



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 149 OF 2014

CLEMENT CHEMONGES.....PLAINTIFF

VERSUS

JOHN MASAI.....1ST DEFENDANT

WILLY KWARAT.....2ND DEFENDANT

RULING

1. By a notice of motion dated **4/10/2019** and filed on the same date, the plaintiff/applicant seeks the following orders against the defendants:

1. ...spent

2. ...spent

3. That court be pleased to extend the time of filing notice of appeal dated 15/5/2019 and the notice filed herein be declared properly filed and served.

4. Any other order this court deem fit to be granted.

2. The grounds upon which the application is based are that on **8/5/2019** the court granted the applicant extension of time to file Notice of Appeal within **14 days** and also granted him stay of execution pending hearing and determination of the intended appeal; that the applicant through his advocate prepared notice of appeal dated **15/5/2019** to be filed; that the applicant's advocates gave copies of the notice of appeal to a court process server, who is a court clerk, by the name of **Ben Cheruiyot** to file and serve the notice to the defendants' advocate; that the court process server indicated to applicant's advocate that the notice had been filed, signed by the Deputy Registrar and that he had served the same upon the respondents' advocate on time; that the said process server indicated to the applicant's advocate that he would deliver the served copy to his office at Eldoret but failed to do so and subsequently he could not be traced; that the applicant's advocate later went to the court and established that the notice is not yet filed; that the applicant's advocate had paid the filing and service fee to the said process server vide a mobile money service; that the non-compliance was not intentional and was occasioned by the process server whose mistake should not be visited upon the innocent applicant.

3. The application is supported by an affidavit of the counsel for the applicant sworn on **4/10/2019**. That affidavit reiterates the same matters set out in the grounds at the bottom of the application.

4. The respondents' counsel filed a replying affidavit dated **31/10/2019**. His response is that the provisions of the **Civil Procedure Act** and **Civil Procedure Rules** quoted are not applicable in the instant application; that this court has no jurisdiction to grant the prayers sought; that this court exercised the only jurisdiction it had in respect of stay when it granted extension for **14 days** which expired without any notice being filed and a similar application cannot be made under **Section 7** of the **Appellate Jurisdiction Act**; that there is unexplained delay and a clear demonstration of want of diligence on the part of the applicant.

5. The plaintiff filed his submissions on **7/11/2019**. The defendants filed their submissions on **11/11/2019**. I have considered the application, the response as well as the submissions.

6. The applicant cited the decision in **Kenya Industrial Estates Limited -vs- Samuel Sand & Another [2008] eKLR** for the proposition that lengthy delays by advocates should not always lead to the dismissal of applications for extension of time. He also cited the case of **Philip Chemwolo and Mumias Sugar Co Ltd -vs- Augustine Kubende [1986] eKLR** for the proposal that the court should ignore technicalities in favour of substantive rights.

7. The reply of the respondents is that there is no notice of appeal filed and only a copy is annexed to the application. Secondly it is averred that Section 1A, 1B 63(e) and 79 (G) of the CPA and Order 50 rule 1 of CPR and Article 159 of the Constitution cannot effectively invoke the jurisdiction of this court so as to extend the time as sought. The respondents cites **Supreme Court of Kenya Civil Appl. No. 3 of 2016 County Executive of Kisumu -vs- County Government of Kisumu & 8 Others** for the proposition that Civil Procedure Rules and Court of Appeal Rules are inapplicable in the Supreme Court. He submits that, analogously, only the Appellate Jurisdiction Act is applicable.

8. Section 63 (e) of Civil Procedure Act provides that in order to prevent the ends of justice from being defeated the court may if it is so prescribed issue such other interlocutory orders as may appear to the court to be just and convenient. It is submitted by the respondent's counsel that Section 7 of Appellate Jurisdiction Act does not provide for a second extension in this court and in any event it was not quoted by the applicant as an enabling provision.

9. Another argument by the respondent is that even if it were deemed that this court has jurisdiction the circumstances outlined by the applicant do not warrant a second extension.

Determination

10. The issues for determination are as follows:

(a) **Whether there is a notice of appeal filed;**

(b) **Whether this court has jurisdiction to extend time to file a notice of appeal a second time;**

(c) **Whether the applicant has made a proper case for extension of time.**

(a) **Whether there is a Notice of Appeal filed**

11. The background of this application is that the applicant was at his instance granted **14 days** extension beginning **8/5/2019** to file and serve a notice of appeal in this matter. He never did so. Indeed from date of that ruling the only action that appears to have undertaken was the filing of a letter dated **24/5/2019** from Kiarie & Co. Advocates seeking the fixing of a notice to show cause after the applicant failed to file a notice of appeal. The instant application was filed on **4/10/2019** approximately **5 months** after the ruling granting an extension was made. Having perused the court record it is clear that the submission of the respondent to the effect that there is no filed notice of appeal is correct: there is no notice of appeal on the record which this court would act upon in granting prayer No. (3) of the application. The application is therefore incompetent for that reason.

(b) **Whether this court has jurisdiction to extend time to file a notice of appeal a second time**

12. From what is stated above it is clear that after granting of extension of time to file a notice of appeal the applicant never filed any notice.

13. In the earlier application for extension of time filed by the applicant this court considered the decision in **Loise Chemutai Ngurule and Another -vs- Wilfred Leshwari Kimung'en and 2 Other [2015] eKLR** in which an application had been made for extension of time to file a notice of appeal and in which the court found that this court has jurisdiction to entertain such an application.

