REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL MISC. NO. 322 OF 2019

DAVID MOKAYA .....APPLICANT

VERSUS

WESTLANDS PROPERTIES LIMITED ..... RESPONDENT

RULING

1. By his Notice of Motion dated 24th April 2019, *David Mokaya* (hereinafter the applicant) approached this court seeking enlargement of time within which to file his intended appeal against orders of the trial court issued on 18th February 2019 in Nairobi CMCC No. 6204 of 2013.

2. In the grounds anchoring the motion and in the supporting and supplementary affidavits sworn on his behalf by his learned counsel *Mr. George Brian Okello* on 24th April 2019 and 6th August 2019 respectively, the applicant contends that he is aggrieved by the orders made by the trial court on 18th February 2019 dismissing his suit for want of prosecution; that he sought and obtained leave of the court to file an appeal against the said orders but he was unable to do so within the statutorily prescribed time since he intended to file a memorandum of appeal together with the record of appeal but certified copies of the trial court's proceedings were not available till 20th March 2019 well past the time limited for filing of appeals; that the record of appeal is now ready but leave of the court is required to file the appeal out of time; that the intended appeal has high chances of success and it is in the interest of justice that the application be allowed.

3. The application is opposed. The respondent through a replying affidavit sworn on 26th June 2019 by its director *Mr.Charles Mwangi Githinji* attacked the competence of the application claiming that it was defective allegedly because it was supported by an affidavit which was not commissioned as required by *Rule 9* of the *Oaths and Statutory Declarations Act*; that the applicant is undeserving of the exercise of the court's discretion since he was indolent in the prosecution of his suit which was instituted in the year 2013 hence its dismissal; that the applicant has failed to demonstrate sufficient cause to warrant extension of time to file his intended appeal.

4. The respondent in addition averred that the application was filed in bad faith with the aim of prolonging the pendency of the matter in the court system and denying the respondent the fruits of its judgment; that the intended appeal is not arguable as it does not raise any serious issues of law; that it is in the interest of justice and fairness that the application be dismissed with costs.

5. By consent of the parties, the application was prosecuted through written submissions which both parties duly filed and which I have given due consideration together with the authorities cited by each party.

Having done so, I find that the only issue which arises for my determination is whether or not the applicant has demonstrated that he is deserving of the orders sought but before I deal with this issue, I wish to consider the preliminary point raised by the respondent regarding the competence of the application as filed.

6. In its replying affidavit, the respondent claimed that the application was defective as it was supported by an affidavit which was not commissioned and the exhibits annexed to it were not marked or signed. However, a casual look at the supporting affidavit sworn by *George Brian Okello* shows clearly that the affidavit was signed on 24th April 2019 and was commissioned on even date by *George Richard Maina Nechesa*, an Advocate and a Commissioner for Oaths. The annextures to the affidavit are also signed and marked as exhibits "*GBA 1*", "*GBA 2*" and "*GBA 3*".

In the premises, it is my finding that the respondent's challenge on the competence of the application is baseless and unmerited.

7. Turning now to the merits of the application, it is common ground that this court has unfettered discretion to extend the time statutorily limited for filing of appeals upon establishment of sufficient cause explaining why the intended appeal was not filed on time. The principles that guide the court in exercising its discretion under the proviso to *Section 79G* of the *Civil Procedure Act* have been enunciated in several authorities. In ***Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & 7 Others, [2014] eKLR,*** the Supreme Court considered the said principles and expressed itself as follows:

"Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court; whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court; whether there would be any prejudice suffered by the respondent, if extension is granted; Whether the application has been brought without undue delay; and whether in certain cases, like election petitions, public interest should be a consideration for extending time."

8. The Court of Appeal in ***Thuita Mwangi V Kenya Airways Limited, [2003] eKLR*** also identified at least four factors a court should take into account while exercising its discretion in deciding whether or not to grant extension of time to file an intended appeal. These are:

i. The length of the delay;

ii. The reason for the delay;

iii. Whether the appeal is arguable or frivolous; and

iv. The degree of prejudice that may be occasioned to the respondent if the application was allowed.

9. Applying the above principles to the facts presented in this application, I find that the order sought to be challenged on appeal was issued on 18th February 2019. The thirty day period within which the applicant ought to have filed his intended appeal therefore lapsed on or about 19th March 2019. The instant application was filed on 25th April 2019 about 6 days later. In my view, a delay of six days cannot be said to be unreasonable, inexcusable or inordinate. I thus find that the application was filed within a reasonable time.

10. Regarding the reason for the delay, the applicant's counsel explained that time expired as he was waiting for supply of the trial court's certified copies of proceedings because he intended to file a memorandum of appeal together with the record of appeal.

11. The above reason is in my view not entirely convincing considering that there is no legal requirement that a memorandum of appeal must be filed together with the record of appeal. Be that as it may, this court is alive to the fact that there may be situations where an aggrieved party or his counsel may need to obtain and study copies of proceedings or the impugned ruling or judgment to help him decide on the grounds to advance in the memorandum of appeal.

12. Though the applicant has not availed to this court a copy of the ruling in which his suit was dismissed for want of prosecution and it is therefore impossible for me to determine whether or not the intended appeal is arguable, the grounds advanced in the draft memorandum of appeal shows that the applicant's main grievance rests on his view that the trial court dismissed his suit for mistakes that were not of his own making and which can only be attributed to his advocate on record. In the circumstances, I am persuaded to find that it would be in the interest of justice to grant the applicant an opportunity to be heard on appeal so that this court can conclusively determine whether his case was rightly or wrongly dismissed.

13. The respondent has asserted that the application ought to be dismissed since prior to its dismissal, the suit had been pending since year 2013 and that it was entitled to the fruits of its judgment. That may well be true but the right of a party to enjoy the fruits of his judgment must be weighed against the right of the opposite party to access appellate courts if that party is dissatisfied with the trial court's decision and was for one reason or another unable to exercise his right of appeal within the prescribed time.

14. In my view, as custodians of justice, courts have a duty to facilitate deserving litigants to access appellate courts to ensure that they are not shut out from exercising their constitutional right of appeal and access to justice. In determining applications such as the present one, the court must always bear in mind the dictates of *Article 159* of the *Constitution* which, *inter alia*, obligates courts to dispense substantive justice which can only be done if parties were given an opportunity to exhaust due process to have their disputes determined with finality on merit.

15. With the foregoing in mind, I find that if the court were to dismiss the application, the applicant will suffer great injustice as he will be removed from the seat of justice before his intended appeal was heard on merit. If on the other hand, the application is allowed, the respondent is not likely to suffer any prejudice which cannot be compensated by way of costs. In the circumstances, I am inclined to exercise my discretion in favour of the applicant. The result is that I find merit in the application and it is hereby allowed in terms of prayer 2. The applicant will file and serve his intended appeal within the next 14 days.

16. The respondent is awarded thrown away costs in the sum of KShs.20,000 to be paid by the applicant within 14 days of today's date.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this 14th day of May 2020.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Khakula for the respondent

No appearance for the applicant

Ms Carol: Court Assistant