



**REPUBLIC OF KENYA**

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

**MISC CIVIL APPLICATION NO.256 OF 2019**

**MAULID MAGINGI MWABARAZA.....APPLICANT**

**VERSUS**

**SIFA INVESTMENTS LIMITED.....RESPONDENT**

**RULING**

1. This is a **Ruling** in respect of the **Notice of Motion** application dated **17<sup>th</sup> May, 2019** and filed on **12<sup>th</sup> June, 2019**. It mainly seeks **Leave to Appeal** out of time.
2. From the face of the application, the main ground is that upon delivery of **Ruling** dated **22<sup>nd</sup> March, 2019** by the trial Magistrate, Hon. Kassam, the Applicant instructed his advocate to file Appeal but failed to file the same on time. As such the delay in filing the Appeal was occasioned by an advocate and the mistake of an advocate should not be visited onto the client.
3. The Application is supported by the Affidavit of **Maulid Magingi Mwabaraz**, the Applicant herein, sworn on **12<sup>th</sup> June, 2019**. He averred that on **22<sup>nd</sup> March, 2019** the Lower Court delivered a Ruling dismissing his application for Leave to admit the **Plaint** in the Lower Court.
4. Besides instructing his advocate to launch an Appeal, the advocate failed to do so and the mistake by his Counsel should not be visited on him.
5. He further averred that the delay is only about **30 days** and since the Appeal raises triable issues, the same should be allowed.
6. In his submissions, the Applicant argues that the Respondent had not participated in the proceedings and only entered appearance after the application seeking to admit the suit out of time was dismissed. As such the Respondent stands not suffer any prejudice that cannot be compensated by an award of damages.
7. In support of his submissions, the Applicant relied on the case of **J.G Builders...Vs...Plan International [2015]eKLR**, where it was reiterated that mistake of Counsel should not be visited on the innocent Litigant.
8. In response, the Respondent filed **Grounds of Opposition** dated **17<sup>th</sup> September, 2019**. The grounds are:
  - a) *That the Application is ex Facie bad in law, mischievous, frivolous and utterly incompetent and should thus be struck out.*
  - b) *That the Applicant has not rendered any plausible explanation for the delay in filing an Appeal against the finding of the Learned Magistrate within the requisite time.*
  - c) *That the Applicant is thus guilty of laches and the court should thus not be inclined to exercise its discretion in favour of an indolent party.*
  - d) *That the dictates of justice and equity do not favour the court's discretion in favour of the Applicant given his proclivity to seek extension of time to comply with the limitation period.*
  - e) *That the application should therefore be dismissed with costs.*
9. In its submissions, the Respondent argued that the delay in filing the Appeal had been for a period of **2 months and 21 days** after the **Ruling** in the trial court and the Applicant is thus guilty of indolence.

10. According to the Respondent, the intended Appeal raises no arguable grounds since both the **Plaint** and the Application were filed out of time and cannot be cured as procedural lapse.

11. In response to the argument that the Appeal was not filed in time owing to mistake by the Counsel, it is submitted that the Applicant had a corresponding duty to ensure the Appeal was filed on time. That no evidence has been adduced to show that the Applicant made any efforts in ensuring the Appeal was filed.

12. Lastly, the Respondent submitted that it will be prejudiced since it will be made to incur litigation costs for suits which are already time barred. I have considered the plethora of authorities relied on by the Respondent in support of its submissions.

### **Analysis and Determination**

13. After perusing all the pleadings filed in this case and the various submissions made by the parties herein as well as the authorities relied on, the main issue that came up is as to whether the delay in filing the Appeal has been explained.

14. **Section 79G** of the **Civil Procedure Act** deals with the time for filing Appeals from Subordinate Courts and states:

***“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.”***

15. It is a well settled position in law and as buttressed by a long line of authorities by this Court that the decision of whether or not to extend time for filing an Appeal is an exercise of this Court’s 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; and the degree of prejudice to the Respondent if the application is granted.

16. It is noteworthy that the **Ruling** of the trial court was delivered on **22<sup>nd</sup> March, 2019**. This application was delivered on **12<sup>th</sup> June, 2019** although dated on **17<sup>th</sup> May, 2019**. The Application has therefore been filed **2 months and 21 days** after delivery of the **Ruling** and not 30 days as the Applicant alludes.

17. The Applicant has blamed his advocate for the delay in filing the Appeal and expressed the view that the mistake of his advocate should not be visited on him. In the circumstances of those allegations, there is no evidence that has been laid before the court to buttress the same. Much as the Applicant has attempted to shift the blame to his advocates who are still on record on his behalf, nothing has been exhibited to confirm that indeed the advocate failed to act as instructed. My view is that whereas litigants instruct Advocates to act for them, the cases belong to litigants and they have a duty to monitor the progress of their cases.

18. **Section 79G** of the **Civil Procedure Act** requires that before the Court enlarges the time for appealing the Applicant must satisfy the court that he had good and sufficient cause for not filing the Appeal in time. In the case of **Alibhai Musajee...Vs...Shariff Mohammed Al-Bet Civil Appeal No.283 of 1998**, the Court of Appeal held that whereas the **Civil Procedure Act** allows for extension of time for filing Appeal, if good and sufficient cause is shown, failure to act does not constitute a good or sufficient cause. Further in the case of **Berber Alibhai Mawji...Vs...Sultan Hasham Lalji & 2 Others [1990-1994] EA 337**, the court held that inaction on the part of an advocate as opposed to error of Judgment or a slip is not excusable.

19. I am therefore not satisfied that the delay or default on the part of the Applicant has been satisfactorily explained. However, this court is now mandated to exercise justice under **Sections 1A, 1B, & 3** of the **Civil Procedure Act** as well as **Article 159** of the **Constitution**. Justice is only done when a party is allowed to prosecute its case to the highest court. However, such discretion should be exercised while observing the competing interests of the parties.

20. In this case, I see no prejudice that will befall the Respondent is allowed to file the Appeal. I therefore issue the following orders:-

***a) Time to file appeal is extended.***

***b) The Appeal be filed within 30 days from today.***

***c) Failure to comply with the directions above the extension orders for filing the Appeal will stand vacated.***

***d) The costs for this application are awarded to the Respondent since the delay in initiating the Appeal is by fault of the Applicant.***

It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA on this 10<sup>TH</sup> day of NOVEMBER, 2020.**

**D. O. CHEPKWONY**

**JUDGE**

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15<sup>th</sup> March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all Judgments and Rulings be pronounced in open Court.

**D. O. CHEPKWONY**

**JUDGE**