



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISCELLANEOUS CIVIL APPLICATION NO. E438 OF 2020**

**CAREN BOCHERE ANGIMA & ANOTHER.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**JACOB MASESE ANGIMA.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**-VERSUS-**

**BOSIRE DANIEL KIRERA T/A**

**ONGEGU & ASSOCIATES ADVOCATES.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**FREDRICK KIMANI KIMEMIA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

The application dated 22<sup>nd</sup> October, 2020 seeks the following orders:-

- 1. THAT the applicant herein be certified as urgent and the same be heard ex-parte in the first instance.**
- 2. THAT the 1<sup>st</sup> Defendant be ordered to deposit a sum of Kshs.8,000,000/- in the Honourable Court pending the determination of this matter.**
- 3. THAT the 1<sup>st</sup> Defendant be ordered to furnish security to produce any property belonging to him and to place the same at the disposal of the court or order the attachment of any property belonging to the 1<sup>st</sup> Defendant pending the determination of this matter.**
- 4. THAT a receiver be appointed of any property and enforce the performance of this duties by attaching and selling the 1<sup>st</sup> Defendant's property.**
- 5. THAT costs of this application be provided for.**

The application is supported by the grounds upon which it is brought as well as the affidavit of Stanley Mugacha of even date. The second respondent opposed the application and filed a replying affidavit sworn on 6<sup>th</sup> October, 2020 by Betty Mugira. Mr. Mugambi, Counsel for the first respondent did not oppose the application.

Mr. Makumo, Counsel for the applicant submitted that the applicant intends to appeal against the ruling of Hon. Orenge (SPM) delivered on 22<sup>nd</sup> May, 2020. The ruling was initially slated for the 21<sup>st</sup> of April, 2020 but the same was not delivered owing to the downscaling of court operations due to the Covid-19 pandemic. There was communication that rulings and judgments were to be delivered on notice through e-mails and all matters affected by the pandemic were rescheduled. According to the rescheduled list, the matter was to come up on 7<sup>th</sup> August, 2020 but the ruling was delivered on 22<sup>nd</sup> May, 2020 in the absence of the parties. Counsel for the applicant came to know about the ruling on 25<sup>th</sup> August, 2020 and thirteen (13) days later filed the current application.

Mr. Makumo further submitted that the court was closed on 16<sup>th</sup> March, 2020 through a notice by the Chief Justice. The on-line platform started in June, 2020. The appeal could not have been filed as by the time the applicant came to know about the ruling time to file an appeal had lapsed. The issue in dispute involves the auctioneer's costs. The auctioneer was effecting a decree of the court. The application that was dismissed was seeking a determination as to who should pay the auctioneers costs. The delay to file the appeal out of time has been explained. Counsel referred to the case of **ABDULLA SAID & ANOTHER -V- BONIFACE NDUNGU KAMAU**, Murang'a Misc Civil

Application No. 47 of 2014 where Justice H. Waweru stated:-

**“In the present case the Applicants have an undoubted right of appeal. They were late by only eight days. It cannot be said that the delay is inordinate. It is not unreasonable that the delay was caused while the Applicants' advocates sought instructions from the Applicants' insurers. I am thus satisfied that there was good and sufficient cause for not filing their appeal in time.”**

Mr. Makumi also referred to the case of **EGERTON UNIVERSITY –V- DIANA LUGANJE (2006) eKLR** where Kimaru J held that the considerations under Rule 4 of the Court of Appeal Rules are not provided under Section 79G of the Civil Procedure Act and therefore are not to be considered by the High Court when considering an application for extension of time from the Subordinate Court.

