



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISC. APPLICATION NO. 82 OF 2013

PETER MWANGI KANGIAPPLICANT

V E R S U S

DAMARIS WANJIRU GIKUNJU1ST RESPONDENT

HELLEN WAMBUI KANGI2ND RESPONDENT

RULING

1. The applicant has filed an application dated 26/02/2009 seeking an order that the Honourable court be pleased to extend time to and leave to file an appeal out of time against judgment delivered in **Kerugoya PM Succession Cause No. 41 of 2002**.

2. The application is based on the ground that he did not file an appeal on time due to the mistakes of his former advocates and he was not supplied with the proceedings on time. That judgment was delivered on 08/12/2006 and he paid deposit on fees for appeal. He would subsequently follow up with his advocates who informed him he had applied for certified copies of proceedings and judgment and they had not been furnished to enable him lodge the appeal.

3. On the date of ruling for execution by the respondent is when he learnt the advocate had not even applied for the said proceedings. He instructed his current advocates who applied for the certified documents on 15/07/2008 and was supplied on 06/02/2009. That he has good grounds of appeal with chances of success and one of them being the lower court did not have jurisdiction since the estate was in excess of Kshs.100,000/=.

4. In response, the respondent stated that judgment was delivered on 08/12/2006 and the application was filed on 20/02/2009 almost 2 years later and the delay has not been explained. That the applicant only intends to delay execution of the certificate of confirmation of grant.

5. Filing an appeal out of time

Section 79G of the Civil Procedure Act deals with the time for filing appeals from subordinate courts and states:

“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 appellants of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellants satisfy the court that he had good and sufficient cause for not filing the appeal in time.”

6. Refer to **Paul Musili Wambua v Attorney General & 2 others [2015] eKLR**

The Court of Appeal in considering an application for extension of time and leave to file Notice of Appeal out of time stated the following;

....it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.

7. Judgment was delivered on 08/12/2006 and the delay for filing the application was for about 2 years which is inordinate. He claims that his previous advocates were to blame and he was informed they had applied for certified copies of proceedings and judgment which was not

correct.

8. The applicant is therefore contending that failure to file appeal in time was due to the mistake of his advocates. It is trite that mistake of counsel should not be visited on the party. The applicant with annexure P.M K-1- has shown that he paid his counsel then on record some fees deposit for filing the appeal on 18/12/2006 which was soon after the Judgment. It would seem the counsel on record did not take steps to file appeal. It is clear that failure to file the appeal in time was occasioned by the counsel. The applicant had take action in good time. I find that the failure by the advocate should not be allowed to affect the litigant negatively. Mistake of counsel should not be visited on the applicant.

Mugure Mahinda v Ali Mohammed Farah [2016] eKLR

The Court of Appeal stated;

Also in CFC Stanbic Limited versus John Maina Githaiga & Another [2013] eKLR the following observation was made:

On the issue of the mistake of counsel, it is not in dispute that the appellant gave instructions to its advocates in good time once it was served with the pleadings and summons to enter appearance. Therefore, the failure to enter appearance and file a defence is clearly attributable to its advocate who failed to enter appearance and file defence in good time. This being the mistake of counsel, the same ought not to be visited upon the appellant.

This Court is guided by the case of LEE G. MUTHOGA V HABIB ZURICH FINACNE (K) LTD & ANOTHER, CIVIL APPLCIATION NO. NAI 236 OF 2009, where this Court held:

“It’s a widely accepted principle of law that a litigant should not suffer because of his advocate’s oversight.”

.....It is appreciated the litigation has taken long and the Respondent unduly kept out of reach of the fruits of the judgment rendered in his favour. However interests of justice demand that the applicant be given an opportunity to progress her quest for the appellate process on its own merits.

9. In view of the averments by the applicant and guided by the above binding authorities, I find that I should exercise discretion in favour of the applicant. I find that application has merits. I allow the application and I order as follows:-

- 1. Time to file appeal is extended.**
- 2. The appeal be filed within 30 days from today.**
- 3. I make no orders as to costs.**

Dated at Kerugoya this 15th day of February, 2019.

L. W. GITARI

JUDGE