



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 138 OF 2015

AMPATH PLUS CENTRE.....APPELLANT/RESPONDENT

-VERSUS-

CHUMO PASCALIA CHERONO.....RESPONDENT/ APPLICANT

RULING

1. The application made pursuant to provisions of section 79 G of the Civil Procedure Act, Order 50 Rule 6 of The Civil Procedure Rules and Order 51 and 22 Rule 7 and 13, Order 21 rule 8 and 9 of the Civil Procedure Rules, seeks leave for extension of time within which the record of appeal is filed pending the hearing and determination of the application inter parties. They additionally sought that the record be deemed as properly filed and served since requisite court fees have been paid and that the order of stay granted on 15th March 2016 be extended until the appeal is determined.

2. The application seeks the above orders based on grounds that;

a. There was a delay in typing proceedings

b. The appellant requested for proceedings to be typed on 15th December 2015, the proceedings were certified on 3rd October 2016 and delivered 292 days after the initial request

c. The memorandum of appeal was filed on 17th December 2015 and the amended memorandum of appeal filed on 6th October 2015 following which the file disappeared and despite the appellant's advocate efforts to search for the file or try to compile the documents in the file, her efforts were fruitless.

d. The advocate only realized that the file had been traced once she was served with the application dated 26th February 2018 by the respondent's counsel

e. The appellant/ applicant here states that their appeal has a high chance of success and prayed to be allowed the application failing which the appellant stands to suffer irreparably and the appeal would be rendered nugatory.

3. The applicant reiterates the above in the supporting affidavit and adds that the delay in filing the appeal should not be visited upon the appellants who have demonstrated good faith all along.

4. The applicant explains that the delay to trace the file was not intentional and it should be afforded an opportunity to have the appeal heard since the right of appeal is a constitutional right which is a cornerstone of the rule of law.

5. It is contended that the respondent would not be prejudiced in any way by the extension sought. She relies upon the fact that the applicant had deposited money (the entire decretal amount) in the joint interest earning account as a sign of good faith

6. In their replying affidavit dated 2nd July 2018 (***I could not trace this in the file. Relied on submissions and the applicant's reference in her supplementary affidavit of 9th May 2018***) the respondents opposed this application pointing out that the delay over the memorandum of appeal was over 1 year. The memorandum of appeal was lodged on 3rd October 2016 and the application for extension of time was made on 9th May 2018. The respondent averred that the orders sought are aimed at aiding the appellant's selfish personal interests and were opposed to the interests of justice and fairness.

7. Counsel states that the respondent has waited for too long for the outcome of the appeal to enjoy her fruits from the judgment issued in her favor. Stay orders have been in force for close to **4 years** since the judgment was delivered on **28th November 2015**. He states that if the applicants prayers are granted as sought, then the same will amount to injustice, prejudice and miscarriage of justice.

8. Counsel for the applicant filed a supplementary affidavit dated 9th July 2018 in view of the reply where she stated that she had filed the application immediately after being served with the respondent's application of 22nd February 2018, basically reiterating the issues stated in her application and supporting affidavit.

9. In his submissions, the respondent cites Article 87(1) of the Constitution which requires timely and expeditious disposal of matters; he states that a delay of 2 years is inconsistent with the spirit of the constitution.

10. Counsel for the respondent also submits that there is question as to the validity of the appeal in the first place owing to the fact that the applicant has delayed in meeting the condition of depositing the decretal sum in an interest earning account within 30 days from 1/3/2016. He stated that he who comes to equity must do equity and yet the inordinate delays point to inequity.

11. In **COUNTY EXECUTIVE OF KISUMU V COUNTY GOVERNMENT OF KISUMU & 8 OTHERS SC CIVIL APPLICATION NO. 3 OF 2016** the court stated thus;

“ It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case (NICHOLAS KIPTOO KORIR ARAP SALAT V INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 7 OTHERS, [2014] EKLR) to which all the parties herein have relied upon. The Court delineated the following as:

“the under-lying principles that a Court should consider in exercise of such discretion:

- 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***

14. Still citing the afore mentioned case, the court continued to state that;

“The issue of delay of typed proceedings is well known in our legal system and on this basis; this Court has previously extended time and held that such a delay is not on part of the party but the court and that this issue consists of facts beyond a party's reach. In HASSAN NYANJE CHARO V KHATIB MWASHETANI AND 3 OTHERS, EKLR [2014] this Court stated:

“Counsel for the applicant has stated that he has exercised all due diligence to get the proceedings from the Court of Appeal, but to no avail...

Would it be in the interests of justice then to turn away an applicant who has, prima facie, exercised all due diligence in pursuit of his cause, but is impeded by the slow-turning wheels of the Court's administrative machinery? We think not.”

15. In the case of **Aviation Cargo Support Limited v St. Mark Freight Services Limited [2014] eKLR** G.B.M Kariuki J. stated persuasively that;

“the policy of the court is to exercise latitude in its interpretation of the rules so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out. That is why the principle of overriding objective was enacted in Section 3A (1) of the Appellate Jurisdiction Act, Cap 9. It provides that:

“the overriding objective of the Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of appeals governed by the Act.”

This principle applies to determinations not only of appeals but also of applications made in appeals and intended appeals, as in this case. The Court is enjoined under Section 3B (1) of the said Act while interpreting the provisions of the Act to give effect to the overriding objective which include just determination of the proceedings. As stated by this Court in **CITY CHEMIST (NBI) & ANOTHER V. ORIENTAL BANK LIMITED Civil Application No. Nai 302 of 2008 (UR 199/2008)**

“the overriding objective thus confers on the Court considerable latitude in the interpretation of the law and rules made thereunder, and in the exercise of its discretion always with a view to achieving any or all the attributes of the overriding objective. The overriding objective does not however facilitate the granting of orders seeking leave or extension of time to file record of appeal where the applicant has not shown to the satisfaction of the Court that the delay is not inordinate or has been explained to the satisfaction of the Court.

16. If indeed there was a delay in typing of proceedings, I would expect:

- A certificate of delay issued by the court confirming that such delay was as a result of whatever draw-backs the court had.
- Follow-up correspondences to the executive officer or the Deputy Registrar regarding the delay in the typed proceedings, and that the court file was missing. The last correspondence is dated 2017 which in my view simply demonstrates indolence, and as the equitable maxim so aptly declares, equity does not aid the indolent. I am therefore disinclined to allow the application, and the same is dismissed with costs to the respondent

DELIVERED AND DATED THIS 12TH DAY OF FEBRUARY 2019 AT ELDORET

H. A. OMONDI

JUDGE