



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO 130 OF 2017

SOLOMON WAMBOGO MANJUKHU.....APPELLANT

VERSUS

SWAN CARRIERS LTD.....RESPONDENT

R U L I N G

1. By a Notice of Motion dated 1/09/2016 and brought under Sections 75G and 95 of the Civil Procedure Act, Cap 21, Order 50 Rule and Order 42 Rule 1 of the Civil Procedure Rules, 2010, the Applicant sought the following orders:-

a. That the Applicant be granted leave to appeal out of time against the judgment delivered by **Arome, RM** on the 24th of December, 2015.

b. That the Memorandum of Appeal annexed to the motion be deemed as duly filed and served.

2. The Application is premised on among other grounds that judgment was delivered without notice to the Applicant and thereafter the file went missing at the Registry thus the delay in filing the Memorandum of Appeal.

3. The Applicant, Solomon Wambogo Manjukhu swore an affidavit in support of the motion. He deposed that judgment was delivered by the lower court without notice and that subsequently the file went missing, and efforts to locate the same had been futile. He further stated that as soon as the file was traced on 5th April, 2016 a letter was done to obtain a copy of the said judgment. He was dissatisfied with the said judgment and desired to prefer an appeal though the time allowed to file an appeal has since lapsed. He further deposed that the court has power to enlarge time in this case as the delay which is not inordinate, was excusable having been occasioned by the misplacement of the court file.

4. The Respondent filed grounds of opposition on 5th October, 2016 stating that the application is frivolous, unmerited and an abuse of the court process as the Memorandum of Appeal discloses no reasonable grounds and that there was no basis to warrant extension of time as there is no reasonable justifiable explanation for the delay. The Respondent stated that the Applicant ought to give security as the likelihood of him paying costs upon the conclusion of the appeal is not guaranteed. The court was urged to dismiss the applicant's application.

5. The application was dispensed with by way of oral arguments as ordered by the Court. Mr. Mayende submitted on behalf of the Applicant as follows. That the applicant was relying entirely on his supporting affidavit and the annexures thereto. He reiterated that judgment in the lower court was delivered without notice to the applicant thus the failure to file the appeal on time. He also pointed out that the court file had been missing prior to the judgment and the Applicant had written many letters to the registry trying to trace the said file, all in vain. Counsel further asserted that the file is yet to be found. In conclusion, counsel submitted that Section 79G of the Civil Procedure Act allows for filing of an appeal out of time upon an applicant showing good cause for the delay.

6. Mr. Omondi submitted on behalf of the Respondent. Relying on the grounds of opposition filed by the respondent, counsel submitted that the application herein is riddled with contradictions: the applicant claims that he was aware of the delivery of the judgment in his application and in the supporting affidavit he claims to not be aware of the same. It was submitted that there was no explanation for the inordinate delay in filing the Memorandum of Appeal. Counsel stated that the letters mentioned by the Applicant were not annexed to the supporting affidavit. To support his submissions, he placed reliance on the case of **Fahim Yasin Twaha Limited vs. Timamy Issa Abdalla & 2 others (2014) eKLR**.

7. The court has considered the material canvassed in respect of the instant motion. The application is expressed to be brought primarily under Section 79 G and 95 of the Civil Procedure Act and Order 50 Rule 1 of the Civil Procedure Rules. The judgment that it is sought to be appealed from was delivered on 23rd January, 2018.

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. The successful applicant must demonstrate “good and sufficient cause for not filing the appeal in time.” In **Thuita Mwangi v Kenya Airways [2003] e KLR**, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in *pari material* with Section 79G of the Civil Procedure Act, reiterated its decision in **Mutiso v Mwangi [1997] KLR 630** as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

10. While the discretion of the court is unfettered, an Applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the invocation of the court’s discretion in his favor.

11. The Supreme Court in the case of **Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] e KLR** enunciated the principles applicable in an application for leave to appeal out of time. The Court state inter alia that:

“(T)he underlying principles a court should consider in exercise of such discretion include;

- 1. Extension of time is not a right of any 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 burn 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 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 Respondent if the extension is granted;**
- 6. Whether the application has been brought without undue delay.**
- 7.”**

See also **County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] e KLR**.

12. The delay in this case was about nine months since delivery of the judgment. It is a long period. The Appellant’s explanations are inconsistent. In ground (i) in support of the motion, it is stated that the judgment was delivered without notice and the file thereafter went missing. There is no evidence to support allegation that the file went missing immediately after the judgment as all that is supplied are letters to the Chief Magistrate’s registry in March and April 2016. No response from the registry to confirm this allegation is availed. Besides, ground ii) on the face of the motion states that:

“ii) That the intended appellant was contacted immediately judgment was delivered to avail further instructions and by the time the sufficient instructions could be obtained from the Proposed Appellant, the time allowed to file appeal had run out.”

13. This is clearly contradicted by the deposition at paragraph 4 of the supporting affidavit and the submissions of the Applicant’s counsel to the effect that the applicant learned of the entry of the judgment on 5th April 2016 when the court file was traced. Even assuming that the Appellant only learned of the entry of judgment on 5th April 2016, no explanation is given for the fact that he took a further five months before filing the present application and memorandum of appeal. Indeed, his depositions suggest that after 5th April 2016 the lower court file was available.

14. In my own view the delay has not been satisfactorily explained and is inordinate in the circumstances of this case. No good and sufficient cause as envisaged in Section 79 G of the Civil Procedure Act has been demonstrated. The judgment to be appealed from was delivered in December 2015. Parties can no longer afford to litigate at their own leisure thereby prejudicing adverse parties through costs and causing unnecessary delay in the administration of justice.

I find no merit in the Applicant’s motion and will dismiss it with costs.

DELIVERED AND SIGNED AT KIAMBU THIS 15TH DAY OF MAY 2019

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C. MEOLI

JUDGE

In The Presence of:-

Mr. Mwangi holding brief for Mr. Omondi for Respondent

Applicant absent

Court Assistant - Nancy