



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. CIVIL APP. NO 281 OF 2018

DAVID KIMILU MUTINDA (Suing as the Legal Representative of

WYCLIFF KIMILU-DECEASED).....APPLICANT

-VERSUS-

MASINDE WAMELA SAMULE alias **SAMULE WAMELA**

MASINDE.....RESPONDENT

RULING

1. By a Motion brought on notice dated 10th September 2018, the Applicant herein, **David Kimilu Mutinda**, seeks extension of time and leave to lodge an appeal against the judgement in Mavoko PMCC No. 734 of 2017 which was delivered on 28th June, 2018. He accordingly seeks an order that the Memorandum of Appeal annexed hereto be deemed as duly filed with leave of the court.

2. It is clear that the second limb of the application cannot be granted in the manner sought. This application being a miscellaneous application, the court cannot deem an appeal to be duly filed in such proceedings as the court can only deem a memorandum of appeal duly filed in a properly filed appeal file. Accordingly, that prayer is misconceived.

3. The applicant's application is based on the fact that since the delivery of the said judgement on 28th June, 2018, by which the applicant's suit was dismissed, the applicant has been trying to obtain copies of the judgement in order to understand the reasoning behind it with no avail. It was deposed that following the appellant's counsel's frequent visits to the registry requesting for a copy of the judgement, he was informed that the judgement was yet to be typed and that the handwritten copy could not be availed hence the delay. It was averred that it was not until 7th August, 2018 that the said legal representative was alerted that the judgement was ready and he was able to get a copy thereof. By that time, however, the 30 days' period prescribed for appealing had expired.

4. It was the applicant's view that the Respondent will not be prejudiced by the grant of the orders sought herein, though the denial of the same would prejudice the applicant. According to the applicant he has strong grounds for lodging the appeal hence his intended appeal has high chances of success.

5. The said application was however, opposed by the Respondent. According to them, a party does not need a copy of the judgement to lodge an appeal as no such copy is required to be annexed to the memorandum of Appeal. It was averred that the applicant's advocate only needed to peruse the court file and take the necessary notes. In the Respondent's view, this application is an afterthought as there has been inordinate delay in filing it. Further after obtaining the judgement on 7th August, 2018 the applicant waited till 20th August, 2018 to file the application, a delay which has not been explained in the application.

6. It was the Respondent's case that allowing the application will greatly prejudice the Respondents who have already forgotten about the case and proceeded to close the file. Allowing the application, it was averred would amount to reviving a legal dispute that had been settled by a court of competent jurisdiction hence the application ought to be dismissed with costs.

Determination

7. I have considered the application, the supporting affidavit, the grounds of opposition and the submissions filed as well as the authorities relied upon.

8. Section 79G of the *Civil Procedure Act* provides that:

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. It Section 79G aforesaid employs the use of the phrase “an appeal may be admitted out of time” as opposed to “time may be extended to lodge an appeal out of time”. However, even in cases where the law uses the latter phraseology, it has been held that it is prudent to regularise the default before seeking to extend time. This was the position in Mugo & Others vs. Wanjiru & Anor [1970] EA 482 where it was held that:

“Clearly, as a general rule the filing and service of the notice of appeal ought to be regularised before or at least at the same time as an application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused.”

10. In this case however the law expressly provides that an appeal may be admitted out of time. That this is so was affirmed by Emukule, J in Gerald M’limbine vs. Joseph Kangangi [2009] eKLR, in which he expressed himself as follows:

“My understanding of the proviso to Section 79G is that an applicant seeking an appeal to be admitted out of time must in effect file such an appeal and at the same time seek the court’s leave to have such an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the court’s permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the court’s process which under Section 79B says.....”

11. Under the proviso to section 79G of the *Civil Procedure Act*, an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so. This must be so since it was held in Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633 that there is no difference between the words “sufficient cause” and “good cause”. It was therefore held in Daphne Parry vs. Murray Alexander Carson [1963] EA 546 that though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of *bona fides*, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.

12. As to the principles to be considered in exercising the discretion whether or not to enlarge time in First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65 the Court set out the factors to be considered in deciding whether or not to grant such an application and these are (i). the explanation if any for the delay; (ii). the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; (iii). whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

13. As regards the reason for the delay, it was contended that the lower court filed was not available for perusal by the applicant’s counsel after judgement was delivered in order for the applicant to make an informed decision on whether to appeal. This position has not been seriously challenged save for the contention that the applicant did not require a copy of the judgement to file the appeal. That may be so. However, the applicant surely required a copy of the decision to enable him form an opinion as to whether an appeal was worth pursuing. To do so cannot in my view be such an unreasonable decision as to deprive a party of favourable exercise of discretion. Waki, JA in Seventh Day Adventist Church East Africa Ltd. & Another vs. M/S Masosa Construction Company Civil Application No. Nai. 349 of 2005 held that:

“As the discretion to extend time is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant; the period of delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with the time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors...In an application for extension of time, each case must be decided on its own peculiar facts and circumstances and it is neither feasible nor reasonable to lay down a rigid yardstick for measuring periods of delay as explanations for such delays are as many and varied as the cases themselves...The ruling striking out the appeal is not only necessary for exhibiting to the application for extension of time but also for consultations between the applicant’s counsel and their clients and the fact that the ruling was returned to Nairobi for corrections is a reasonable explanation for the delay... Where the Respondent has already recovered all the decretal sum and costs attendant to the litigation, the right of appeal being a strong right which is rivalled only to the right to enjoy the fruits of judgement, no prejudice would be caused to the respondent who has enjoyed his rights in full if an opportunity is given to the applicants to enjoy theirs too, even if it is on a matter of principle.”

In this case, the unchallenged averments of the applicant show that he only got hold of the judgement on 7th August, 2018 and this application was filed on 20th August, 2018, after 13 days. In Concord Insurance Company Limited vs. Susan Nyambura Hinga Civil Application No. Nai 251 of 2002 it was held that a delay for 28 days is not inordinate for purposes of an application for extension of time to appeal.

14. The intended appeal seeks to challenge a decision of the trial court in which the appellant’s case which sought damages arising from fatal accident was dismissed. In my view considering the circumstances of this case and as there is a plausible reason for the delay in filing the appeal, it is in the interest of justice that the applicant be granted a chance to file and argue his appeal on merits even if it is only on a matter

of principle. He definitely has a right of appeal and save for the fact that he did not file his appeal within the prescribed time, there is no impediment to his doing so. Prejudice if any occasioned to the Respondent can, no doubt be compensated in costs. It has been said there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such disadvantage or that it cannot be cured by the application of that healing medicine. See **Waljee's (Uganda) Ltd vs. Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188.**

15. Accordingly, I find the application merited. Time is hereby extended to the applicant to file his appeal. Let the memorandum of appeal be filed and served within 14 days from the date hereof in a properly filed appeal file.

16. The costs of this application are however awarded to the Respondent.

17. It is so ordered.

Read, signed and delivered in open Court at Machakos this 4th day of April, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nthiwa for Mr Mulyuingi for the Applicant

Miss Nzilani for Mr Mulwa for the Respondent

CA Geoffrey