14. Mr. Kiarie now raises the issue of whether this court has jurisdiction to grant extension of time for a second time. He cites **Section 4** of the Court of Appeal Rules.

15. **Rule 4** of the Court of Appeal Rules provides as follows:

“The court may on such terms as it think just, by order extend the time limited by these rules, or by any decision of the court or of superior court for the doing of any act authorized or required by these rules, whether before or after the doing of the act and a reference of these rules to any such time shall be construed as a reference to that time as extended.”

16. In Mr. Kiarie's interpretation that is the only Section applicable in respect of this kind of application.

17. I have examined the provisions of **Rule 4** of Court of Appeal Rules in my view there is no clear authority cited by Mr. Kiarie clarifying the distinction that he seeks to amplify between a first application and a second application for extension.

18. Under the same provisions I do not see any reason why this court is capable of entertaining a first application and disallowing a second application on the basis of that objection as long as the rule does not distinguish between the two applications.

19. In my view this court has general jurisdiction to deal with either a first or a subsequent application, and the respondent's assertion that it has no jurisdiction therefore has no merit.

(c) **Whether the applicant has made a case to the extension of time**

20. This is the most challenging of the issues that the applicant faces in the instant application. Having been granted an extension, the first time, his license to the coveted realm of appeal was merely the preparation and filing a notice of appeal, usually a one page document sparsely populated with words. He never filed any hence this application.

21. Mr. Kiarie's strenuous objection to the application is that no circumstances warranting a second extension has been set out in the application.

22. I have already herein before set out the applicant's version of events as contained in the supporting affidavit. Do they amount to a reasonable explanation to enable this court grant a second extension?

23. Mr. Kiarie amplified the fact that a period of **135 days** elapsed from the date of expiry of the extension period previously granted before the instant application was filed. That is over **4 months**. Quite a lengthy delay, I must say.

24. The respondent cited **Civil Appl. No. 47 of 1998 Abel Nyambati Bigogo -vs- Henry Michoma Nyantari & 2 Others** where the judge held as follows:

“I have no hesitation in saying that an error or errors of judgment on part of counsel are excusable and these qualify for inappropriate cases of extension of time. But what I have before me, are not errors of judgment or errors regarding understanding of some rules or rules but purely and simply negligence, inaction, sloth and indolence. These do not qualify for exercise of any discretion to extend time for the filing of the record of appeal... if any advocate is plainly negligent in the performance of his contractual duties to his client, that client cannot vex the other side, as seems to be the case here.”

25. In the light of the foregoing, it behoves this court to examine the cause of the delay and whether it has been explained sufficiently.

26. It is said that the notice of appeal was prepared and given to a court process server to file and serve. The first question that comes to mind is: having struggled so much to obtain the first extension from this court should the applicant's counsel have taken the matter so casually as to leave it in the hands of a person whose understanding of the exigencies of the situation has not been demonstrated? And if the counsel was aware that time was running out and perchance it is true the process server holding the draft notice of appeal could not be traced, why was it not possible for the counsel to take the matter into his own hands, simply reprint the same document from his computer and ensure personally or by way of personal supervision that it was filed and served? It cannot be understood why. The reliance on the mistake of the process server is not sufficient in my view to explain the delay while there was an alternative for counsel for the applicant to follow.

27. Another argument by the applicant's counsel is that the mistakes of the process server should not be visited on an innocent litigant. Here, I am not concerned with the mistake of the process server for the applicant had engaged counsel who as I have indicated could have been mindful of the lapse of the extension period and acted quickly to save the situation upon finding that things were going awry.

28. Mr. Kiarie points out that the mobile money statement shows that the filing fee was sent on **21/5/2019** while the extension period ended on **22/5/2019**. There is clear evidence that Mr. Kiboi was aware that by **21/5/2019** the notice of appeal had not been filed and that some funds were required to facilitate the filing thereof, hence the dispatch of some funds to the process server.

29. It is clear that Mr. Kiboi waited until the last minute to engage a process server. This court does not have independent evidence that the process server was given the notice of appeal by Mr. Kiboi on **15/5/2019**. In any event if Mr. Kiboi gave him that document why were funds to facilitate filing not simultaneously given to him on the same date? The mobile money statement exhibited as **“ATK6”** does not demonstrate that any money was sent to the process server on any other day other than **21/5/2019**. I find no reasonable explanation for non-provision of those funds on **15/5/2019** alongside the document to be filed.

30. If the withholding of funds by the applicant's counsel occasioned the delay in filing the notice such that only a one day window was available to the process server after the receipt of funds on **21/5/2019** then all the delay cannot be attributed to the process server. In any event the plaintiff's counsel has not demonstrated in the supporting affidavit that there was any emphasis given to the process server on the need to ensure that the notice must be filed by **22/5/2019**. In my view therefore, the inordinate delay is not adequately explained.

31. For the foregoing reasons I find that the applicant has not made out a case for the extension of time for the second time and I hereby dismiss the application dated **4/10/2019** with costs to the respondent.

Dated, signed and delivered at Kitale on this 10th day of February, 2020.

MWANGI NJORGE

JUDGE

10/2/2020

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Kiarie for the defendants

N/A for plaintiff/applicant

COURT

Ruling read in open court.

MWANGI NJORGE

JUDGE

10/2/2020