



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS APPLICATION NO. 66 OF 2020**

**JOHN BOSCO KURIA..... APPLICANT**

**-VERSUS-**

**MARGARET GITONGA**

**(SUED AS THE ADMINISTRATOR OF THE**

**ESTATE OF SAMUEL NGAMBI GITONGA).....RESPONDENT**

**RULING**

1. The simple application before the Court is for extension of time to file an appeal. The Applicant, John Bosco Kuria (“the Applicant”) wishes to appeal the decision of Senior Resident Magistrate Hon. Limo B. Benjamin in *Nakuru CMCC 958 of 2018* delivered on 30/01/2020.
2. The Application is dated 07/12/2020. It is opposed by the Respondent. The Application was argued by way of written submissions.
3. The essential facts of the case are not disputed. The Applicant filed a suit sounding in breach of contract or restitution for unjust enrichment in the Lower Court. The suit was *Nakuru CMCC 958 of 2018*. The suit was defended by the Respondent in her capacity as the Personal Representative to the estate of Samuel Ngambi Gitonga. The Trial Court received viva voce evidence in the case. Defence case closed on 22/11/2019. The Trial Magistrate directed parties to file their submissions and scheduled the case for mention on 17/01/2020. On that day, the Learned Magistrate confirmed that the parties had filed their submissions and scheduled judgment for 28/02/2020.
4. The official Trial Court record ends there. The only other item in the Trial Court record is a judgment dated 30/01/2020. It is signed and it self-indicates to have been delivered on that day in the absence of the parties. It is not clear why the Learned Trial Magistrate decided to give the judgment ahead of the scheduled delivery date. However, it is not disputed that no notice was sent to the parties about the judgment.
5. The Applicant says that his advocate attended Court on 28/02/2020 and was informed that the judgment was not ready and that it would be delivered on 06/03/2020. By that time, however, COVID-19 had hit our shores and courts and registries were no longer accessible.
6. The Respondent does not deny this history of the litigation. As I understand her
7. and seeks the following orders:
  1. Spent
  2. THAT the court be pleased to extend time to the Applicant herein to file an appeal to this court arising from the judgment of Hon. Limo B. Benjamin Senior Resident Magistrate in *Nakuru CMCC 958 of 2018* delivered on 30<sup>th</sup> January 2020.
  3. THAT the cost of this application be provided for.
8. The Application is supported by the grounds on the face of it and the Supporting Affidavit of the Applicant dated 07/12/2020.
9. The Applicant depones that the suit in the Lower Court was heard on 22/11/2019 and parties attended Court to confirm filing of submissions on 17/01/2020. On the said date, judgment was fixed for 28/02/2020. On 28/02/2020, he was informed by his advocates that the judgment was not ready and the same had been deferred to 06/03/2020.
10. He depones further that there was no indication of what occurred on 06/03/2020 but thereafter, the COVID pandemic occurred, making it

impossible to access Court for some time. His advocates then informed him that the file was missing until 17/11/2020 when they told him judgment had been delivered on 30/01/2020. The judgment dismissed his suit with costs. He states that his advocates were not served with the notice for 30/01/2020 and were unaware of the judgment delivery.

11. He deposes that the Trial Magistrate did not give reasons why the judgment slated for 28/02/2020 was delivered on 30/01/2020 and that being aggrieved by the said judgment, he has already requested for a copy of the requisite documents for filing an appeal. He believes the same would not prejudice the Respondent.

12. The Respondent opposed the Application *vide* her Replying Affidavit dated 01/02/2021. She deposes that the application is misconceived and an abuse of the Court process. She alleges that the Applicant failed to produce any documentation and email correspondence showing the efforts made to request for judgment between 16/03/2020 when Courts downscaled due to COVID and the filing of this application on 07/12/2020.

13. She says that the judgment was neither delivered on 28/02/2020 nor on 06/03/2020 when it was scheduled to be delivered due to Courts downscaling. Nonetheless, her advocates followed up on the status of the case through numerous emails to the Court.

14. The Respondent concedes that the notice for 30/01/2020 was not served on either party and it is her Nairobi-based advocates, who, being unable to travel to Nakuru requested an advocate in Nakuru to follow up on the case. She says that the Applicant is an indolent party, who only brought the present application upon being served with a Notice of Taxation.

