



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**MISC CIVIL APPLICATION NO. E222 OF 2021**

**SAMUEL GICHERU MBURU.....APPLICANT**

**VERSUS**

**VICTOR MBITHI.....RESPONDENT**

**RULING**

1. This is the notice of motion dated 18<sup>th</sup> May 2021 brought under sections 79G of the Civil Procedure Act, Order 50 Rule 6, and Order 51 Rule 1 of the Civil Procedure Rules. It seeks the following orders:

*i) Spent*

*ii) That this Honourable Court be pleased to enlarge time for giving notice to appeal and do grant the applicant herein leave to file an appeal out of time against the judgment of the Honourable Court issued on 12<sup>th</sup> October 2018 in Nairobi CMCC NO.2697 OF 2018; VICTOR MBITHI VERSUS SAMUEL GICHERU.*

*iii) That costs of this application be provided for.*

2. The application is supported by the grounds on its face plus the sworn affidavit of Samuel Gicheru Mburu the applicant. He averred that the said judgment for the sum of Kshs. 2,050,000/= against him had been entered because his previous counsel failed to attend court despite having been served with all court processes as well as hearing notices. That he was dissatisfied with the said judgment and filed an application dated 6<sup>th</sup> February 2019 which sought setting aside the judgment which was dismissed (Annexure SGM2 a & b).

3. He deponed that he sought further extension of time to file an appeal before the lower court vide an application dated 11<sup>th</sup> November 2020 but the same was dismissed due to lack of jurisdiction on 16<sup>th</sup> of April 2021. (SGM3 a & b). He avers that he has a strong arguable appeal with a high chance of success (Annexure SGM4).

4. In opposition to the application, the respondent Mr. Victor Mbithi swore a replying affidavit on 2<sup>nd</sup> July 2021. He deponed that the application is incorrigibly defective, made with immense malafide, incompetent, misconceived, has no merit and is an abuse of the court process and is meant to deliberately waste precious judicial time.

5. He averred that the application is marred with lies particularly that the applicant had no knowledge of the said judgment since he was served with a decree emanating from it. He adds that the decree was partially satisfied by payment of Kshs. 500,000/= (Annexure VM-a is a copy of the cheque).

6. He deponed that the applicant has failed to disclose crucial material information and to bring the court upto speed by briefly putting the history of the litigation between the parties herein to perspective. He deponed that the applicant delayed in entering appearance and filing of defence upon which his advocates requested for judgment which was entered and a decree issued in his favour.

7. He further deponed that his advocates instructed Recovery Concepts Auctioneers to undertake execution and after frantic efforts the said firm of auctioneers located the applicant's properties which were proclaimed. He begun executing the decretal sum by issuing two cheques of Kshs.500,000/=each dated 12<sup>th</sup> March 2017 and 25<sup>th</sup> March 2017 (annexture VM-3 a & b ). That the applicant gave instructions for the second cheque to be dishonored and filed an application through the firm of Ms. Oduor Henry John & Company Advocates seeking to set aside the exparte judgment. The application was heard and allowed hence the applicant was allowed to enter appearance and defend the suit.

8. He averred that his advocates procured a pretrial date for 30<sup>th</sup> November 2020 upon which a mention notice was prepared and served on the applicant's advocates. There was no appearance by the applicant's advocates. He deposed that the matter came up for hearing and despite proper service neither the applicant nor his counsel were present. His case was heard and closed. The judgment was delivered in his favour for Kshs.2, 050,000/=plus interest and costs. (Annexure VM-9).

9. It's his averment that the applicant fired the firm of Oduor Henry John & Company advocates and instructed the firm of Ario & Company Advocates who filed an application seeking to set aside the judgment for the 2<sup>nd</sup> time and the court dismissed the same. They proceeded to instruct Nextgen Auctioneers who obtained warrants and proceeded to proclaim the properties of the applicant who pleaded with them and promised to pay. He issued the cheque for Kshs.500,000/= and by dint of this act the applicant gave into the judgment and it's at this point that he ought to have filed an appeal.

