



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**MISCELLANEOUS CIVIL APPLICATION NO.76 OF 2018**

**PETER MWANGI NJUGUNA.....APPLICANT**

**VERSUS**

**JANE NYAMBURA GITHIGA.....RESPONDENT**

**RULING**

1. The Applicant filed Notice of Motion application dated 18th October 2018 under Section 79G of the Civil Procedure Act Cap 21 Laws of Kenya seeking the court to admit his appeal out of time. The intended appeal is against the judgment and decree of Hon. W. Kagendo in Nyeri Chief Magistrate's Court Matrimonial Cause No. 16 of 2014 delivered on 31st November, 2017.

2. The application is supported by grounds on the face of the application and the affidavit of Peter Mwangi Njuguna, Applicant, of even date stating as follows: -

- a) Judgment was set for 25th October 2017. It turned out to be a holiday and hence rescheduled to 31st October without notice to the parties. Consequently, the judgment was delivered on that date in the absence of the parties.
- b) The Applicant's counsel learnt of the delivery of the judgment on 13th November 2017. Counsel received instructions to lodge an appeal and immediately applied for copies of the proceedings and judgment. He received the documents on 21st September 2018.
- c) The case was complex and necessitating counsel to take some time in acquainting himself with the matter.
- d) The appeal raises substantial questions of law on division of matrimonial property which must be determined by this court.

3. The Respondent filed a Replying Affidavit dated 5th November 2018 contesting the application as follows: -

- a) The application is incompetent because no appeal has yet been filed and there can be no admission of non-existent appeal.
- b) The applicant was aware of the judgment on 13th November 2017 but filed the instant application 11 months later. The decree was also issued 11 months before the application on 17th November 2017.
- c) The applicant received the proceedings on 21st September 2018. If the grounds of appeal are genuine the Applicant would have filed his appeal immediately after receiving the proceedings. There is no explanation as to why the appeal has not yet been filed to date.
- d) The Applicant did not apply for the decree. The Certificate of Delay does not touch on the decree and hence it is irrelevant in explaining the 12 month's delay in filing the appeal since the judgment was delivered.

4. The Applicant also filed a further affidavit dated 7th December 2018 where he deponed that: -

- a) An appeal need not precede an application to admit an appeal out of time and that an appeal filed before leave is granted is a nullity.
- b) The delay between the collection of the proceedings and judgment on 21st September and filing of this application on 19th October 2018 is not inordinate considering that the Certificate of Delay was issued on 3rd October 2018 and counsel needed time to peruse the proceedings and judgment to prepare the appeal.

c) The application was filed within 30 days of receiving the proceedings and judgment.

5. The parties agree to canvass the application by way of written submissions. **The Applicant's submissions**

6. Counsel for the applicant reiterated the facts deponed to in the affidavits. He argued that the correct interpretation of section 79G of the Civil Procedure Act is that an appeal may be admitted out of time upon an application to that effect being made before or after filing the appeal, and that either the application or the appeal could precede the other according to the proviso to section 79G of the Civil Procedure Act.

8. The Applicant relied on **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi and Anor (Kiambu H.C Misc Application Number 108 of 2017)** where Section 79G was interpreted as follows: -

“To deny such a party leave to file the appeal merely because they did not first, file the appeal which would have been, in the first place, out of time, as a way of preserving their right to approach the court seems in a touch too formalistic for our jurisprudence in this day and age.”

9. The Applicant also relied on **Mwangi v Kenya Airways (2003) eKLR** where it was held: -

“Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance, **in Leo Sila Mutiso vs Rose Hellen Wangari Mwangi. (Civil Application No Nai 255 of 1997)** (unreported), the Court expressed itself thus:

“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 in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted”.

These, in general, are the things a judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive; it was not meant to be exhaustive and that is clear from the use of the words “in general”.