Mr. Mugambi opposed the application. Counsel maintain that the question of delay should be considered in line with the party's efforts to get the ruling. There is no letter or e-mail that was attached to show that the applicant made efforts to get the ruling. The applicant was required to move the court without unreasonable delay, the reasons for the delay must be explained, the appeal must have high chances of success and the degree of prejudice to be suffered by the other parties if the orders are granted has to be considered. The intended appeal is not arguable. The auctioneer should have initiated proceedings as his costs have not been adjudicated upon. Counsel referred to the case of **CHARLES NYAMBURA & ANOTHER –V- JOSEPHINE NTHENYA MBULU (2020) eKLR** where Odunga J held that the discretion of the court on whether or not to grant leave to appeal out of time must be based on principles and not on private opinion, sentiments, sympathy or benevolence.

Mr. Mugambi also referred to the case of **KTDA (OGEMBO TEA FACTORY) –V- CHARLES NYAUNDI OKEMWA (2009) eKLR** where Musinga J (as he then was) stated that if the auctioneers intended to recover their costs before the finalization of pending applications, they ought to have filed a suit based on the agreed costs and obtain judgment and thereafter process a decree.

The issue for determination is whether the applicant should be granted leave to file the intended appeal out of time. The applicant is supposed to explain the reasons as to why the appeal was not filed on time. Section 79G of the Civil Procedure Act states 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.**

There is a difference between an application for extension of time to file an appeal before the Court of Appeal and a similar application to extend time before the High Court. However, most of the matters to be considered are to a certain extent similar. The applicant has to explain the delay and the underlying reasons for such delay. The court has to consider whether the extension will prejudice the other party. Whether the appeal is arguable can as well be considered so as not to allow frivolous appeals whose intention is simply to delay the execution of the impugned judgment.

The applicant contends that the ruling was initially scheduled for 21<sup>st</sup> April, 2020. It was delivered on 22<sup>nd</sup> May, 2020, that is about one month later and in the absence of all the parties and their advocates. Counsel for the respondent is of the view that the applicant ought to have found out from the court whether the ruling was delivered. This could be done by e-mail. Although this can be true, it was upto the court to communicate to the litigants that the ruling had been delivered. The applicant has stated that communication was made to the court assistant and it is only on 25<sup>th</sup> August, 2020 when a copy of the ruling was made available. It is evident that even the respondent was not aware of the delivery of the ruling. I do find that the delay in filing the appeal has been sufficiently explained.

The current application was made about thirteen (13) days later from the date a copy of the ruling was made available. That period falls within the 30 days period under Section 79G of the Civil Procedure Code although by then the time to appeal had lapsed. There is correspondence through phone messages which is proof of attempts to get the ruling. Further, the Chief Magistrate, Civil Division issued a notice indicating that all matters that were to be heard on 21<sup>st</sup> April 2020 were allocated a fresh date of 7<sup>th</sup> August, 2020. The ruling was delivered on 22<sup>nd</sup> May 2020 while Counsel for the applicant expected it on 7<sup>th</sup> August 2020. The explanation for the delay is sufficient.

The ruling did not award the respondent any money. The applicant simply intends to know who will pay his costs. It is true that those costs are yet to be determined. However, the trial court did not determine that issue and there is need for its determination. The respondents will not be prejudiced by the extension of time to file the appeal. The 2<sup>nd</sup> respondent is not opposed to the extension of time.

In the case of **KIRAGU –V- KIRAGU (1990) KLR 323**, the Court of Appeal held:-

**“an application for an extension of time for lodging an appeal may be made even after the prescribed time has expired. However, failure by an applicant to explain away the delay in prosecuting his appeal may lead to the extension being refused.”**

The applicant is not seeking an order of stay of execution of the ruling or decree. The application only seeks extension of time to lodge an appeal. The delay has been explained and cannot be attributed to the applicant. I do find that the application is merited and is hereby allowed. The applicant to file his memorandum of appeal within fourteen (14) days hereof. Costs shall follow the outcome of the Appeal.

**Dated and Signed at Nairobi this 7<sup>th</sup> day of December, 2020**

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**S. CHITEMBWE**

**JUDGE**