



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KIAMBU
MISC. CIVIL CASE NO. 178 OF 2020

BETWEEN

STEPHEN MUTHOKA MAITHYA....APPLICANT

VERSUS

JOEL MUTHOKA MAITHYA

JULIUS NDUNGU GITU.....RESPONDENTS

RULING

1. **STEPHEN MUTHOKA MAITHYA**, the applicant hereof has approached this Court with his Notice of Motion application dated 21st September, 2020. The applicant seeks leave to file an appeal out of time against the judgment in Thika Chief Magistrate's Court Civil Case No. 491 of 2015. The applicant also seeks stay of execution of that judgment pending the hearing and determination of the intended appeal.

2. The application is supported by the affidavit of the applicant's learned advocate, *Anertia Salinder Gulyenya*. The learned advocate deponed that the trial court delivered its judgment on 7th May, 2020 to which the applicant sought review by reason of two contradictions that were in the judgment. The ruling to that review application was delivered on 28th July, 2020 with the trial court correcting the contradiction. That the applicant was aggrieved with the judgment of 7th May, 2020 and hence why the prayer is made for leave to file an appeal out of time. The learned advocate also deponed that the 1st respondent, *STEPHEN MBURU MUIRURI* had proceeded to execute the trial court's judgment to which the applicant seeks stay of execution.

3. The application is opposed by the 1st respondent, by a replying affidavit of the 1st respondent dated 1st July, 2021, on the ground that it was only after he sought to execute the trial court's judgment that the applicant approached this Court with the present application.

ANALYSIS

4. The applicant should have filed his appeal against the judgment of the trial court within 30 days of that judgment. The judgment was delivered on 7th May, 2020. The applicant did however approach the trial court with his application for review of that judgment. The trial court's ruling to that review application was on 28th July, 2020. There is therefore explanation why the applicant did not file his appeal between 7th May, and 28th July, 2020. There is however no explanation for the delay from 28th July, 2020 up to the date this present application was filed on 24th September, 2020. The applicant should have explained that delay amongst others as set out by the Court of Appeal in the case *ANNAH MWIHAKI WAIRIMU VS. HANNAH WANJA WAIRURU (2017) eKLR* thus:-

"In LEO SILA MUTISO V ROSE HELLEN WANGARI MWANGI, (CIVIL APPLICATION NO. NAI. 255 OF 1997) (unreported); this Court stated thus regarding how such discretion is to be exercised:-

"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".

5. The applicant did not meet any of the conditions set out in the above case. The court therefore is unable to accede to the prayer for leave to file an appeal out of time for no reason is given by the applicant for this Court to exercise its discretion in his favour.

6. Further, under Section 79G of the Civil Procedure Act, the applicant was required to first file the appeal then seek leave of the court to admit the already filed appeal out of time. This indeed is this Court's determination of the provision of Section 79G. This position is supported by the decision of *Hon. Emukule J* (as he then was) in **GERALD M'LIMBINE VS. JOSEPH KANGANGI (2008) eKLR** thus:-

“My understanding of the proviso to section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal, and at the same time seek the court’s leave to have such an appeal admitted out of the statutory period of time. The proviso does not mean that an intending appellant first seeks the court’s permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the court’s process under section 79B which says:-

“79B Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree part of a decree or order appealed against he may notwithstanding section 79C, reject the appeal summarily”

It seems to me therefore that it is not open to the court to exercise its discretion under the proviso to section 79G of the Civil Procedure Act except upon the existence and perusal of the appeal to be “admitted” not to be “filed out of time.” Admission presupposes that the appeal has been filed and will be “admitted” for hearing after a judge has established under Section 79B that there is “sufficient” ground for interfering with the decree part of a decree or order appealed against.”

7. It follows that the application also fails because no appeal is filed which is capable of being admitted as envisaged under Section 79G.

DETERMINATION

8. In view of the above discussion, the following are the orders on the Notice of Motion application dated 21st September, 2020:-

- a. The application is hereby dismissed with costs.
- b. This file shall henceforth be closed.

RULING DATED AND DELIVERED AT KIAMBU THIS 11TH DAY OF NOVEMBER, 2021

MARY KASANGO

JUDGE

Coram:

Court Assistant: Morris

For Applicant Ms. Labosa H/B Gulenywa

For Respondent: Miss Munyua

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE