REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 29 OF 2017

KENYA WILDLIFE SERVICES.....APPELLANT/RESPONDENT

-VS-

ERIC GITUMA.....RESPONDENT/APPLICANT

R U L I N G

1. By a Motion on Notice dated 22/6/2019 brought under ***section 1A, 3A, 79G, 95 of the Civil Procedure Act, Order 9 Rule 9, Order 50 Rule 6, and Order 51 Rule 1 of the Civil Procedure Rules, Article 159 (2) (d) of the Constitution of Kenya 2010,*** the applicant sought two orders: -

a) Leave for the firm of **Kithome L. Mutinda & Co, Advocates** to come on record for the applicant, and

b) For leave to lodge an appeal file and serve a Memorandum of appeal in respect of the Judgment that was delivered on 25/1/2018 out of time.

2. The grounds upon which the application was grounded were set out in the body of the Motion and the supporting affidavit of **L. Mutinda, advocate**. It was urged that the firm of **Kithome L Mutinda & Co**. Advocates was formerly known as **F. K Gitonga & Co**. Advocates. That the said firm received the judgment notice by the court for the delivery of the judgment on 25/1/2018.

3. However, the office assistant who received the same failed to diarize the same or bring to it to the attention of the advocate. It is when the applicant visited the advocates' chambers that it was discovered that the judgment had been delivered. That by the time instructions could be obtained from the applicant, time allowed to file an appeal had run out. The delay was inadvertent and the orders sought will not prejudice the respondent. Finally, that the appeal is arguable with high chances of success.

4. The application was opposed vide grounds of opposition dated 2/9/2019. It was contended that the court lacks jurisdiction to issue the prayer sought which is also vague. That there was undue delay in the bringing of the application and that the appeal has no chances of succeeding.

5. It was submitted for the applicant that the court has jurisdiction to entertain the application by virtue of ***Section 7 of the Appellate Jurisdiction Act Cap 9***. The case of ***Edward Njane Nganga & another v Damaris Wanjiku Kamau & another [2016] eKLR*** was cited in support of that submission. It was further submitted that the delay to file the appeal was an honest mistake. The respondent being a body corporation will not be prejudiced as the applicant has an arguable appeal with chances of success.

6. On behalf of the respondent, it was submitted that the court has no jurisdiction for it has no power to extend time for an appeal to the Court of Appeal. That neither ***section 7 of the Appellate Jurisdiction Act*** nor ***Rule 4 of the Court of Appeal Rules*** *gives that jurisdiction.* Moreover, the applicant did not seek to file a notice of appeal out of time but rather leave to file and serve a memorandum of appeal out of time. With regard to the merits of the application, that it did not meet the conditions for grant of the orders sought. That litigation must come to an end. The cases of **Maree Ahmed & another v Leli Chaka Ndoro [2017] eKLR**, **Aviation Cargo Support Limited v St. Mark Freight Services Limited [2014] eKLR**, **Alice Mumbi Nganga v Danson Chege Nganga & another [2006] eKLR** and **Peter Kinyari Kihumba v Gladys Wanjiru Migwi & another [2006] Eklr** were relied on in support of those submissions.

7. The first prayer is to be granted as a matter of course since it was averred that the former firm of advocates had since changed its name to the present one.

8. Jurisdiction is key and without it a court is supposed to down its tools. I have looked at the provisions under which the application was brought. None of them gives this Court jurisdiction to grant the extension of time sought. The requirement for one to cite the provisions under which he seeks the Court's assistance is important in that it serves as notice to both the Court and the opposite party, of which powers of the Court are being invoked.

9. However, in his submissions, the applicant submitted that this Court has jurisdiction under ***section 7 of the Appellate Jurisdiction Act.*** It is clear that the applicant had not invoked this Court's jurisdiction under that provision in his Motion. Be that as it may, the Court will nevertheless consider the same.

10. ***Section 7 of the Appellate Jurisdiction Act CAP 9 of the Laws of Kenya*** provides:-

"The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

…"

11. It is clear from the foregoing that this Court has jurisdiction to extend time for:-

a) giving a notice of intention to appeal;

b) for making an application for leave to appeal; and

c) for a certificate that case is fit for appeal.

12. I agree with the submission of the respondent's Counsel that the prayer for extension of time was worded in an ungodly manner.

It is however, clear that what was intended was leave to lodge a notice of appeal out of time. I will excuse that error and deal with the merits of the application.

13. In ***Thuita Mwangi v Kenya Airways Ltd [2003] eKLR*** the Court of Appeal set out the principles applicable in an application for extension of time. These are; the *length of delay*; *reason for delay*; *the chances of the appeal succeeding if the application is granted*; and *the degree of prejudice to the respondent if the application is granted.*

14. Regarding the first and second conditions length and reason of delay, the judgment the applicant seeks to appeal against was delivered on 25/1/2018. The present application was filed on 22/6/2019 which is about one and a half (1 ½) years later.

15. The reason that was proffered for the delay is that the assistant to the applicant's advocates failed to diarize the matter and that it was only discovered when the applicant came to inquire about his matter.

16. Firstly, the name of the assistant who allegedly failed to diarize the matter was not disclosed. Secondly, the alleged assistant did not swear an affidavit to confirm that allegation. It is crucial that in such circumstances, the offending person swears an affidavit to positively confirm the allegation. That will be a sign of good faith. Otherwise what will stop a recalcitrant litigant from making unending applications with a view to annoy the opposite party by making such allegations?

17. One and a half years is an inordinate delay and needs to be sufficiently explained. It was alleged that the delay was on the assistant who failed to diarize the matter. Already, I have stated that the alleged assistant never swore any affidavit to confirm that fact. It was not disclosed when the applicant went to see his advocate before the present application was made. That non-disclosure in my view was not in good faith.

18. It is inexcusable that a litigant can wait for a whole one and a half years to go and make a follow up on his case that is pending in Court. I agree with the cases cited in support of the principle that *equity aids the vigilant and not the indolent.* Clearly, a litigant who waits for a whole one and a half years to make inquiries about his case is not deserving of the exercise a Court's discretion.

19. In ***Savings And Loans Limited v Susan Wanjiru Muritu Nairobi (Milimani) HCCC NO. 397 OF 2002,*** **Kimaru, J stated**:-

> ***"Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, it is trite that a Case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her Case. The Court cannot set aside dismissal of a suit on the sole ground of a mistake by Counsel of the litigant on account of such Advocate's failure to attend Court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present Case, it is apparent that if the Defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the Court, it would be a travesty of justice for the Court to exercise its discretion in favour of such a litigant".***

20. I associate myself with the said sentiments and I am of the view and hold that the length of the delay was too long of which no sufficient reason was proffered.

21. On the chances of the appeal succeeding if the application is granted, since the judgment sought to be appealed against was made by this Court, I am unable to state whether the appeal has any chances of success.

22. Once a litigant gets a judgment in his favour, he has legitimate expectation to enjoy its fruits. Being denied that chance or delaying such

enjoyment is prejudicial to such a litigant. In this regard, allowing the extention would delay the enjoyment of the fruits of the judgment the respondent got in its favour over two years ago. That will definitely be prejudicial to it.

23. Accordingly, I find the application to be unmeritorious and dismiss the same. In the circumstances of this case, I will order each party to bear own costs.

SIGNED at Meru

A. MABEYA

JUDGE

DATED and DELIVERED at Meru this 6th day of February, 2020.

F. GIKONYO

JUDGE