



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISCELLANEOUS CIVL CASE NO. 175 OF 2018

ANNASTASIA NTHANGU SOLLY.....APPLICANT

VERSUS

JANE WANJIRURESPONDENT

RULING

1. By her application, affidavit and submissions, the Applicant seeks that this court grants her leave to appeal out of time in respect of the judgment in **Thika CMCC 925 of 2010** delivered on 16th July 2018. Her explanation, as contained in the supporting affidavit of her counsel, **Lourine L. Ochogo** is that previous counsel handling the matter left the firm in July 2018 and that by the time the firm discovered that no appeal had been filed, it was too late as 30 days for the filing of the appeal had lapsed. Thus, they filed this application on 24th September 2018, and assert in submissions that the delay is not inordinate; that the Applicant ought not to be penalized for mistakes of her counsel.

2. The Respondent filed a reply through her counsel to the effect that all the parties were aware of the judgment date and that the Applicant's firm has more than one advocate in the firm. The Respondent's submissions merely reiterated the depositions on the Replying affidavit.

3. The successful applicant in an application of this nature must demonstrate "*good and sufficient cause for not filing the appeal in time.*" In **Thuita Mwangi v Kenya Airways [2003] e KLR**, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in *pari material* with Section 79G of the Civil Procedure Act, reiterated its decision in **Mutiso v Mwangi [1997] KLR 630** as follows:

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

4. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court's discretion in his favor.

5. The Supreme Court in the case of **Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] e KLR** enunciated the principles applicable in an application for leave to appeal out of time. The Court state inter alia that:

"(T)he underlying principles a court should consider in exercise of such discretion include;

1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;

2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case to case basis;

4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;

5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;

6. Whether the application has been brought without undue delay.

7."

See also **County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] e KLR.**

6. The period of delay between the expiry of the appeal period and the filing of the instant motion is about 6 weeks. It appears from the Respondent's affidavit and indeed it is indirectly admitted by the Applicant's affidavits that the Applicant's advocates failed to attend the lower court on the Judgment date. That is the only explanation for their alleged discovery upon alleged perusal of the lower court file that the appeal had not been filed – the lower court file could not contain such information and besides, had they attended judgment, they would have known that the period of appeal was running.

7. It is not clear from their affidavit when in July 2018 the alleged instructed counsel left the firm. A party seeking that the court exercises its discretion in his favour ought to show more candour and full disclosure of pertinent facts. Nevertheless, the period of delay is not inordinate and the Applicant whose case was dismissed in the lower court cannot in the circumstances be blamed for delaying unduly to keep up with her case.

8. The Respondent in my view will not be unduly prejudiced by the delay and can be compensated through costs. In the circumstances I do allow the motion and direct that the memorandum of appeal be filed with 14 days of today's date. The costs of the application are awarded to the Respondent in any event.

DELIVERED AND SIGNED AT KIAMBU THIS 6TH DAY OF FEBRUARY 2020

C. MEOLI

JUDGE

In the Presence of:

Applicant - No appearance

Respondent – No appearance

Court Assistant – Nancy/Kevin