



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISCELLANEOUS CIVIL APPLICATION NO 468 OF 2019**

**KELVIN LWANGU KIBISU.....APPLICANT**

**VERSUS**

**ISAAC MUCHIRI NJUGUNA.....1<sup>ST</sup>RESPONDENT**

**ONESMUS WAWERU.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Applicant's Notice of Motion application dated 17<sup>th</sup> June 2019 and filed on 1<sup>st</sup> July 2019 was seeking leave to file an appeal out of time.
2. The said application was supported by the Affidavit of his advocate, Nelson Kaburu Felix, which was sworn on 17<sup>th</sup> June 2019. He stated that after parties filed Written Submissions in the lower court, judgment was reserved for 6<sup>th</sup> March 2019. However, the judgment was not ready on the said date. Counsel who held brief for him on the said date informed him that judgment would be delivered on notice. He followed up with the said Counsel who indicated that the said notice had not been issued.
3. He averred that he was not aware of the delivery of the judgment in the lower court and only learnt of delivery of the same on 15<sup>th</sup> May 2019 when he received a letter from the Respondents' advocates in which they had proposed to pay a sum of Kshs 400,000/= all inclusive. Upon enquiring from the court assistant of the Trial Court, he was informed that the said judgment was indeed delivered on 6<sup>th</sup> March 2019 in the absence of the parties herein, which he confirmed after he perused the court file.
4. It was his contention that having read the said judgment, there was need to appeal against the same because the damages on pain and suffering that were awarded by the Trial Court were too low and that the said judgment did not include an award for future medical expenses. He pointed out that the Respondents did not even file their Written Submissions in the Trial Court.
5. He contended that the Applicant ought not to be punished for the mistakes of his advocates and thus urged this court to allow his application as prayed as it was mete and just that the same be allowed.
6. In opposition to the said application, on 16<sup>th</sup> October 2019, the Respondents' advocate, Wamae Ndegwa, swore a Replying Affidavit on their behalf. The same was filed on 6<sup>th</sup> November 2019.
7. He contended that judgment was delivered on 6<sup>th</sup> March 2019 as had been directed by the Learned Trial Magistrate and that it was therefore not true the same was not delivered as had been averred by the Applicant's counsel. He pointed out that the said counsel did not adduce evidence to show that he instructed an advocate to hold his brief or that he followed up to establish if the judgment had been delivered. He further said that the Applicant's advocate descended into the arena of the dispute by deponing on matters that were contentious and his affidavit therefore ought to be struck out.
8. It was his further contention that the court was unable to appreciate whether or not the Applicant had an arguable appeal because no draft memorandum of appeal had been attached to his present application. In addition, he stated that his instructing client had already paid the Applicant a sum of Kshs 431,395/= which he had never returned.
9. It was his assertion that the Applicant could not approbate and reprobate and consequently asked this court to dismiss his present application with costs.
10. The Applicant submitted that under Section 75G of the Civil Procedure Act Cap 21 (Laws of Kenya), the court has jurisdiction and discretion to admit an appeal out of time if it was satisfied that there was sufficient and good cause for an applicant not having filed an appeal within the stipulated period of thirty (30) days from the date of the decision.

11. He placed reliance on the case of Mwangi vs Kenya Airways Limited (2003) KLR where the court listed the factors that a court should consider when exercising its discretion on whether or not to extend time to a party to file an appeal out of time.

12. It was his submission that his advocate was not present at the time the judgment was delivered and that even if the court clerk had given his advocate wrong information about non-delivery of the judgment, he ought not to be punished because of the mistakes of his advocate. He urged this court not to proceed on technicalities because courts were now enjoined to administer justice without undue regard to technicalities. In this regard, he placed reliance on the case of Edith Gichugu Koine vs Stephen Njagi Thoithi [2014] eKLR.

13. On the other hand, the Respondents reiterated the averments that were contained in their Replying Affidavit. They submitted that the Applicant had not demonstrated that he had satisfied the factors to be considered by a court exercising its discretion to extend or not to extend time.

14. In support of their argument that an advocate should not swear an affidavit where there were contentious matters and that the one that had been sworn by the Applicant's advocate should be struck out, they relied on the case of Nicholas Kipchirchir Kimaiyo vs Wilson Kibet Kimutai & Another (2014) eKLR. They further placed reliance on the case of Teachers Service Commission vs Ex parte Patrick M Njuguna [2013] eKLR where Kimaru J held that a case belongs to a litigant and not to his advocate and consequently, he has to follow the prosecution of his or her case. They further made reference to several cases, copies of which were not attached to their submissions.

