



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISC. CIVIL APPLICATION NO. 421 OF 2019

KISUMU EXPERT CONTRACTORS LTD.....1ST APPLICANT

JOHNSTONE WAMBUA.....2ND APPLICANT

VERSUS

ERIC WAMBUA MAKUMBI.....RESPONDENT

RULING

1. What remains for determination in this application dated 23.10.2019 is a prayer for an order for leave to file the memorandum of appeal out of time. The application is brought under Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules and Section 1A, 3A, 79G and 95 of the Civil Procedure Act. It is supported by the affidavit of Wangari Mwanzia learned counsel for the applicants.
2. The background to the application, as gleaned from the pleadings and the annexures thereto, relates to a civil suit 832 of 2013 in Mavoko where judgement was delivered on 13.9.2019. There is a copy of a draft memorandum of appeal, a copy of the judgement and a letter requesting for typed proceedings.
3. The grounds were stated briefly in the Notice of Motion and laid out in detail in the affidavit in support of the application where the applicant averred that judgement in the lower court was delivered on 13.9.2019 and counsel for the 2nd applicant intimated that they enter into negotiations but however no response was elicited from the respondent within which period the stipulated time to file the appeal had lapsed. The applicant averred that there will be prejudice suffered if the orders sought are not granted.
4. In opposition to the application, is a replying affidavit dated 11.11.2019. The respondent finds the same as lacking merit and that the grounds of appeal are akin to engaging the court in an academic exercise since the applicant had earlier sought to negotiate on the matter only to renege.
5. The court directed that the matter be canvassed vide written submissions that have been duly filed. Vide submissions filed on 22.11.2019, learned counsel for the applicant in addressing the prayer for stay of execution placed reliance on Order 42 Rule 6 of the Civil Procedure Rules and submitted that the applicant had met the threshold for grant of the said order. Counsel cited the case of **Thuita Mwangi v Kenya Airways Limited (2003) eKLR** in addressing the prayer for leave to file the appeal out of time. According to counsel, the 2nd applicant had an arguable appeal, that no prejudice will be suffered by the respondent if the application is allowed and thus urged the court to allow the application.
6. In response, learned counsel for the respondent cited the case of **First American Bank of Kenya Limited v Gulab P. Shah & 2 Others (2002) 1 EA 65 and** submitted that the applicant did not meet the conditions to warrant exercise of discretion in his favor and that the respondent will be prejudiced if the application is allowed. Learned counsel sought for the dismissal of the application with costs.
7. The issues for determination in this application are firstly **whether the applicant should be granted leave to file the appeal out of time and finally whether any injustice will be caused if the application is not granted.**
8. This court has the discretion, for sufficient cause, to extend time under Section 79G of the Civil Procedure Act. Sufficient cause should relate to the inability to do a particular act.

Section 79G provides as follows:-

“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.”

9. The above principles were earlier considered by Duffus P in the case of **Mugo & Others v Wanjiru & Another [1970] EA 481** at p.484 where he stated thus;

"Each application must be decided in the particular circumstances of each case but as a general rule the applicant must satisfactorily explain the reason for the delay and should also satisfy the court as to whether or not there will be a denial of justice by the refusal or granting of the application."

10. The Court of Appeal in **Mwangi v Kenya Airways Ltd [2003] eKLR** listed the factors which aid our courts in exercising the discretion whether to extend time to file an appeal out of time. 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 litigation or issue; and**
- f. The effect if any on the administration of justice or public interest if any is involved.**

11. I will bear the above principles in mind as I proceed to determine this application. It is therefore not in dispute that the applicant is aggrieved with the decision of the trial court and has a draft memorandum of appeal annexed to the application. A careful perusal of the replying affidavit, does not inform the court the specific reasons why the respondent is opposed to the application save that he is apprehensive that the fruits of his judgement are at risk.

12. In this case, the application was filed on 28.11.2019 that is about 2 ½ months after the judgement was delivered, and 1 ½ months after the prescribed time within which to file an appeal. I find the delay not to be inordinate and the explanation is satisfactory. I am unable to see the prejudice that the Respondent will suffer if the application is allowed as the applicant is entitled to pursue its appeal. I find the applicant has easily met the test for grant of order for leave to file the appeal out of time.

13. The applicant has sought for an order of stay of execution of the judgement in Mavoko Spmcc number 832 of 2013. Going through the applicant's affidavit iam not satisfied that they have complied with the mandatory requirements of Order 42 Rule 6 of the Civil Procedure Rules more specifically on the aspect of furnishing security for costs. The applicants are silent on that issue yet the Respondent is entitled to enjoy the fruits of the judgement. Again there is no evidence that the decree has been extracted for execution. There are no signs that precipitate action has been commenced by the Respondent. Consequently the request for stay of execution is declined.

14. In the result the application dated 27th October 2019 partly succeeds. The same is allowed in the following terms:

- a. Leave is granted to the Appellants to file and serve Memorandum of Appeal within the next ten (10) days from the date hereof.**
- b. The costs hereof are granted to the Respondent**

It is so ordered

Dated and delivered at Machakos this 22nd day of January, 2020.

D. K. Kemei

Judge