



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC APPLICATION NO. 404 OF 2018

EVALYNE MURUGI T/A ALMARES INVESTMENTS APPLICANT

VERSUS

JOSEPH KINYUA NYAGARESPONDENT

RULING

1. The applicant in the Notice of Motion dated 25th July 2018 principally seeks leave of this court to file her intended appeal against the ruling delivered by *Hon. D. O. Mbeja* on 28th May 2018 out of time. The application is premised on grounds stated on its face. It is supported by an affidavit sworn by the applicant on 24th July 2018 and the annexures thereto.
2. In the grounds anchoring the motion and in the supporting affidavit, the applicant contends that the delay in filing her appeal was not deliberate but was caused by circumstances beyond her control; that the delay was caused by unavailability of the court file which made it impossible for her advocate to obtain the proceedings and ruling subject of the intended appeal within the prescribed time despite having applied for the same on the same day the ruling was delivered and despite having made efforts to follow up on the request through several subsequent letters.
3. In his grounds of opposition, the respondent opposed the motion mainly on grounds that it offends the provisions of *Section 79 G* of the *Civil Procedure Act*; that it is frivolous, misconceived and amounts to an abuse of the court process and that no good reason or sufficient cause had been given to merit the exercise of the court's discretion in favour of the applicant.
4. By consent of the parties, the application was canvassed by way of written submissions which I have duly considered together with the authorities cited.
5. Having considered the application and the party's rival submissions, I find that the only issue for my determination is whether the applicant has established a good case to justify the exercise of the court's discretion in her favour by granting her the orders sought.
6. The law governing the filing of appeals from subordinate courts to the High Court is set out in *Section 79 G* of the *Civil Procedure Act* (the *Act*). Such appeals ought to be filed within 30 days of delivery of the judgment or order sought to be appealed against but the proviso to *Section 79 G* gives the High Court power to extend the time for filing of appeals if good and sufficient cause is shown for failure to file the intended appeal within time.
7. In this case, the reason advanced by the applicant for failure to file her intended appeal on time is that despite having applied for certified copies of proceedings and the impugned ruling as soon as the ruling was delivered and following up on the issuance of the proceedings, the trial court was unable to supply the applicant with the proceedings within time and had not done so by the time the application was filed; that the delay was therefore occasioned by circumstances beyond her control and it was in the interest of substantive justice to allow the application as in any event, the respondent will not suffer any prejudice if the application was allowed.
8. The respondent has attacked the competence of the application on grounds that the applicant has failed to satisfy the requirements of the proviso to *Section 79 G* of the *Act* which in his view, requires an applicant to file his intended appeal out of time then seek to have it validated by the court by admitting it out of time; that since the applicant has not filed a memorandum of appeal, the application should be dismissed. The respondent also submitted that the applicant has failed to establish sufficient cause for grant of the relief sought since she did not need to have certified copies of the proceedings and ruling before filing her appeal.
9. It is not disputed that this court under the proviso to *Section 79 G* of the *Act* is clothed with unfettered discretion to decide whether or not to grant leave to an applicant to file an appeal out of time provided good and sufficient cause is established for failure to file the intended appeal on time.

10. The Court of Appeal in *Thuita Mwangi V Kenya Airways Limited, [2003] eKLR* identified at least four factors which a court should take into account while exercising its discretion under Section 79 G of the Act. These are:

- i. The length of the delay;
- ii. The reason for the delay;
- iii. The chances of the appeal succeeding if the application is granted; and
- iv. The degree of prejudice that may be occasioned to the respondent if the application is allowed.

11. In this case, the ruling subject of the intended appeal was delivered on 28th May 2018. The 30 day period within which the applicant ought to have filed her appeal expired on or about 29th June 2018. The instant application was filed on 25th July 2018. The period of delay is thus slightly less than a month. In my view, the delay is not inordinate and though I agree with the respondent's submission that there is no legal requirement that an aggrieved party must obtain certified copies of proceedings and decision of the trial court before filing an appeal, I find that there may be situations where obtaining the proceedings and copy of the impugned ruling or judgement would be crucial to help the aggrieved litigant or counsel on record decide on the grounds to advance in the memorandum of appeal.

12. It is clear from the applicant's submissions that the ruling she intends to appeal against dismissed a suit in which she had sued the respondent for recovery of KShs.2,575,368. Though the trial court's ruling has not been availed to this court and it is therefore impossible for this court to assess whether or not the intended appeal is arguable, it is my view that given the nature of the intended appeal, the interests of justice requires that the applicant be granted an opportunity to be heard on appeal so that this court can have an opportunity to determine whether her case was rightly or wrongly dismissed. If the court refused to allow the application, the applicant will suffer great prejudice as she will be removed from the seat of justice before her case was determined on merit. If on the other hand the application was allowed, the respondent is not likely to suffer any prejudice which cannot be compensated by way of costs.

13. For the foregoing reasons and taking into account the particular circumstances of this case, I am inclined to exercise my discretion in favour of the applicant. I therefore allow the applicant's main prayer and grant her leave to file her intended appeal within the next 21 days.

14. The respondent is awarded costs of the application.

It is so ordered.

DATED, SIGNED and DELIVERED at **NAIROBI** this 11th day of July, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Kiptoon holding brief for Mr. Anyoka for the applicant

No appearance for the respondent

Ms Catherine Njeri: Court Assistant