



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 483 OF 2013**

**RENSON ONGAKI.....APPELLANT/APPLICANT**

**VERSUS**

**CAROLYNE WANGUI WACHIRA.....1<sup>ST</sup> RESPONDENT**

**ANTONY MUTHOMI MATI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before me for determination is the Notice of Motion dated 13<sup>th</sup> January, 2020 lodged by the appellant/applicant herein and supported by the grounds set out on its face and the facts stated in the affidavit of the applicant. The applicant sought for the substantive orders of leave to file a notice of appeal out of time in respect to the ruling delivered by the court on 25<sup>th</sup> October, 2019 and that the notice of appeal dated 31<sup>st</sup> October, 2019 and annexed as RO3 be and is hereby deemed as duly filed upon payment of the requisite court fees.

2. In his affidavit, the applicant stated that on 17<sup>th</sup> October, 2019 his advocate was served with a notice to show cause issued by the court on 4<sup>th</sup> October, 2019 requiring the parties to show cause as to why the appeal should not be dismissed for want of prosecution.

3. The applicant explained that when his advocate attended court for hearing of the notice to show cause on 25<sup>th</sup> October, 2019, he sought leave of the court to put in an affidavit in response to the notice and which prayer was denied by the court and the appeal was dismissed on the basis that the appellant had not given sufficient reason to warrant a different outcome.

4. It was the appellant's averment that he is aggrieved by the aforesaid decision and desires to lodge an appeal against the same with the Court of Appeal, adding that his advocate could not file the notice of appeal within the stipulated timelines owing to the disappearance of the court file until 17<sup>th</sup> December, 2019 when his advocate was served with the respondents' Bill of Costs.

5. The applicant urged this court to consider the interest of justice coupled with the fact that it was not his deliberate intention to fail to comply with the timelines for lodging a notice of appeal.

6. To oppose the Motion, the respondents put in Grounds of Opposition dated 5<sup>th</sup> February, 2020 in which they raised the following grounds:

*(1) THAT the application does not disclose any reasonable cause of action and is therefore scandalous, frivolous and vexatious.*

*(2) THAT the application, if granted, may prejudice, embarrass or delay the respondents' realization and enjoyment of the fruits of their judgment and decree of this court and the lower court.*

*(3) THAT the application does not provide evidence that substantiates loss that may result to the applicant if the application is not granted or that it has good chances of success or that it has arguable issues.*

*(4) THAT no security has been offered for the due performance of the court's decree and the lower court's order on costs and that the respondents will continue to suffer irreparably without the deposit of the outstanding costs pending the hearing of the application.*

*(5) THAT the application is otherwise an abuse of the process of this Honourable Court.*

*(6) THAT the balance of convenience demands that the application be refused.*

*(7) THAT the application be dismissed with costs.*

7. The 2<sup>nd</sup> respondent equally swore a replying affidavit in which he reiterated the Grounds of Opposition and further asserted that upon entry of judgment in their favour in the lower court, the applicant lodged an appeal with this court by filing a memorandum of appeal on 13<sup>th</sup> September, 2013.
8. According to the respondent, the applicant did not file a record of appeal for a period of close to four (4) years thereafter, prompting the respondents to file an application seeking the dismissal of the appeal on that ground, and which application was opposed by the applicant. The respondent stated that eventually, the court dismissed their application, following which the applicant filed his record of appeal on 13<sup>th</sup> July, 2018.
9. It was the 2<sup>nd</sup> respondent's assertion that since then, the applicant took no steps to set the appeal down for directions or hearing, hence the notice to show cause issued on 4<sup>th</sup> October, 2019.
10. The 2<sup>nd</sup> respondent added that the reasons which were given by the applicant in response to the notice to show cause are not viable or believable and that in any event, the applicant has not paid any of the outstanding costs to the respondents.
11. The Motion was dispensed with through oral arguments. To start off was *Mr. Ochieng* counsel for the applicant who submitted that the period between the date of the ruling in question and the filing of the application does not constitute inordinate delay. The counsel restated the reason behind the delay and the fact that the delay was unintentional.
12. It was also *Mr. Ochieng's* argument that the appeal is merited in the sense that it raises issues to do with whether an appeal can be dismissed when the party who stands to suffer is not given a chance to be heard and also when the delay was caused by all the parties involved and not just the appellant.
13. In reply, *Mr. Aswani* advocate for the respondents relied on the documents filed in resistance to the Motion save to include the submission that there is evidence of unreasonable delay in filing the notice of appeal and in bringing the application.
14. The advocate equally contended that the intended appeal is lacking in merit for the reasons given in the replying affidavit and further contended that the applicant has at no point been denied access to justice.
15. I have duly considered the grounds as presented in the Motion, the facts deponed in the supporting and replying affidavits respectively, the Grounds of Opposition and the competing oral arguments.
16. The guiding principles in determining whether to grant a party leave to appeal out of time were aptly discussed in the case of **Apa Insurance Limited v Michael Kinyanjui Muturi [2016] eKLR** with reference to the Court of Appeal case of **Thuita Mwangi v Kenya Airways Limited [2010] eKLR**.
17. I shall begin with the first principle on the length of the delay and whether any such delay has reasonably been explained. **Rule 75(2)** of the **Court of Appeal Rules** gives a timeline of 14 days from the date of the impugned decision for the lodging of a notice of appeal. It is apparent from the record that the timelines have long lapsed since delivery of the ruling on 25<sup>th</sup> October, 2019. That said, the Motion was filed on 13<sup>th</sup> January, 2020 which happens to be about three (3) months later. In my view, the length of delay cannot be termed inordinate.
18. In addressing the reasons presented before me, I looked at the court record and I found no evidence to indicate that the court file at any one point went missing following the ruling, as asserted by the applicant. The applicant did not tender any credible evidence to support his claim that upon presenting the draft notice of appeal before the registry for filing purposes, he was informed that the court file could not be traced. Further to this, the applicant did not demonstrate that either he or his advocates followed up on the file and that it miraculously resurfaced at the time the respondents filed their Bill of Costs.
19. The second principle is that an applicant ought to establish an arguable appeal. In my view, the question as to whether the appeal is arguable cannot be determined by this court since it is the preserve of the Court of Appeal.
20. This brings me to the third principle to do with the prejudice that will befall the respondent should the orders sought be granted. It is apparent from the record that judgment was entered in favour of the respondents in the lower court and which judgment they are lawfully entitled to the fruits of. Further to this, it is apparent that despite being given every opportunity possible, the applicant did not demonstrate any seriousness in prosecuting his appeal and without sufficient cause, which would explain its dismissal. In the circumstances, I take the view that the prejudice to be suffered by the respondents far outweighs that which the applicant would suffer.
21. Notwithstanding the fact that I have found the reasons given by the applicant to be insufficient, my convictions urge that I consider the interest of justice. In my attempts to do so, I will grant the applicant an opportunity to pursue his appeal as he so desires.
22. The upshot is that the Motion is allowed and the applicant is ordered to file his notice of appeal within 14 days from the date when the normal business of the court shall resume. The respondents are awarded costs of the application assessed at Kshs. 10,000/= to be paid within 14 days from the date as stated above.

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

**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Appellant/Applicant

..... for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents