



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT EMBU**

**MISC. CIVIL APPLICATION NO. 46 OF 2019**

**ROY ANTHONY MUGO KAUGI.....APPLICANT**

**VERSUS**

**JACOB MUCHANGI.....RESPONDENT**

**R U L I N G**

**A. Introduction**

1. This ruling pertains to the application dated 17<sup>th</sup> June 2019 in which the applicant seeks leave to appeal out of time against the judgement of Honourable Court in Embu CMCC No. 67 of 2018 delivered on the 17/04/2019.
2. It is the applicant's case that the certified copies of proceedings and judgement were supplied on the 10<sup>th</sup> June 2019 by which time the time for filing appeal had lapsed. The applicant further states that as such the delay in filing the intended appeal is inadvertent, excusable and not inordinate and that he has an appeal with a high probability of success.
3. The applicant further states that the respondent will not suffer any prejudice if the orders sought are not granted.
4. In rejoinder, it is the respondent's case that the lower court decision was delivered on the 17/04/2019 and that the applicant did nothing until 3/05/2019 when he applied for proceedings and further that he did not pay for the stipulated proceedings until the 29/05/2019 and as such the applicant has not explained the delay therein.
5. Further, it is the respondent's case that the applicant did not require the proceedings and judgement to file the appeal and as the delay is not justified, the instant application lacks merit.
6. The parties filed the submissions to dispose of the matter.

**B. Applicant's Submissions**

7. The applicant submits that he has satisfied that he has good and sufficient cause for not filing the appeal in time as specified in the case of **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & Another [2018] eKLR** where the court set out the factors that a court must consider in exercising its discretion to extend time to file an appeal.
8. It is submitted that the delay in filing the intended appeal was inadvertent and excusable as it was occasioned by factors beyond the applicants control and further that the intended appeal raises triable issues of fact and has overwhelming chances of success.
9. The applicant further submits that the respondent will not suffer any prejudice if the application herein is allowed as he has not pleaded or even proved that he will suffer any. It is further submitted that the issue of payment for the typed copies of the proceedings and judgement as raised by the respondent is non-existent as the same is done after they have been typed to ascertain the exact amount to be typed.
10. It is further submitted that the court ought to disregard the respondent's advocate submission on the deposit of the decretal amount as the same is not justified since there is no requirement for deposit of decretal amount in an application for extension of time under the law.

**C. Respondent's Submissions**

11. It is submitted that the applicant has displayed total lack of interest in the instant matter and it is apparent that he is being pushed to

prosecute the same. Further, the respondent submits that the applicant did not require proceedings and judgement to file the appeal as he was only required to lodge a memorandum of appeal as the proceedings are only mandatory when preparing a record of appeal.

12. It is further submitted that the applicant has not offered to provide security which is a mandatory requirement prior to grant of the orders sought and if the instant application is to be granted, the court should order the same.

#### **D. Analysis & Determination**

13. The singular issue for determination is whether the Applicant is entitled to an extension of time to lodge his appeal. Section 79G of the Civil Procedure Act is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. The section 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.”**

14. Therefore, an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so, since as was held in **Feroz Begum Qureshi and Another v Maganbhai Patel and Others [1964] EA 633**, there is no difference between the words “sufficient cause” and “good cause”. It was therefore held in **Daphne Parry v Murray Alexander Carson [1963] EA 546** that though 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. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.

15. Case law has now provided guidelines on what will be considered “good cause” for purposes of permitting a party who is aggrieved by a lower court judgment or ruling to file an appeal out of time. The most important consideration is for the Court to advert its mind to the fact that the power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be granted on a case by case basis. While not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised on its behalf and in their favour.

16. Our case law has also developed a number of factors which aid our courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in **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 litigation or issue; and**

**f. The effect if any on the administration of justice or public interest if any is involved.**

17. I do not agree with the respondent’s argument that this application is an abuse of the court process. The success of this application will depend on several factors as I have already stated.

18. I note that the application was brought on the 17<sup>th</sup> June 2019 whereas the judgement was delivered on the 17<sup>th</sup> April 2019. This is about 2 months after delivery of the judgement. It was on the 3<sup>rd</sup> May 2019 the applicant’s advocate applied for copy of certified proceedings and judgement so as to facilitate the applicant make an informed decision on whether or not to lodge an appeal however the typed judgement had not been availed by time which the requisite time to lodge an appeal had lapsed. Accordingly, I do not find this to be inordinate under the circumstances.

19. Secondly, I am unable to see any substantial adverse effects granting this order will have on the Respondent other than permitting the Applicants to exercise a preciously cherished right of appeal.

20. Thirdly, looking at the draft memorandum of appeal filed, I am of the considered view that the intended appeal is arguable. At this point, the applicant is *not* required to persuade the appellate court that the intended or filed appeal has a high probability of success. A demonstration that the appellant has plausible and conceivably persuasive grounds of either facts or law likely to overturn the original verdict is sufficient.

21. The upshot of the above is that I find the application dated 23<sup>rd</sup> October 2018 to be meritorious. It is hereby ordered that;

**a. The applicant is hereby granted leave to appeal out of time against the judgement of Honourable Court in Embu CMCC No. 67 of 2018 delivered on the 17/4/2019.**

**b. The appeal shall be filed within seven (7) days failure to which the orders will be automatically vacated.**

**c. Costs to be in the cause.**

22. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 21<sup>ST</sup> DAY OF JANUARY, 2020.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Mr. Kiai for Kathungu for Applicant**