



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. APPLICATION NO. 149 OF 2017

LUCY NJOKI GITAU.....1ST APPLICANT

ESTHER WAMBUI KIMANI.....2ND APPLICANT

RUTH NYAMBURA.....3RD APPLICANT

PETER MAGUTO KIMANI.....4TH APPLICANT

VERSUS

JANE WANJIKU KAMAU.....RESPONDENT

RULING

1. The Applicants approached this Court vide a Notice of Motion dated 16/05/2017 seeking for the following substantive prayers:

1) *Spent.*

2) *Spent.*

3) *That pending the hearing and determination of the Appeal to be filed, this Honourable Court be pleased to review and set aside the ruling/order delivered on 20/11/2013 in Nakuru CMCC No. 123 of 2011 and any other consequential orders.*

4) *That this Honourable Court be pleased to grant the Appellants/Applicants leave to file an appeal out of time.*

5) *That the costs of this application be in the appeal.*

2. I take it that the prayer seeking for orders for enlargement of time to file Memorandum of Appeal out of time is the main prayer. I am using tentative language because the application was ultimately not argued by the Applicant's counsel before me and I have the greatest difficulties understanding the full purport of the Application. On 11/06/2018, the parties appeared before me and by consent agreed to take directions on the arguing of the application on 02/07/2018.

3. On 02/07/2018, the parties appeared and Counsel for the Respondent had already filed Written Submissions. Counsel for the Applicant agreed to put in his submissions within 14 days and then obtain a date for a ruling.

4. By consent, the parties took out 31/07/2018 as the mention date to confirm compliance. By that date, counsel for the Applicants had not filed his submissions. The Court directed him to file his submissions within seven days and gave a ruling date. Counsel, still, did not file his submissions.

5. Consequently, one way to deal with this application is to dismiss it for want of prosecution. I have, however, resisted the urge to do so. I have, instead, looked at its merits. I have, sadly, found none whatsoever. Here is why.

6. The intended appeal is from a judgment delivered in Nakuru CMCC No. 123 of 2011 on an undetermined date in 2013. I say undetermined because the Application, Supporting Affidavit and Draft Memorandum of Appeal do not disclose the date of the judgment. All I can tell from the documents filed is that there was an application for stay of execution dated 10/09/2013 and it was dismissed on 20/09/2013. That is the subject of the second prayer in the Application.

7. It is difficult to know the facts of the case here although the Respondent has tried to fill in the gaps. However, in trying to fill the gaps, the Respondent has ended up arguing an application that is not before the Court. What is before the Court is, first, an application to enlarge time to file the Draft Memorandum of Appeal attached to the Supporting Affidavit.

8. What we know is that the Draft Memorandum of Appeal was being filed at least four years after the judgment was given. Yet, the Supporting Affidavit and, indeed, the Application itself does not even attempt to explain why it took so long to bring the Application. No attempt whatsoever. All it says is that the Applicants believe that the Court has discretion to grant the relief sought!

9. Section 79G of the Civil Procedure Act is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. The section 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.

10. Our case law has now provided guidelines on what will be considered “good cause” for purposes of permitting a party who is aggrieved by a lower court judgment or ruling to file an appeal out of time. The most important consideration is for the Court to advert its mind to the fact that the power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be granted on a case by case basis. While not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised on its behalf and in their favour.

11. Our case law has developed a number of factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in *Mwangi v Kenya Airways Ltd [2003] KLR*. They include the following:

- 1) The period of delay;
- 2) The reason for the delay;
- 3) The arguability of the appeal;
- 4) The degree of prejudice which could be suffered by the Respondent if the extension is granted;
- 5) The importance of compliance with time limits to the particular litigation or issue; and
- 6) The effect if any on the administration of justice or public interest if any is involved.

12. In this case, the Applicants have simply given no reason why they were late and why discretion should be exercised in their favour. In any event, there is no question that the period of more than four years which is un-explained is inordinate. There is simply no reason for this Court to bend over backward, summon the demons of a suit long finished, and re-start it on appeal. I decline to grant the prayer to extend time.

13. With the decline to extend time to file the appeal out of time, the other prayer – which sounds to me like a prayer for stay of execution – falls by the way side. It is predicated on the main prayer and there being an appeal in place.

14. Consequently, there is no denouement here: the Application dated 16/05/2017 is dismissed with costs in its entirety.

15. Orders accordingly.

Dated and delivered at Nakuru this 16th day of January, 2019

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JOEL NGUGI

JUDGE