



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT MISCELLANEOUS.CIVIL APPL. NO. 15 OF 2020

JOSIAH MUTUKU.....APPLICANT

-VERSUS-

PETER MUEMA..... RESPONDENT

RULING

1. This application is brought under sections 79G and section 95 of the Civil Procedure Act and Order 50 Rule 5 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. The Applicant seeks leave to file appeal out of time against the ruling and order given on the 12th November 2019 in Makindu SPM's court in Civil Case No. 242 of 2014.

2. He also sought an order of stay of execution of the order or decree and all consequential proceedings pending hearing and determination of this application and the contemplated appeal.

3. The application is premised on the ground that though the ruling was delivered in November 2019, he only learnt of the delivery of the same on 14th July 2020 after so many struggles. Secondly he claims that there was no service of the notice for the ruling. He had explained all this in his supporting affidavit sworn on 21st July 2020. Copy of the ruling (JM1) was annexed.

4. He has deponed that due to the Covid-19 pandemic, the file remained inaccessible. It was only after Judicial services were scaled up that the file was found and it was established that a ruling had been rendered.

5. He also avers that the Respondent will not be prejudiced if his application is allowed.

6. The Respondent filed a replying affidavit sworn on 4th August 2020 in opposition to the application. He depones that the application is an abuse of the court process and should be dismissed. He confirms that the ruling was delivered on 12th November 2019. He however adds that there is no evidence showing that the Applicant learnt of the ruling on 14th July 2020. His argument is that the Applicant was aware and was duly notified of the ruling.

7. He further avers that the suit was procedurally dismissed and annexed the mention notice (PM1). That there was delay in contesting the dismissal. He prays for costs of Kshs.44,875/= in the event that this court finds merit in the application. That the said costs should be paid before the application is allowed.

8. The application was canvassed by way of written submissions.

9. Mr. Muema for the Applicant has submitted that by virtue of sections 79G and 95 Civil Procedure Act and Order 50 Rule 5 of the Civil Procedure Rules, the Applicant did not have to seek leave to appeal before the trial court. The said provisions cloth this court with discretion to grant the leave sought. He adds that no ruling notice was served on the Applicant to make him aware of the ruling date. He urges the court to grant the leave sought so that the Applicant is not unjustifiably, locked out of the temple of justice.

10. To buttress his argument he referred to the cases of:

- **Efraim Yossef –vs- Rosemary W. Kihiu Miscellaneous Civil Application No. 140/2018 (High court Nakuru).**
- **Mwangi –vs- Kenya Airways Ltd (2003) KLR.**
- **Nicholas Kiptoo Arap Korir Salai –vs- The IEBC & 7 Others (2014) eKLR.**

11. Mr. Onyancha T.G for the Respondent has submitted that the application lacks merit, is a delaying tactic and should be dismissed. He

argues that the suit was procedurally dismissed and the Applicant nowhere discloses learning of the dismissal of the suit. Counsel submits that the suit having been dismissed on 23rd October 2018 and the ruling delivered on 12th November 2019, there is evidence of unreasonable delay showing that the Applicant was not interested in filing the case.

12. Counsel further submits that the Respondent continues to suffer great prejudice since an order for decree and certificate of costs have not been complied with by the Applicant. He prays for dismissal of the application.

Analysis and determination

13. The application is grounded on section 79G, section 95 and order 50 Rule 6 of the Civil Procedure Act and Civil Procedure Rules respectively. The same is supported by the grounds on the face of the application and the supporting affidavit of the Applicant.

14. I wish to point out that the leave being sought is in respect to the ruling delivered on 12th November 2019 and not the order dismissing the suit on 23rd October 2018 for want of prosecution.

15. There is no dispute that the ruling being contested was delivered on 12th November 2019. This application was filed on 21st July 2020 which is 8 months and 9 days after the delivery of the said ruling. It is for that reason that this application seeking leave to appeal out of time is before this court. Granting of such leave out of time is discretionary. Some factors to be considered while exercising this discretion are found in the case of **Mwangi –vs- Kenya Airways ltd (2003) KLR**. They are as follows:

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 is granted

e. The importance of compliance with time limits to the particular litigation or issue; and

f. The effect if any of the administration of justice or public interest if any is involved.

16. There is no dispute that there has been delay in filing this application. The issue is whether the delay is justified. The Applicant alleges not to have been aware of the delivery of the ruling. It is not clear how the date of 12th November 2019 as the ruling date was given. Was it given in the presence of both parties or were notices issued and served on both parties?

17. Neither the Applicant nor the Respondent have made any mention of this. The lower court record is not before this court. That is what would have enabled this court to know what transpired in the lower court. For now that question remains unanswered.

18. Secondly there is no draft of the Memorandum of Appeal for this court to know the issue or issues that the Applicant will be raising in the contemplated appeal.

19. It is also not in dispute that the Covid-19 pandemic has had a negative impact on the court operations especially in the months of March – June 2020. Tracing a file during the said period was an uphill task. The Applicant cannot be blamed for that.

20. The Respondent has stated that he will be prejudiced if the application is allowed but quickly adds that in the event it is allowed the costs shown in the certificate and decree should be paid by the Applicant. He puts the amount at Kshs.44,875/=.

21. I have had the opportunity of reading the ruling dated 12th November 2019 by Hon. Magori Senior Principal Magistrate in SPM Makindu Civil Case No. 242 of 2014, and confirm that this matter has been pending in court since 2014. However, this would not be a good reason for denying the Applicant an opportunity to articulate his grievances before this court.

22. After due consideration, of the material before this court, I find some merit in the application which I hereby allow on the following conditions:

a. The Memorandum of Appeal to be filed and served within ten (10) days from today's date.

b. The Applicant to deposit in court the sum of Kshs.44,845/= within ten (10) days as security.

c. The appeal if filed MUST be fast tracked by the parties.

Orders accordingly

Delivered, signed & dated this 10th day of November 2020, in open court at Makueni.

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H. I. Ong'udi

Judge