



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS CIVIL APPLICATION NO. 349 OF 2018

AGNES NDINDA MASAI & JAPHETH MASAI MBANE

(Suing as the Administrators of the Estate of the Late

PAUL MUSAU MWATHI.....APPLICANTS

VERSUS

BONIFACE MUTISO MUSAU.....1ST RESPONDENT

FRANCIS MBOYA WAMBUA.....2ND RESPONDENT

NYERI MOTORS SERVICES LIMITED.....3RD RESPONDENT

(Being an application for extension of time to file and serve Notice Of Appeal, Memorandum of Appeal and Record of Appeal out of time in an intended appeal from the Ruling of the Chief Magistrates Court in Case Number 1574 of 2009 (Hon. C.A Ocharo, SPM dated 21st May 2018)

RULING

INTRODUCTION

1. The applicant has filed the instant application dated 25/10/2018 expressed to be brought under Sections 3A, 79G and 95 of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules. The applicant seeks the following substantive orders:

(i) That this Honorable Court be pleased to enlarge the time within which the Applicants may prefer an appeal against the ruling of Hon C.A Ocharo delivered on 21st May, 2018.

(ii) The court be pleased to enlarge the time within which the applicants may file their memorandum of appeal and record of appeal.

(iii) Costs of the application be provided for.

2. The applicant's application is supported on the grounds set out in the body of the application and the affidavit sworn in support by Japheth Masai Mbane dated 25th of October 2018. The applicant contends that the intended appeal has high chances of success and the delay in filing the application is not inordinate as the respondents will not suffer prejudice if the application is allowed.

3. The 2nd respondent filed grounds of opposition to the applicant's application dated 13th November 2018 inter alia based on the following grounds:-

a. The applicant's suit in the lower court is slated for hearing on 22.1.2019 and the date was taken by consent.

b. The subject ruling was delivered over five calendar months ago thus the applicants are guilty of indolence.

c. The instant application constitutes an abuse of the due process of the Court.

d. In any event, the Notice of Motion application herein, is not supported by the facts deponed in the affidavit.

e. At any rate, the instant application does not disclose and/or capture the criteria set out in Section 79G of the Civil Procedure Act.

SUBMISSIONS

4. In oral submission before me, Mr. Kiongera advocate for the applicant submitted that the court has unfettered discretion to enlarge time under Section 79G of the Civil Procedure Act and that the intended appeal is arguable and not frivolous. Counsel contended that the delay is not inordinate and there will be no prejudice occasioned to the Respondent and thus the application should be allowed.

5. Mr. Ngolya Advocate for the respondent submitted that there is no copy of the ruling appealed against and thus there is no material to enable the court exercise its jurisdiction. He submitted that the ruling was delivered in May, 2018 and the applicants have sat on their rights and have thus waived them. He contended that the present application amounts to an abuse of the court process and sought for its dismissal.

6. The only issue for determination is whether the applicants are entitled to the exercise of discretion in their favour by the court.

ANALYSIS

7. It is noteworthy that the applicant seeks an order of enlargement of time within which to lodge an appeal against a ruling.

8. In an application for enlargement of time, the requirements under Section 79G of the Civil Procedure Act have to be fulfilled. 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.

9. These requirements were set out in the case of **Mwangi v Kenya Airways Ltd (2003) KLR** and they include the following:

- 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 on the administration of justice or public interest if any is involved.

10. With regard to an application that is brought 5 months after the decision without any satisfactory explanation, I am unable to find that the applicant has raised sufficient reason to warrant exercise of discretion. The Applicant's claim that all this time they were waiting for a copy of the ruling is not convincing. Suffice to add that even to date no such ruling has been availed. Nothing prevented the applicant from filing even a draft appeal and to amend it afterwards. I find it is an afterthought.

11. With regard to arguability of the appeal, I note that neither the pleadings, proceedings nor ruling in **CMCC No. 1574 of 2009** was annexed to the affidavit. The court has no benefit of reviewing the said documents as the affidavit is without a material annexure and to that extent the court is handicapped. Indeed without a copy of the ruling delivered by the trial magistrate, this court is not in a position to evaluate the basis of the learned magistrate's decision. The reason for requiring the attachment of a copy of the decision, subject of appeal, is in order for the Court to examine by reading the decision and satisfy itself as to its correctness, legality or propriety. This is because as was observed by Justice Ngugi in **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & Another (2018) eKLR**, a demonstration that the appellant has plausible and conceivably persuasive grounds of either facts of law to overturn the original verdict must be shown by an applicant. From the application before me, I am unable to establish what that original verdict is.

12. In the case of **Juliet Kwamboka Ongwae t/a Kahawa Kulture v Mocha Place Limited [2018] eKLR**, Judge J. M. Mutungi found that "...the ruling sought to be appealed from was not annexed; the pleadings in the lower court were not equally annexed; and neither was the lease agreement between the parties which was the genesis of the dispute between the appellant and the respondent..." therefore the application was found to lack merit and was dismissed. It is noted that the Applicant has not even in the least annexed a copy of the handwriting ruling for the court's perusal so as to convince the court that the typed ruling had delayed and was being awaited all this time.

13. A look at the application that has been brought five months later is indicative of indolence on the part of the applicant and clearly the respondents have told the court that they will be prejudiced. The matter has a hearing date that was fixed by consent and it means that concurrent hearings of the same dispute would be heard in different courts. Such a scenario cannot be countenanced and the application is clearly an abuse of court process. The applicant must elect one of the actions but cannot be permitted to proceed on both fronts.

DETERMINATION

14. The court is not in a position to grant the order sought as there was omission of crucial relevant materials that the court would have needed to evaluate. The applicant has failed to demonstrate that they have fulfilled the requirements of Section 79G of the Civil Procedure Act and the fact that the matter has a hearing date in the lower court appears to have closed the door of discretion from this court. No prejudice will be suffered by Applicants as they already have fixed the matter by consent for hearing on the 22/1/2019 wherein their issues will be ventilated.

15. For all the above reasons, it is my view that the appellant's application dated 25th October 2018 lacks merit and the same is for dismissal. I order the same dismissed with costs to the 2nd Respondent.

Orders accordingly.

Dated, signed and Delivered at Machakos this 16th day of January, 2019.

D.K. KEMEI

JUDGE