



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC CIVIL APPLICATION NO. 34 OF 2019

TRUSTEES REGISTERED MAUA

METHODIST HOSPITAL.....APPLICANT

VERSUS

PENINA THIRINDI KOOME (As Legal Representative

of the late ROONEY MUTHARIMI).....RESPONDENT

RULING

1. Other than costs, the significant order sought in the notice of motion dated 9/4/2019 which is expressed to be brought under section 1A, 1B, 3A, 79G and 95 of the Civil Procedure Act and Order 50 Rule 1 of the Civil Procedure Rules is;

a. Leave to the applicant to file appeal out of time against the judgement of honorable O. Wanyaga delivered on 24/12/2018 in Maua CMCC No. 16 of 2016

2. The application is based on the grounds set out in the application and the supporting affidavit of David Maitai Rimita, an advocate of the high court who stated that judgement was adjourned severally but was delivered on 24/12/2018; at the time his offices were closed for Christmas holiday. He stated further that, when they resumed work he applied for copy of the judgement on 15/1/2019. The file however could not be traced and so he wrote to the chief Magistrate on 21/3/2019 about the matter. There was no reply to his letter until he received a call from Maua Hospital informing him that their assorted properties and motor vehicles had been proclaimed for sale by Jocet Auctioneers. He then called the executive officer and complained about the missing file who informed him that the judgement had not been proof read and not certified; he nonetheless asked for a copy of the same. Counsel blames failure to appeal in time upon Maua Court. He asks the court to permit the appellant to appeal out of time.

3. The application was opposed by the replying affidavit of Penina Thirindi Koome dated 9/9/2019 who stated that the application has no merit as it has not complied with order 42 rule 7 of the Civil Procedure Code. The applicant seems to want to prolong this case against the efficient administration of justice. Additionally, there is nothing to be stayed or appealed from since the applicant has settled the whole decretal amount awarded in MAUA CMCC No. 16 of 2016.

4. The matter was heard by way of written submissions where the appellants argued that the reason for delay was as explained in the affidavit of the advocate. Furthermore, the appeal is meritorious. On the issue that they have already paid the decretal sum, they did so because their equipment was proclaimed. They additionally paid the advocates for the respondents and asked them not to release the monies to their clients until the issue of appeal is sorted.

5. On the other hand, the respondents indicated that judgment was delivered on 24/12/2018 and the application filed 11 months after. It was their argument that the applicants did not provide sufficient reason for the delay. Therefore, the application herein is an afterthought with the sole intention of denying the respondent from enjoying the fruits of her judgement.

ANALYSIS AND DETERMINATION

6. I have considered the application, the supporting affidavit, the grounds of opposition and the submissions filed as well as the authorities relied upon.

7. **Section 79G** of the Civil Procedure Act provides that:

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.

8. In law, the applicant seeking enlargement of time to file an appeal or for admission of an already filed appeal must show that he has a good cause for doing so. The Court of Appeal in **Mwangi v Kenya Airways Ltd [2003] KLR** listed the following as factors to consider when exercising discretion to extend time to file an appeal out of time;

- 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.**

9. Judgement in this matter was delivered on 24/12/2018; a time when most advocates' firms are closed for holidays. Upon resuming work, Mr. Rimita averred that he sought for the judgment but the trial court's file could not be traced. This caused the delay herein. He stated further that he wrote a letter to the Chief Magistrate on 21/3/2019 about the missing file but there was no reply. Despite this explanation, the respondents contended that the applicant did not provide sufficient reason for the delay and that the decretal amount has already been paid therefore there is nothing to stay or appeal.

10. There is no rule of law that payment of the decretal sum obliterates the right of appeal in the matter. I note that the applicants paid to avoid carting away of the proclaimed goods. I also note that the applicant stated that they paid the decretal sum with the advice that the money will not be paid out to the decree-holder. These factors are relevant considerations in this application. In light thereof, I do not agree with the respondent that this application is an abuse of court process. The explanation provided by the applicant is plausible and was uncontroverted. I am convinced the applicant's lawyers exercised diligence expected of them. It would therefore be unfair to decimate the right of appeal in such circumstances.

11. Consequently, in light of the above, I allow the application. The applicant is directed to file and serve the memorandum of appeal within 30 days from the date hereof. No orders as to costs. It is so ordered

Dated signed and delivered in open court this 12th day of February, 2020

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F. GIKONYO

JUDGE

In presence of

M/s Otieno for applicant

M/S Nelima for Mwirigi for respondent

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F. GIKONYO

JUDGE