily succeed but one that raises issues worthy of the consideration of the appellate court. Finally, citing the case of **Edith Gichugu Koine v Stephen Njagi Thoithi [2014] eKLR**, submitted that the Respondents have not demonstrated what prejudice they would suffer if the motion were allowed.
6. The Respondents submitted that no memorandum of appeal had been filed for this court's admission hence the motion cannot succeed. Counsel submitted that the delay in filing the appeal between 18.6.20 to 29.6.20 was unexplained. He relied on the Court of Appeal decision in **Hunker Trading Co. Ltd v Elf Oil Kenya Ltd – Civil Appeal No. Nai. 6 of 2010** on the application of the overriding objective in the Civil Procedure Act to disputes. He asked the Court to dismiss the motion.
7. The court has considered the application in light of the parties' respective material and submissions. The preliminary issue raised by the Respondents is that failure to file a memorandum of appeal prior to seeking its admission defeats the motion. Consequently, it was submitted that the prayer in the motion is moot *ab intio*

8. This court respectfully disagrees with the above submission. While it is true that what is filed herein is a draft memorandum of appeal and not the actual appeal (and hence the erroneous assignment of an appeal number to the matter), Section 79G as read with section 95 of the Civil Procedure Act is wide enough to accommodate both prospective and retrospective application. Where a proper memorandum is yet to be filed, as in this case, the Court can in deserving cases still enlarge time to enable filing of the appeal. The courts have in similar instances or where a party has failed to attach a draft memorandum of appeal allowed the party to file its appeal out of time so long as the grounds of the intended appeal are captured in the motion or submissions. See the Court of Appeal decision in **Paul Wanjohi Mathenge v Duncan Gichane Mathenge [2013] eKLR**. In the present matter the Applicants have attached a really a draft Memorandum of Appeal – **WMM-2** which the Applicants seek be deemed as filed on time. *Although the Applicants ought, in view of their prayer, to have filed the actual memorandum of appeal, the Respondents' objection is nevertheless without merit.*

9. Moving onto the merits, Section 79G of the Civil Procedure Act provides that:

**“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:**

**Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”**

10. The successful applicant must demonstrate **“good and sufficient cause”** for not filing the appeal in time. In **Thuita Mwangi v Kenya Airways [2003] e KLR**, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in *pari materia* with Section 79G of the Civil Procedure Act, reiterated its decision in **Mutiso v Mwangi [1997] KLR 630** as follows:

**“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”**

11. While the discretion of the court is unfettered, a successful Applicants is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court’s discretion in his favor.

12. The Supreme Court in the case of **Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others [2014] e KLR** enunciated the principles applicable in an application for leave to appeal out of time. The Court state inter alia that:

**“(T)he underlying principles a court should consider in exercise of such discretion include;**

**1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;**

**2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**

**3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case- to-case basis;**

**4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;**

**5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;**

**6. Whether the application has been brought without undue delay.**

**7. ....”**

See also **County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] eKLR**.

13. The delay in this case is about 2 months. While no persuasive explanation has been given by the Applicants for non-attendance on the date of delivery of the judgment or why it took to over a month to file the instant motion, it is true that the onset of the COVID-19 pandemic caused the scaling down of court operations from mid-March 2020. This obviously affected the ability of Courts to provide proceedings on time and the transitioning of court proceedings from physical to virtual platforms may also have hindered the Applicants’ attendance of the judgment. Therefore, it is reasonable to believe that in the period after mid-March 2020 was difficult for parties seeking court services. The Applicants’ memorandum of appeal raises pertinent issues and is not patently frivolous. There is no evidence that the Respondents will be unduly prejudiced by the granting of the motion, as costs would, in addition to interest earned on their decree if upheld, be adequate compensation.

14. The Court is therefore satisfied that the motion is for granting. The Court therefore allows the prayer (1) of the motion subject to the Applicants filing a clean copy of the memorandum of appeal dated 29<sup>th</sup> June 2020 within 14 days and due payment of appropriate filing fees. The costs of the motion are awarded to the Respondents in any event.

**DELIVERED AND SIGNED AT NAIROBI ELECTRONICALLY ON THIS 1<sup>ST</sup> DAY OF JULY 2021.**

**C.MEOLI**

**JUDGE**

**In the presence of:**

**Mr. Mito h/b for Mr Mugane for the Applicants**

**Mrs Mbaabu for the Respondents**

**C/A; Carol**