10. The explanation for the delay in filing the appeal was that Counsel could not prepare the appeal without the proceedings and judgment. That the decree alone could not enable counsel to prepare an appeal. That the application was filed within a month of receiving the proceedings and the appeal raises arguable grounds.

#### **The Respondent's submissions**

11. It was argued for the respondent that the Applicant ought to have filed a Memorandum of Appeal pending the obtaining of the proceedings and copies of the judgment. That the decree should have been extracted and attached to the Memorandum of Appeal.

12. That order 43 of the Civil Procedure Rules provides for a Memorandum of Appeal and a decree to be filled where a party intends to institute an appeal; and that section 79 of the Civil Procedure Act provides that an appeal should be filed within 30 days from the day of receipt of a decree. That no sufficient and reasonable explanation is given by the Applicant for not extracting a decree in time.

13. He also argued that section 79G provides for a window for extension of time where the decree could not easily be obtained. In this case the decree was ready but the Applicant failed to extract the same and only applied for judgment and proceedings. That the certificate of delay applied for by the Applicant only related to certified copies of the judgment and proceedings.

14. The Applicant did not give any reasonable explanation for the fact that he was aware of the judgment on 13th November 2017; a decree was issued on 17th November 2017; yet he filed the application 11 months later.

The Respondent relied on **Andrew Ng'ang'a Ndungu v Godfrey Karuru & Another (2006) eKLR** where the court held that there was no reason why the appeal was not filed within 30 days and the explanation for delay given was not sufficient thus dismissing the application.

Issue for determination

16. This application raises only one issue for determination; whether the Applicant is entitled to an extension of time to lodge his appeal.

17. Section 79G of the Civil Procedure Act provides as follows: -

“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.”

18. The above provision being mandatory, an appeal from a subordinate court to the High Court should be filed within 30 days from the date of the decree or order appealed against, and may be admitted out of time only where there is good and sufficient cause for not filing the appeal in time.

19. Before determining the substantive application it is necessary to deal with the issue raised by the Respondent that an application for extension of time has to be brought after the memorandum of appeal has been filed otherwise the application will be incompetent. I don't agree.

20. This court finds such interpretation of Section 79G of the Civil Procedure as unnecessarily constraining and that an application for extension of time may well lay before the appeal is filed. This court is agrees with the persuasive authority in the decision of Hon. Justice Joel Ngugi in **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another [2018] eKLR** where he held: -

“9. The last point taken up by the Respondent is that the Application is incompetent because the Applicants ought first to have filed a Memorandum of Appeal and then seek for its admission out of time. The claim is that the plain reading of section 79G is to that effect. Further, the Respondent relied on the interpretation to that section given by the High Court in **Gerald M'Limbine v Joseph Kangangi [2009] eKLR and Asma Ali Mohamed v Fatime Mwinyi Juma.**

21. An appellant who is late in filing their appeal need not necessarily file the appeal first and then seek for its admission. The interests of substantive justice would allow that appellant to file an application to seek leave to file the appeal out of time. I don't read s. 75 G to s barring such an appellant from approaching the court without first having filed the appeal. It appears only reasonable that there be a window for that appellant to seek the requisite leave. 21.

22. The Supreme Court, in the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** held as follows: -

“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive 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; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

23. The Supreme Court in **County Executive of Kisumu v County Government of Kisumu & 8 others [2017] eKLR** held: -

“[25] 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:

“[27] 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...”

[28] 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.”

[26] However, we hasten to add that a ground of delay of getting typed proceedings is not a prima facie panacea for a case of delay whenever it is pleaded. Each case has to be determined on its own merit and all relevant circumstances considered. It is worth reiterating that in considering whether or not to extend time, the whole period of delay should be stated and explained to the satisfaction of the Court.”

24. The court notes that the decree was available on 17th November 2017 and since the letter written by the Appellant's counsel dated 13th November 2017 seeking for copies of proceedings there have not been any follow up on the same. In any event the delay explained in the certificate of delay is only on proceedings and judgment and not the decree which was already available.

