



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISCELLANEOUS CIVIL APPLICATION NO. 9 OF 2020

SUPER FOAM LIMITED.....1ST APPLICANT

STEPHEN THIONGO KARURA.....2ND APPLICANT

VERSUS

GLADYS NCORORO MBERO.....RESPONDENT

RULING

[1] The significant order sought in the Motion dated 28/01/2020 brought pursuant to **Order 50 Rule 6 and Section 63E and 79G of the Civil Procedure Rules and Act** is leave to file appeal out of time against the judgment and decree in **Meru Chief Magistrate's Court Civil Case No. 51 of 2017**.

[2] The grounds upon which the application is premised are set out in the Motion and the supporting affidavit of Jackson Omwenga, advocate of the High Court, sworn on 28/01/2020. It is his contention that the applicants learnt of the judgment when the auctioneers proclaimed its goods. They were not notified of the judgment date and the decree and certificate of costs were extracted without forwarding the draft to them. He also averred that there is a similar suit pending in court being *CMCC No. 275 of 1999* in respect of the same cause of action and same parties. For those reasons, he beseeched the court to allow the application so that they can file an appeal; to them, it has high chances of success. They are also ready and willing to provide security.

[3] The respondent opposed the application through the replying affidavit of Gladys Ncororo Mbero sworn on 12/02/2020. She deposed that judgment was delivered six (6) months ago on 24/07/2019. It was delivered with notice to the parties through their advocates; in the trial court, the applicants were represented by Bali-Sharma & Bali-Sharma Advocates. Since the delivery of the judgment the applicants' advocates kept on promising that settlement was underway but to no avail. It was only after waiting for six months that they applied to court for assessment of costs and issuance of decree and certificate of costs. She denied that *Meru CMCC No. 275 of 1999* is similar to the suit in issue herein. The case related to material damage claim which was heard and substantively determined. The defendants appealed against the determination in *Meru HCCA No. 133 of 2002* but their appeal was dismissed on 18/02/2014. *Meru CMCC No. 51 of 2017* is purely a claim for loss of life of the deceased. They made that distinction.

Submissions

[4] The application was to be canvassed by way of written submissions. But, at the time of writing this ruling, the applicants had not filed their submissions.

[5] The respondents, however, submitted that the applicants have failed to meet the conditions to be granted leave to appeal out of time, which are: length of delay, reason for delay, chances of the appeal succeeding and degree of prejudice to the respondent if application is granted. She relied on **Aviation Cargo Support Limited v St. Mark Freight Services Limited [2014] eKLR** to support her submissions.

ANALYSIS AND DETERMINATION

[6] **Section 79G of the Civil Procedure Act** provides as follows:

“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.”

[7] The important considerations in such application were stated in the case of **Paul Musili Wambua v Attorney General & 2 others**

[2015] eKLR by the Court of Appeal in the following terms:

“...it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

[8] The applicants have not provided the court with a copy or certified copy of the judgment of the lower court. Nonetheless, according to the respondent, judgment was delivered on 24/07/2019 and that the applicants filed the present application on 29/01/2020. This is a delay of six (6) months. Whether this is inordinate delay and therefore inexcusable will depend on the reasons given by the applicant.

[9] I do note that the applicants have stated that they were not notified of the judgment date and the decree and certificate of costs was extracted without their knowledge. From the affidavit of the applicants' counsel, he was informed of this by the 1st applicant. At this point, I must state that, it is always desirable that advocates should avoid deposing on oath to matters which are not within their knowledge or which they may not personally verify or which are contested. The averments by counsel require real substantiation especially taking into account that; (1) the deponent herein was not the counsel on record at the time of judgment delivery; and (2) the respondent claims that the judgment was delivered with notice to advocates for the respective parties. This tension could have been resolved by the applicant providing documents, clear and plausible explanations. But, the applicant left everything to conjecture and speculation. Needless to state that the party desiring to file appeal out of time has the obligation to offer sufficient reason for the delay.

[10] In light of the foregoing serious omissions, it is reasonable to conclude that the delay has not been explained to the satisfaction of the court.

[11] I should also state that prejudice to the respondent is a relevant consideration. Accordingly, an application for extension of time which is devoid of sufficient reason for the delay, will be refused lest it should become a source of prejudice to the right of the respondent to enjoy the fruits of their judgments. Based on the foregoing circumstances, I dismiss the application with costs to the respondent.

Dated, signed and delivered at Meru this 8th day of October 2020

F. GIKONYO

JUDGE

Representation

M/S Nyaga for respondent

No appearance for applicant

F. GIKONYO

JUDGE