10. He averred that the applicant continued to make numerous promises to pay the outstanding balance but he took them in unnecessary cycles to no avail. That the applicant has deliberately frustrated him since judgment was issued and he was advised by his advocates to file bankruptcy proceedings against him. That the applicant through his advocates denied the claim.

11. He deposed that the applicant has had his time in court and misused the same and granting him another bite at the cherry will be against the accepted Latin maxim "*Interest Reipublicae Ut Sit Finis Litium Definition*" which speaks to the fact that it is in the public interest that litigation has to come to an end. That the fact the applicant has had three firms of advocates representing him since commencement of this litigation only paints him as an overly litigious person who is not deserving of precious judicial time which is very limited.

12. Further, in opposing the application, the respondent filed grounds of opposition dated 2<sup>nd</sup> July 2021 on the following grounds:

*a) That the said application is incurably defective, incompetent, misconceived, has no merit whatsoever and is an abuse of the court process.*

*b) That the application does not disclose any reasonable grounds to warrant the prayers sought as it is based on falsehood and concealment of material facts from the honourable court.*

*c) That applicant has already been caught up by the doctrine of laches since the judgment he intends to appeal against was delivered more than two years ago and has filed the present application only for the sole reason of frustrating and denying the respondent the fruits of his judgment in the subordinate court.*

*d) That the applicant has failed to disclose to the court that he had already begun liquidating the decretal sum emanating from the judgment he so wishes to appeal against, and by dint of that fact, he had already acquiesced to the decision of the court below by which he is bound.*

*e) That litigation has to come to an end, given the fact the facts in issue in the present application have been litigated upon in more than three applications including the present application.*

*f) That the applicant has not shown any willingness in his application as to whether he shall be willing to abide by the conditions the court may set including deposit of the outstanding decretal sum into court.*

*g) That the said application be dismissed with costs to the plaintiff/respondent.*

13. The application was disposed of by written submissions. Mr. Nderitu for the applicant in his submissions gave a brief background of the matter and referred to section 79G of the Civil Procedure Act and Order 50 Rule 6 of the Procedure Rules in support of this application. He cited the case of **Daphne Parry v Murray Alexander Caeson (1963) EA 546** where the court expounded on the issue of sufficient cause and stated that the provision for extension of time requiring sufficient reason should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles.

14. He further submitted that the burden lies on the applicant to prove sufficient cause and on this he relied on the case **Ratman v Cumarasamy (1964) 3 ALL ER 933** and **Savill v Southend Health Authority (1995)1WLR 1254 at 1259** which were cited with approval in **Dipack Kenya Limited v William Muthama Kitonyi (2018) eKLR**

15. On the principles to be considered in exercising the discretion whether or not to enlarge time, counsel relied on the case of **Thuita Mwangi v Kenya Airways (2003) eKLR** which reiterated its decision in **Mutiso v Mwangi (1997) KLR 630** where it stated thus:

*"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 in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted."*

16. He submitted that the applicant had no knowledge of the exparte judgment, dismissal of his applications for setting aside the judgment as well as the application for the extension of time to file an appeal. He contends that all these constitute good and sufficient cause for not filing the appeal in time and the delay is fully accounted for and so is not inordinate.

17. He submitted that the applicant continues to be grossly aggrieved by the existence of the judgment and that it is therefore in the interest

of justice that the court grants him leave to file the appeal which shall afford the applicant an opportunity to be heard. He further submitted that the respondent stands to suffer no prejudice as the applicant's action is in good faith which is evidenced by the payments already made to the respondent.

