



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

MISC. APPLICATION NO. 44 OF 2017

SIMEON NYAMWEYA ABINCHA..... APPELLANT

VERSUS

K.G. PATEL & SONS LTD.....1ST RESPONDENT

RABDIYA CONSTRUCTIONS LTD...2ND RESPONDENT

RULING

By a Notice of Motion Application dated 2nd November 2017, brought **under section 3A, 75, 79G** of the Civil Procedure Act; **Order 50 Rule 6, Order 51 Rule 1** of the Civil Procedure Rules and all enabling provisions of law, the Applicant is seeking the following orders:

1. **THAT** *this Honorable Court be pleased to certify this Application urgent and hear it ex-parte in the first instance.*
2. **THAT** *the Honorable Court be pleased to grant the Applicant leave to appeal against the judgement delivered herein on 3rd of August 2017 by Hon. Shitubi at Principal Magistrate Court at Kajiado.*
3. **THAT** *the costs of this application be costs in the cause.*

The Application is premised upon several grounds which are as follows: that the judgement in suit herein was delivered on 3rd August 2017; the Applicant is aggrieved by the judgement delivered by Hon. Shitubi in Kajiado PMCC NO.535 and desires to appeal on the same; **section 79G** of the Civil Procedure Act requires that an appeal shall be filed within a period of thirty days from 3rd August, 2017 which period has lapsed and the Notice cannot be filed unless leave is granted by this Honourable Court.

Further grounds are that the delay was occasioned by the fact that the judgement was delivered in the absence of the Plaintiff and their advocate was not aware of the judgement; that the delay is in any event not inordinate; that the defendant will not suffer any injustice by court allowing this application; the intended appeal raises valid triable issues and has high chances of success and lastly, that it is therefore in the interest of substantive justice that the court does grant leave to commence appeal proceedings out of time for proper determination of the issues to be raised in the intended appeal.

The Application is further supported by a supporting affidavit of Musili Mbiti an advocate of the High Court of Kenya. He deposed that the judgement that is intended to be appealed against was delivered in the absence of the Advocate for the plaintiff and the Plaintiff himself on 3rd August 2017. They later on or about 4th October 2017 perused the file and learnt that the suit was dismissed. The Plaintiff intends to appeal against the said order.

The Application was opposed by the Respondents through replying affidavit sworn by Marcella Atieno Oloo, an advocate of the High Court of Kenya. It was deposed therein that the judgement in Kajiado PMCC NO. 535 of 2015 was scheduled to be delivered on 29th June 2017 but was deferred and delivered on notice from the Court on 3rd August 2017 which notice they received late on 15th August 2017.

Upon perusal the file on 7th September 2017, they learned that the Plaintiff's case against them had been dismissed. The deponent believes that the Plaintiff's Counsel is guilty of laches as they filed their application three months after the judgement was delivered and an entire month after they learned of the outcome of the judgement. This delay is inordinate and no sufficient reasons have been advanced for the same. Therefore, it was deposed that there is no basis for any of the orders sought in the Plaintiff's application and he urged this court to dismiss it with costs.

LAW AND ANALYSIS

An appeal from the subordinate court to the High Court is governed by **Section 79G** of the **Civil Procedure Act** which provides-

“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 a good and sufficient cause for not filing the appeal in time”. (Emphasis added)

Whenever an application for extension of time is before a court, exercise of discretion required under law is to take into account several factors as observed by Odek, JJ.A in *Edith Gichugu Koine vs. Stephen Njagi Thoithi [2014] eKLR*, thus

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others...”

From the record, I have noted that the judgement of the lower court was delivered on 3/8/2017. I have also noted that the Applicant sought leave to appeal out of time against the said judgement on 2/11/2017. This was approximately 3 months after the judgement of the lower court had been delivered. **Section 79G** of the Civil Procedure Act requires that an appeal shall be filed with a period of thirty days from 3/8/2011.

The reasons for the delay as advanced by the Applicant are that the delay was occasioned by difficulties in obtaining the Court file to obtain judgement since it was in the absence of Plaintiff and his advocate. For that reason, the applicant argues that the delay was not inordinate and granting the relief sought herein will not occasion any injustice upon the Respondents.

Be that as it may, this Court in *Kamlesh Mansukhalal Damji Pattni vs. Director Of Public Prosecutions & 3 others [2015] eKLR* articulated that-

“It must be realized that courts exist for the purpose of dispensing justice. Judicial Officers derive their judicial power from the people or, as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of the Constitution which succinctly states that “judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.” Judicial Officers are also State officers, and consequently are enjoined by Article 10 of the Constitution to adhere to national values and principles of governance which require them whenever applying or interpreting the Constitution or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity are upheld. For these reasons, decisions of the Courts must be redolent of fairness and reflect the best interest of the people whom the law is intended to serve. Such decisions may involve only the rights and obligations of the parties to the litigation inter se (and hence only the parties’ interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the Court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice.” (emphasis added)

I have taken into consideration the inconveniences caused to the Applicants in obtaining the court file together with the judgement. I have also considered the provisions of law above as well as case law as cited above. My view of the matter is that the role of the courts is to ensure substantive justice has been accorded to both parties in every matter. **Article 159** of the constitution outlaws dispensing justice with giving regard to procedural technicalities. I have seen the memorandum of appeal dated 2/11/2017 which carries four grounds of appeal. It is within the principle of substantial justice to allow a part who has unsettled issues to present his case before a court of competent jurisdiction.

In the premises, the Applicant’s Application dated 3211/2017 is found to have merit. The same is allowed as prayed. The Applicant is ordered to file and serve record of Appeal within 30 days and to set down the matter for directions on the hearing of the Appeal.

The costs of the application to abide the appeal

It is so ordered.

Dated and delivered at Kajiado this 7th day of June, 2019.

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R. NYAKUNDI

JUDGE

In the presence of:-

Mr. Mutunga holding brief for Musili for the applicant present