15. Having considered the affidavit evidence that was adduced by the Applicant's counsel, it was clear that the Applicant could not have deponed to the facts regarding the delivery of the judgment. His advocate gave an account of what transpired to explain why he was not aware of the delivery of the judgment on 6<sup>th</sup> March 2019. It was not necessary that a fact that could be proved by one person be proved by another. That would be an overkill. In other words, a fact need not be proved by more than one person if can be proven by one person. This court was not therefore persuaded that it should strike out the affidavit in support of the present application on the ground that the Applicant did not swear the said affidavit.

16. Turning to the substantive issue, this court took cognisance of the fact that every party has a right to access any court or tribunal to have its dispute heard and determined in accordance with Article 50(1) of the Constitution of Kenya, 2010. Even where a party delays in doing an act, there is always a provision that would give it reprieve to seek justice.

17. While Section 75 G of the Civil Procedure Code provides for the period of thirty (30) days for an aggrieved party to lodge an appeal, it does provide that an appeal can be admitted out of time if the appellant satisfied the court that he had good and sufficient cause for not having filed his appeal within the prescribed time. A similar conclusion was arrived at by Odunga J in Dilpack Kenya Limited vs William Muthama Kitonyi [2018] eKLR.

18. Further, Order 50 Rule 6 of Civil Procedure Rules empowers the court to enlarge the time to do a particular act. It stipulates as follows:-

**“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed...”**

19. Having said so, granting of such leave is not as a matter of course. The court is required to consider several factors before it can grant an applicant leave to file an appeal out of time.

20. Notably, the parties herein were in agreement on the circumstances under which such extension could be granted. In this respect, this court had due regard to the case of Samuel Mwaura Muthumbi vs Josephine Wanjiru Ngugi & Another [2018] eKLR where the court therein cited the case of Mwangi vs Kenya Airways Limited (Supra). It was held that the factors to be considered before extension to file suit out of time was granted included:-

- 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 was granted;
- e. the importance of compliance with time to the particular litigation or issue; and
- f. the effect if any on the administration of justice or public interest if any is involved.

21. It did appear to this court that the Applicant herein filed his present application immediately he became aware of the entry of judgment against him. The Respondents did not deny that his counsel was not present at the time the judgment was delivered. In any case, it was evident from a copy of the judgment that was attached to the present application that the judgment was delivered on 6<sup>th</sup> March 2019 in the absence of both parties.

22. There was evidently lack of diligence on the part of the Applicant's advocates as they ought to have exercised due care and diligence to follow up the matter as failure to do so greatly prejudiced him.

23. It was immaterial that the omission was occasioned by his advocate, his advocate's court clerk or the advocate who held his advocate's brief and purportedly communicated wrong information. The blame lay squarely on his advocate because he was better placed to understand the consequences for not being diligent. The advocate's assertion that judgment was to be delivered on notice made this court wonder whether there was really an advocate who held his brief because the lower court record showed that judgment was indeed delivered on 6<sup>th</sup> March 2019.

24. Having said so, it is trite law that no party should be penalised just because there was a blunder particularly by his or her advocate. Indeed, in the case of **Republic vs Speaker Nairobi City County Assembly & Another Ex Parte [2017] eKLR**, it has been held that blunders will continue being made and that just because a party has made a mistake does not mean that he should not have his case heard on merit.

25. So as not to prejudice the Applicant herein, this court found and held that the reason for not filing the appeal within the stipulated time was excusable. Further, it also held that a period of four (4) months from the date the judgment was delivered and the date of filing the present application could not be said to have been inordinate.

26. Accordingly, having considered the affidavit evidence, the Written Submissions and the case law that were relied upon by the parties herein, this court found and held that the duty of the court is to do substantive justice to parties. This demanded that the Applicant's present application be considered favourably as he would suffer more prejudice than the Respondents herein if he was not been given an opportunity to have his appeal heard and determined on merit.

27. The fact that the Respondents had settled the decretal sum did not divest him of his right to appeal against a decision that aggrieved him. In any event, they stood to suffer no loss or prejudice if he exercised his right of appeal.

#### **DISPOSITION**

28. For the foregoing reasons, the upshot of this court's decision was that the Applicant's application that was dated 17<sup>th</sup> June 2019 and filed on 1<sup>st</sup> July 2019 was merited and the same is hereby allowed in terms of Prayer No (1) therein in the following terms:-

**1. The Applicant is hereby directed to file and serve his Memorandum of Appeal within fourteen (14) days from the date of this Ruling.**

**2. The Applicant is hereby directed to file and serve his Record of Appeal within one hundred and twenty (120) days from the date of this Ruling.**

**3. The Deputy Registrar High Court of Kenya Milimani Law Courts Civil Division is hereby directed to facilitate the expeditious typing of the proceedings in the lower court to enable the Applicant comply with the timelines within which to file his Record of Appeal as aforesaid.**

**4. Either party is at liberty to apply.**

**5. Costs of the application will be in the cause.**

29. It is so ordered.

**DATED and DELIVERED at NAIROBI this 7<sup>th</sup> day of May 2020**

**J. KAMAU**

**JUDGE**