15. The application was argued by way of written submissions. The Applicant's submissions are dated 10/05/2021. The Applicant submits that the orders sought by the Applicant are discretionary. He relies on the provisions of Sections 79G and 95 of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules. He cites the case of **Leo Sila Mutiso v Rose Hellen Wangari Mwangi – Civil Application No. NAI 255 of 1997 [unreported]** cited in **Equity Bank Limited v Richard Kerochi Ayiera [2020] eKLR** and the principles stated therein.

16. The Applicant argues that despite not having complied with the provisions of Section 79 G on the issue of time, the special circumstances surrounding the present case require the Court to exercise its discretion. To wit, the directive by the Chief Justice for downscaling Court operations, lack of notice of delivery of judgment and delivery of judgment on a date before it was scheduled to be delivered. The Applicant relies on the case of **Ngoso General Contractors Ltd v Jacob Gichunge [2005] eKLR**

17. Lastly, the Applicant argues that his intended appeal is arguable and reiterates that the Respondent will not suffer any prejudice if the Application is allowed.

18. The Respondent's submissions are dated 10/06/2021. She submits that the Applicant is not deserving of the discretionary power of the Court to extend time to file an appeal. This, she contends is because the Applicant has not given sufficient evidence of the delay of over ten months after the delivery of judgment. She cites the case of **Martin Wanjala Wafula v Margaret Wairimu Mbirua [2017] eKLR**

19. The Respondent rejects the explanations of lack of a judgment notice and the downscaling of Court operations occasioned by COVID. She maintains that the Applicant is an indolent party who should not be aided by equity, having failed to take steps to follow up on the status of their case. She relies on the case of **Penderosa Logistics Limited v Ayub Wesonga [2017] eKLR**

20. From the foregoing, the only issue for determination is whether the Applicant is entitled to an extension of time to file his appeal.

21. The provision of the law governing extension of time to file an appeal is Section 79G of the Civil Procedure Act. It provides as follows:

*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.*

22. Extension of time to file an appeal is a discretionary power of the Court. In applying its discretion, the Court ought to consider the length of the delay; the reason for the delay; the arguability of the intended appeal; and the degree of prejudice to the Respondent if the application is granted.

23. On the first consideration, the application was brought over 10 months after judgment was delivered on 30/01/2020. The most relevant events in this case began on 17/01/2020 when the Trial Court confirmed filing of submissions and gave a judgment date for 28/02/2020. The record of the Trial Court shows that indeed the judgment was set for 28/02/2020 but the same was delivered on 30/01/2020.

24. There is no indication from the record that a notice was sent to the parties therein about the change of dates, a fact also admitted by the Respondent. Both parties have also indicated that the judgment meant for 28/02/2020 was later rescheduled to 06/03/2020 but was not delivered on the said date.

25. Evidently, the parties agree on the sequence of events. Their point of difference is the reasons for delay. The Applicant claims that he could not access the file due to court's scaling down amidst the COVID pandemic while the Respondent argues that had the Applicant made extra effort to access the Courts like she did, he could have accessed the file. The issue of Court's scaling down is within the public domain. This, coupled with the lack of notice to Applicant is in my view, a reasonable explanation for the delay in filing an appeal.

26. On the 3<sup>rd</sup> consideration, the Applicant only needs to raise an arguable appeal. This was defined in ***Kenya National Examinations Council v Republic & 20 others [2021] eKLR*** as “*Not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.*” In my view, the Draft Memorandum of Appeal raises an arguable appeal.

27. On the last consideration, I see no prejudice that will be suffered by the Respondent if the Applicant is allowed to file the appeal.

28. Given all these considerations, I am persuaded that it is fair and just to exercise the Court’s discretion to extend time for the Applicants to file their Memorandum of Appeal in this instance. I will allow the Application dated 07/12/2020 and make the following orders:

**a) The Applicant to file and serve a Memorandum of Appeal within fourteen (14) days of today.**

**b) The Applicant to file and serve the Record of Appeal within ninety (90) days of today’s date otherwise the Appeal will automatically expire unless the time is extended by an order of the Court.**

**c) Each party will bear its own costs.**

29. Orders accordingly.

**DATED AND DELIVERED AT NAKURU THIS 14TH DAY OF OCTOBER, 2021.**

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**JOEL NGUGI**

**JUDGE**

**NOTE:** This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.