



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**MISC. CIVIL APPLICATION NO. E007 OF 2020**

**HAPPY JUMWA KAZUNGU ..... PLAINTIFF/RESPONDENT**

**VERSUS**

**MR. VICTOR KAHINDI KAZUNGU ..... DEFENDANT/APPLICANT**

**Coram: Hon. Justice R. Nyakundi**

**Wambua Kilonzo advocates for the plaintiff/respondent**

**Kimondo Gachoka advocates for the defendant/applicant**

**RULING**

The applicant's notice of motion dated 7.10.2020 expressed pursuant to Section 3(A), 79 (G) and 95 of the Civil Procedure Rules, Order 2 Rule 22, Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rules 1 and 3 of the Civil Procedure Rules seeks the following orders:

***(a). That this Honourable Court be pleased to extend time and grant leave to the application to lodge an appeal out of time against the Judgment of Honourable Analo (RM) in CMCC 137 of 2019 on 15.3.2020.***

***(b). That the Honourable Court be pleased to stay execution of the Judgment pending the hearing and determination of the intended appeal.***

The applicant in his affidavit attributed the delay that the instructions to counsel to file an appeal was received after the expiry of thirty days provided for in the statute to lodge an appeal.

The respondent counsel **Mr. Kilonzo** opposed the application in his replying affidavit dated 15.10.2020. The respondent outlined several grounds which include lack of sufficient reason, being an abuse of the Court process, being bad in Law and incompetent and the application filed as an afterthought to frustrate the execution process.

**Determination**

The question is whether the applicant has met the criteria for grant of the orders for enlargement of time and subsequent stay of execution? It should be pointed out that in terms of Section 79 (G) and 95 of the Civil Procedure Act, Order 50 Rule 6 and Order 51 Rule 3 of the Civil Procedure Rules, the Court has an unfettered discretion to extend the expired time for a party to comply with the procedural timelines to file an appeal out of time.

The matters which the Court will consider in the exercise of discretion are clearly illuminated in **Salat v Independent Electoral & Boundaries Commission {2014} eKLR** in which the Supreme Court held:

***“(1). Extension of time is not a right of a 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 on 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 respondents if the extension is granted.*

(6). *Whether the application has been brought without undue delay.”*

In **Leo Sila Mutiso v Rose Hellen Wangare Mwangi CA No. 255 of 1997** the Court expressed itself 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 in general, the matter which this Court takes into account in deciding whether to grant an extension of time are:*

*First, the length of the delay, secondly, the reason for the delay, thirdly, the chances of the appeal succeeding if the application is granted, and fourthly, the degree of prejudice to the respondent if the application is granted.”*

It is on this equitable underpinning the **Court in Martin v Chao {1985} 34 WLR 379** package the following principles that:

*“The Court has a wide discretion to grant an extension of time to appeal when the applicant has good prospects of succeeding on appeal, even though he or she is guilty of inordinate delay without good explanation. Such applications should be dealt with justly in accordance with the overriding objective in this case, although the applicant was late in applying and the reason for the delay although plausible was not acceptable, the applicant had good prospects of succeeding on the appeal and the respondent will not suffer substantial prejudice if the time for applying for permission to appeal is extended.”*

In the instant case the applicant contends that receipt of instructions came in late from the intended appellant. As already initiated in the draft memorandum of appeal, the applicant is aggrieved with an award of damages for pain and suffering and loss of amenities elaborately stated in the Judgment of the trial Court

In cases of this nature the Court has consistently applied the principles in **Salat and Leo Sila Mutios cases** and other line decisions on exercise of discretion to enlarge time to file an appeal. The test set out in the above cases determines whether leave should be granted or refused altogether.

