



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISC. APPLICATION NO. 234 OF 2018

TABITHA MWIKALI MWANIA.....APPLICANT

VERSUS

SAMSON NJEHIA KARIUKI..... RESPONDENT

RULING

1. For determination is an application by way of notice of motion filed on 30th November 2018 and brought under Order 50 Rule 6 of the Civil Procedure Rules seeking for an order:

a) that the time within which the Applicant may file appeal against the Judgment delivered on 23rd May 2018 in Kiambu CMCCC NO. 10 of 2012 be enlarged.

2. The application is based on the key ground that copies of the proceedings and of the judgment were supplied after the expiry of the time allowed to file an appeal. The application is supported by the affidavit of **Tabitha Mwikali Mwanja**, the Applicant herein who deposed that she was dissatisfied with the judgment delivered in the case above where he was the Plaintiff. She contended the copy of the proceedings and judgment were not supplied within the time allowed to lodge the appeal. He deposed that the failure in the timely furnishing of proceedings and judgment occasioned the delay in filing the appeal on time.

3. **Kelvin Ngure**, described as the Claims Manager at **Directline Assurance Company Ltd** swore the affidavit opposing the application, asserting that no proper explanation has been made for the inordinate delay in bringing the application. He states that the company has already settled the decretal sum in full in July 2018.

4. The application was canvassed by way of oral submissions. Parties based their submissions on the material on record.

5. Order 50 rule 6 of the Civil Procedure Rules which the Applicant has invoked empowers the court to enlarge the time fixed for doing any act or taking any proceedings. For purposes of enlargement of time to file appeal, the other relevant provision cited is 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.”

6. The successful applicant must demonstrate **“good and sufficient cause for not filing the appeal in time.”** In **Thuita Mwangi v Kenya Airways [2003] eKLR**, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in *pari materia* with Section 79G of the Civil Procedure Act, reiterated its decision in **Mutiso v Mwangi [1997] KLR 630** as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.” See also **James Omwonyo’s** case.

7. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court’s discretion in his favor.

8. The Supreme Court in the case of **Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] e KLR** enunciated the principles applicable in an application for leave to appeal out of time. The Court state inter alia that:

“(T)he underlying principles a court should consider in exercise of such discretion include;

- 1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;**
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
- 3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case to case basis;**
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;**
- 5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;**
- 6. Whether the application has been brought without undue delay.**
- 7.”**

See also **County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] e KLR.**

9. The Applicant’s explanation for the delay between May and November was that the judgment and proceedings in the lower court were not furnished in time. However, not a single letter requesting such request was annexed to the affidavit of the Applicant. The period of delay is about six months. A party seeking the enlargement of time ought not to presume on the Court. In the absence of evidence to prove her explanation, this Court cannot exercise its discretion in her favour. The Respondent having paid over the entire decretal sum stands to be prejudiced by the reopening of this litigation which began in 2012. In view of all the foregoing, it is my considered view that the application filed on 30th November 2018 ought to be disallowed, with costs to the Respondent. It is so ordered.

SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU ON THIS 16TH DAY OF JULY 2020.

C. MEOLI

JUDGE