



**REPUBLIC OF KENYA**

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

**MISC. APPLICATION NO. 465 OF 2019**

**MOHAMED SALEH MOHAMED.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**OSMAN ALI ABDI.....DEFENDANT/RESPONDENT**

**ASHA HIRSI HASSAN..... INTERESTED/PARTY RESPONDENT**

**RULING**

1. Before me for determination is the Notice of Motion dated the 26<sup>th</sup> day of June, 2019 brought by the applicant in which he has sought an order for leave to Appeal out of time against the whole ruling of Hon. L. Gicheha, Chief Magistrate, delivered on the 30<sup>th</sup> day of April, 2019 at Nairobi. He has also prayed for the costs of the application.
2. In support of the motion are the grounds set out on its face and the facts stated in the affidavit of Jama Farah Mohamud, advocate who is in conduct of the matter on behalf of the applicant.
3. In his affidavit, he depones that the Lower Court delivered a ruling on the 30<sup>th</sup> day, of April, 2019 in favour of the interested party and the applicant herein being dissatisfied with the same intends to appeal but the time within which to do so has lapsed.
4. The deponent has contended that the delay was caused by the firm on record for the applicant who was relocating offices from Teleposta Towers to Laiboni Center hence there was confusion and their office file got misplaced and by the time the firm was acting on the instructions to appeal, the time for appeal had already lapsed.
5. The 2<sup>nd</sup> respondent has opposed the motion vide a replying affidavit in which he has stated that there is no sufficient reason for the delay in lodging the appeal and the application herein is an afterthought meant to delay the hearing of the suit.
6. The 1<sup>st</sup> respondent did not file any response to the application.
7. It was the 2<sup>nd</sup> respondent's averments that the intended appeal does not raise any arguable grounds. Moreover, the respondent asserted that he stands to be prejudiced if the extension sought is granted since he will be made to wait longer thus depriving him of his constitutional right to property.
8. He contends that the application is made in bad faith and that the same is meant to deny him the fruits of the ruling and has urged the court to dismiss the application with costs.
9. In a supplementary affidavit filed on 20<sup>th</sup> January, 2020, the deponent states that the delay in filing the appeal is not so inordinate and in excusable and that the applicant was ready to file the appeal in June as demonstrated by the draft memorandum of appeal which he has annexed to the application, which appeal he contends, has high chances of success.
10. The deponent has urged the court not to punish an innocent party for the error on the part of his advocate and has reiterated that the appeal is arguable and that any prejudice that the respondent may suffer, can be compensated by way of costs.
11. The court has considered the grounds on the face of the motion, the facts deponed to in the affidavits both in support of and opposing the motion and the rival arguments by the respective parties.
12. The motion seeks extension of time within which to file an appeal against a ruling by the trial court. Under Order 50, Rule 6 of the Civil Procedure Rules, courts have powers to enlarge the time required for the performance of any acts stipulated in the rules, notwithstanding the fact that such time has expired. It therefore follows that whether to extend time or not is a matter of judicial discretion.

13. Section 79G of the Civil Procedure Act expresses that appeals from the Subordinate Courts to the High Court must be filed within a period of 30 days from the date of the decree or order from which the appeal lies. The above provision is also clear that a court of law can extend time where a sufficient cause is shown.

14. The guiding principles to be met in an application seeking leave of the court to file an appeal out of time/extension of time have been discussed in array of cases for example the case of *Thuita Mwangi vs. Kenya Airways Limited (2010) eKLR* which principles were also echoed in the case of *Growth Africa (K) Limited & Another vs. Charles Muange Milu (2019) eKLR*. The said principles are the length and reason for the delay; whether the appeal is arguable or not and the prejudice which will befall the respondent should the applicant be granted leave to appeal.

15. On the length and the reason for the delay, I have already ascertained that the lower court ruling was delivered on the 30<sup>th</sup> day of April, 2019. The application herein was filed on the 28<sup>th</sup> June, 2019 meaning there was a delay of almost two (2) months in bringing the motion. Upon considering the length of the delay, I do not find it to be inordinate or unreasonable.

16. In respect to the reason for the delay, I have taken into account the explanation given by the applicant's advocate that their firm of advocates was relocating offices as a result of which, there was confusion and the file was temporarily misplaced and by the time they acted on their client's instructions, time within which to file the appeal had lapsed. In that regard and as stated by counsel for the applicant, the mistake was not on the part of the applicant but that of his counsel, and it is not fair to punish the applicant for the mistake of his advocate.

17. On whether the appeal is arguable or not, I have perused the draft Memorandum of Appeal annexed to the affidavit in support of the motion and I have noted that the appeal essentially challenges the joinder of the interested party as a party to the suit. This is on the basis that he does not have any identifiable interest and that he intends to introduce new issues and seek actual remedies contrary to the legal position of the interested party.

18. It is noteworthy that, at this stage, it is not my responsibility to consider the merits of the appeal. Suffice it to state that I am satisfied the intended appeal raises arguable grounds which the applicant ought to be given an opportunity to ventilate on merit.

19. On the prejudice which will befall the 2<sup>nd</sup> respondent should the applicant be granted leave to appeal, the respondent has cited the delay in having the matter finalized. While I understand the respondent's plight, I am of the view that the prejudice he stands to suffer can reasonably be compensated by way of costs.

20. From the foregoing, I am satisfied that it would be proper exercise of my discretion to allow the applicant the opportunity of pursuing an Appeal against the lower court's decision.

21. Consequently, the motion is allowed in respect to prayer (1). The Appeal to be filed and served within twenty one (21) days from the date the normal business of the court shall resume.

22. The respondent is awarded costs of Kshs. 10,000/= to be paid within 14 days from the date thereof.

**23. It is so ordered.**

**Dated, Signed and Delivered at Nairobi this 7<sup>TH</sup> day of MAY 2020.**

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**L. NJUGUNA**

**JUDGE**

**In the Presence of**

..... For the Appellant

..... For the Respondent