In the present application for leave, its on record and from the affidavit evidence that the delay was due to late instructions to counsel to file an appeal. The period in question cumulatively totals a period of about five months. Nothing contained in this application and affidavit in support on existence of extenuating or compelling circumstances of a material nature that made it impracticable for retainer instructions to be issued within time of thirty day period stipulated under Section 79 (G) of the Act. In the imperative dictum from the **Supreme Court of Nigeria in Federal Housing Authority v Kalegaiye {2010} 19 NWLR 1226 147** the Court stated as follows an excerpts I find relevant to this case thus:

*“It must be pointed out that the role of the Court in adjudication is to maintain a level playing field of the parties by offering them equal opportunity to present their cases or grievances, if they so wish; once the opportunity is offered, it is the duty of a party to litigation or his counsel to utilize the opportunity so offered, he cannot turn around and blame the Court for the loss of the opportunity as the Court will not allow a party to hold the opponent or the Court to ransom under the guise of the desire to protect the principles of fair hearing. To me the right to fair hearing remains the right to an opportunity to be heard on any matter affecting one’s rights. Once that opportunity is offered by the statute for one to file an appeal and the opportunity is lost without sufficient good cause, the duty of the Court ends there.” (underlined emphasis mine)*

An intended appellant does not increase his or her rights to an appeal by being indolent and the burden to demonstrate sufficiency of evidence of non-compliance with the statutory time limits needs to be adequately addressed in an application for extension of time.

As for the present application, I hold the view that there is no reasonable explanation why the delay occurred not to file the notice of appeal within the stipulated period under Section 79 (G) of the Civil Procedure Act.

In considering the application there is no good explanation for the failure by the intended appellant to instruct his counsel without inordinate delay of five months’ period. This Court is unable to accept applicant’s contention as a ground to enlarge time to file the intended appeal. This is buttressed by the principle in **Johnson v Gore Wood & Co. {2001} 2 WLR 72** though in the English context applies to our circumstances too. The Court held:

*“The public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interest of the parties and the public as a whole.”*

By virtue of Section 79 (G) of the Act out of the central criteria is informed of the fact that the leave so sought is, capable of sustaining a prospect of the intended appeal succeeding out of the salient features of this test is encapsulated in **Michael James v Tasman Gamin Inc:**

*“It is a trite principle, often repeated in this Court, that leave to appeal will be granted if this Court is of the view that the appeal has a realistic prospect of succeeding or if there are other compelling reasons why the appeal should be heard.”*

In **Portreitz Maternity v James Karanja Kabia CA No. 63 of 1997:**

***“The right of appeal must be balanced against an equally weighty right that of the plaintiff to enjoy the fruits of the Judgment delivered in his favour. There must be a just cause for depriving the plaintiff that right.”***

At the outset, the applicant took issue with the award of damages. In the draft Memorandum he urges the Court to set aside the award of Kshs.400,000/=.

I have taken into account the arguments by counsel and taken a panoramic view of the trial Court record and impugned Judgment cited in support, thereof of the aforesaid application, I am not persuaded that the applicant has an arguable case with high prospects of succeeding on appeal to entitle him that leave to file an appeal out of time. Applicable to the issue before the Court are the principles outlined in the case of **Port Services Ltd v Mobay Under Sea Tours Ltd & Firemans Fraud Insurance Co. SCCA 18/2001 EWCA** flowing from the case are the following principles:

***“In this contrary, the behavior of litigants and many cases, their Attorney is at Law, in disregarding rules of procedure has reached what may comfortably be described as epidemic proportions. For there to be respect for the Law and for there to be the prospect of smooth and speedy dispensation of justice in our country, this Court has to set its fact. Firmly against inordinate and inexcusable delays in complying with rules of procedure. Once there is a situation such as exists in this case, the Court should be very reluctant to be seen to be offering a helping hand to the recalcitrant litigant with a view to giving relief from the consequences of the litigants own deliberate action or inactions.”***

For these reasons, I dismiss the application by declining to grant leave for the applicant to file the appeal out of time. Costs to the respondent.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 3<sup>RD</sup> DAY OF DECEMBER 2020**

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**R. NYAKUNDI**

**JUDGE**

**In the presence of**

1. Mr. Nyabeno advocate for the applicant.
2. Mr. Wambua advocate for the respondent.