18. Learned counsel for the respondent –Mr.Barasa in his submissions gave brief facts of the matter and identified two issues as follows:

- i. *Whether the applicant is entitled to an order for extension of time to file an appeal out of time.*
- ii. *Whether the applicant has demonstrated willingness to abide by the directions of the court.*

19. On the first issue, counsel relied on Section 79G of the Civil Procedure Act and further relied on the Supreme Court case of **Nicholas Kiptoo Arap Korir Salat v Independence Electoral and Boundaries Commission & 7 Others (2014)** in which the Court stated that a court has the power and discretion to extend time for any action to be taken in the course of proceedings. Further a party applying for an order for extension of time is not entitled to such an order, as it is upon the court to weigh that party's application and by its discretion determine whether to grant such an order. The Supreme Court in this case proceeded to outline the underlying principles that a court should consider in exercise of such discretion which are as follows:

- i. *Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;*
- ii. *A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;*
- iii. *The Court's exercise of its discretion to extend time, is a consideration to be made on a case to case basis;*
- iv. *Where there is a sensible reason for the delay, the delay should be explained to the satisfaction of the Court*
- v. *Whether there will be any prejudice suffered by the respondents if the extension is granted;*
- vi. *Whether the application has been brought without undue delay; and*
- vii. *Whether in certain cases, like election petitions, public interest should be a consideration for extending time.*

20. On the first principle, counsel relied on the case of **Paul Wanjohi Mathenge v Duncan Gichane Mathenge (2013) eKLR** which addressed this consideration. It referred to the Court's decision in **Henry Mukora Mwangi v Charles Gichina Mwangi –Civil Application No.Nai 26 of 2004** where the court determining the case referred to the decision in **Leo Sila Mutiso v Rose Hellen Wangari Mwangi Civil Application No.Nai 255 of 1997** (unreported) where the Court stated that:

*“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 in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted”*

21. It is counsel's submission that the applicant is not entitled to an order for extension of time as it is an order that this court can only grant on a discretionary basis hence the need for the applicant to demonstrate that he merits the order. He contends that the applicant's delay is fatally inordinate, equally groundless and has no chance of success and that there is no iota of evidence to demonstrate any proper reasons as to why the applicant waited for three years before conceiving an appeal.

22. On the second principle, he submitted that the applicant in his application stated that the basis for his application was that he had no knowledge of the entry of the judgment and the fact that his previous counsel failed to attend court despite being served all the court processes. It is therefore counsel's submission that this reason is not satisfactory as it fails to disclose a proper legal basis for seeking leave.

23. On the third principle, he submitted that it is not automatic for a court to grant an order for extension of time to file appeal out of time since it exercises this discretion cautiously, subjectively, on a case to case basis. The onus falls on the party seeking the order to present its case in a persuasive manner so as to convince the court to grant the order. On this he relied on the case of **Dilpack Kenya Limited v William Muthama Kitonyi (2018) eKLR** which referred to the Court's decision in **Velji Shahmad v Shamji Bros.and Popatlal Karman & Co. (1957) EA 438** where the Court held that:

*“In the interests of the public the court ought to take care that appeals are brought before it in proper time and before the proper court or registry and when a judgment has been pronounced and the time for appeal has elapsed without an appeal the successful party has a vested right to the judgment which ought, except under very special circumstances, to be made effectual. And the Legislature intended that appeals from judgments should be brought within the prescribed time and no extension of time should be granted except under very special circumstances”*

24. On the fourth principle, he submitted that the applicant has not given a satisfactory reason for the delay in filing the appeal. Counsel has contended that the respondent has suffered prejudice by the applicant's failure to fully refund the total amount of money paid for the containers, which is a breach of the agreement between them.

25. Lastly counsel has submitted that the applicant has failed to show his readiness and willingness to abide by the directions of the court. He

therefore urges the court to dismiss the application in the interest of justice.

### **Analysis and Determination**

26. I have duly considered the application, grounds of opposition, affidavits, both submissions and authorities. The issue I find falling for determination is whether the applicant has made out a case for extension of time for filing an appeal.