25. In **Marine Diving & Technical Services Ltd v Southern Engineering Company Ltd [2009] eKLR** it was held: -

“The delay which is condoned relates to the period which the lower court may certify as having been requisite for the preparation and delivery of the decree. Referring to the proviso to the definition of “decree” in Section 2 of the Act, she also argued that since “decree” includes judgment, the period it took the appellant to obtain the judgment is excluded from the computation of the thirty days within which an appeal should be filed under Section 79G.

Even assuming that the words “decree” and “judgment” may be used interchangeably under Section 79G as she said, the Section is very clear that what is required for the filing of an appeal is the decree. This does not extend to proceedings by any stretch of the imagination. What counsel applied for on 10th August, 2006 was neither the decree nor the judgment. She applied for “typed proceedings and judgment.” That explains why the process took so long. And the certificate of delay attached to her affidavit is not in respect of the preparation of the decree or order appealed against as required under Section 79G. It is in respect of proceedings and judgment. Nowhere does Section 79G refer to proceedings.”

26. In the case of **Gregory Kiema Kyuma v Marietta Syokau Kyema, Civil Appeal No. 16 of 1988**, referring to S. 79G of the Civil Procedure Act, Kwach Ag. J.A said –

“A certificate of delay issued in accordance with the terms of that section covers only the period requisite for the preparation and delivery to the appellant of a copy of the decree or order appealed against. It does not and cannot be used to cover a period, as is suggested in the certificate, which may be required to obtain copies of proceedings and judgment. So the certificate of delay filed and relied upon by the appellant was absolutely worthless and totally incapable of remedying the delay that had occurred ...”

27. In **Ndegwa Kamau t/a Sideview Garage v Fredrick Isika Kalumbo [2016] eKLR** Hon. Justice Ngaah Jairus cited the Court of Appeal decision of **Kyuma versus Kyema (1988) KLR 185** where the court upheld the High Court holding that a certificate of delay not speaking of a decree or order is not the one contemplated under Section 79G of the Civil Procedure Act. In this case the applicant applied for a “certified copy of the proceedings and judgment/orders”. He ultimately got the certified copies of the proceedings and judgment and was also issued with a certificate of delay that certified the period required to prepare the proceedings and the judgment; 29. In **Kyuma versus Kyema (1988) KLR 18** above, the learned judge (Shields J, as he then was) held that the certificate of delay which was filed with the appeal was not the one contemplated under section 79G of the Act 21. He struck out the appeal and when the appellant appealed to the Court of Appeal, the latter upheld the High Court’s judgment and said at page 189:

“The question is what documents must the appellant file within thirty days or within the time lawfully extended by the certificate of delay? Since the question contemplates that the appeal is against a decree or order, the appellant is obliged to apply first, Memorandum of Appeal in the form set out in appendix F No. 1 of the Civil Procedure Rules and second, a copy of the formal order of the court, if available. Rule 1A of Order 41 permits this latter document to be filed as soon “as possible and in any event within such a time as the court may order”. Therefore, a certificate of delay within the true intendment of section 79G must certify the time it took to prepare and deliver to the appellant “a copy of the order” of the magistrate. But the certificate of delay exhibited by the appellant, did not speak of a decree or order. No such order was sought or extracted. What the appellant, in error, sought and what the court dutifully supplied, were “the proceedings and judgment”.

28. Having considered the submissions by counsel and the authorities cited I find that there was insufficient explanation for the inordinate delay. The application is not merited and the same is denied with costs to the respondent.

**Dated, signed and delivered in open court this 7<sup>th</sup> June 2019 at Nyeri.**

**Mumbua T.Matheka**

**Judge**

In the presence of:-

Court Assistant: Nancy

Kebuka for Mwangi Kariuki for applicant

Waweru Macharia for respondent

Parties-no appearance.

**Judge**