27. The statutory provision dealing with the requisite period for filing of appeals from the subordinate courts to the high court is Section 79G of the Civil Procedure Act which 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.”*

28. As to the principles to be considered in exercising the discretion whether or not to enlarge time the court in the case of **First American Bank of Kenya Ltd vs. Gulabh P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65** set the factors to be considered as follows:

- (i) the explanation if any for the delay;
- (ii) the merits of the contemplated action, whether the matter is arguable or one deserving a day in court or whether it is a frivolous or one which would only result in the delay of the course of justice;
- (iii) whether or not the respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

29. It is not disputed that the Judgment, the subject of this application was delivered on 12<sup>th</sup> October 2018, and the applicant filed this application on 18<sup>th</sup> May 2021. The 1<sup>st</sup> application seeking extension of time to file an appeal out of time before the lower court was dated 11<sup>th</sup> November 2020. He had prior to this filed another application seeking to set the said judgment aside which application was dismissed on 11<sup>th</sup> April 2019 by the lower court.

30. The reasons given by the applicant for the delay are that he had no knowledge that the said judgment had been entered because his counsel failed to go to court. On the other hand the respondent argues that the applicant is not honest and has not disclosed all the material facts meaning that he has come to court with unclean hands. According to the respondent the applicant has been frustrating him ever since the judgment was issued in his favour. He contends that the reasons given for delay are not satisfactory as they fail to disclose a proper legal basis for seeking leave.

31. The respondent has also in his replying affidavit taken the court through the history of the litigation between the parties. He has demonstrated how he has been serving the applicant's advocates with the various notices but they fail to show up in court. He has shown that he proceeded to execute and the applicant at some point issued two cheques each in the sum of Kshs. 500,000/= (Annexure VM-3 a & b). The respondent finds this to be a clear indication that the applicant had already accepted the judgment.

32. The considerations to be made in a request for leave to file appeal out of time are found in several decisions. The same were suggested in the case of **Mwangi v Kenya Airways Ltd [2003] KLR**. They include the following:

- (a) *The period of delay.*
- (b) *The reason for the delay.*
- (c) *The arguability of the appeal.*
- (d) *The degree of prejudice which could be suffered by the respondent if the extension is granted.*
- (e) *The importance of compliance with time limits to the particular litigant or issue; and*
- (f) *The effect if any on the administration of justice or public interest if any is involved.*

The issue of delay herein is not denied. Its also not denied that the applicants former advocates played a major role in this mess.

33. On arguability of the appeal I have looked at the draft memorandum of appeal filed together with the submissions. The respondent's suit against the applicant was allowed with costs by the lower court. The applicant in the intended five (5) grounds of appeal is questioning the trial court's findings which led to the impugned judgment.

34. At this stage all that needs to be shown is that one has an arguable appeal and not one that has high chances of success. I find the five (5) grounds raised in the draft memorandum of appeal to be arguable.

35. The fact that the applicant has already made part payment of the decretal would be taken to mean that he is willing to pay the outstanding balance once the issues herein are determined. Both parties have mentioned that the advocates for the applicant at some point were not attending court. This is a pointer to the role the said advocates played in causing unnecessary delay herein.

36. In as much as the applicant has the right to appeal the court will not shut its eyes to the fact that the respondent has an unsatisfied decree in his favour. His interest must also be protected so that he is not prejudiced. The applicant will therefore have to move with speed.

37. The upshot is that the application dated 18<sup>th</sup> May 2021 is allowed and the following orders issued.

i) Leave to file appeal out of time is granted.

ii) Appeal to be filed and served within 21 days.

iii) A commitment deposit of Kshs. 400,000/= to be deposited in court within 21 days by the applicant. Failure to comply will automatically vacate the grant of leave.

iv) Costs to the respondent in any event.

**Delivered online, signed and dated this 6<sup>th</sup> day of October, 2021 in open court at Milimani Nairobi.**

**H. I. ONG'UDI**

**JUDGE**