



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**MISC. CIVIL CASE NO. 108 OF 2017**

**SAMUEL MWAURA MUTHUMBI.....PLAINTIFF**

**VERSUS**

**JOSEPHINE WANJIRU NGUGI.....1<sup>ST</sup> DEFENDANT**

**JOSEPHINE KARANI.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. On 1<sup>st</sup> February 2018 this court (**Ngugi J**) allowed the application brought by **Samuel Mwaura Muthumbi**, the Plaintiff in **Gatundu Senior Principal Magistrate's Court Civil Case No.24 of 2016** (and present Applicant) to file an appeal out of time in respect of the judgment delivered on 19<sup>th</sup> April 2017. The court directed that the memorandum of appeal be filed within 7 days of the ruling date, hence the period expired on 9<sup>th</sup> February 2018.
2. About 3 months later, on 9<sup>th</sup> May 2018, Samuel Mwaura Muthumbi brought a second motion expressed to be brought primarily under Sections 1A, 1B, 3A and 95 of the Civil Procedure Act and Order 50 rule 6 of the Civil Procedure Rules seeking once more, that the court be pleased **“to extend grant of leave to the Applicant to file Memorandum of Appeal out of time,”** on grounds, inter alia, that the counsel having conduct of the matter had left, presumably, the firm of **Daniel Henry and Co. Advocates** having not diarized the ruling date; that his mistakes ought not to be visited upon the Applicant; that the application was filed without delay upon the realization of the delivery of the ruling and that the Respondent will not be prejudiced if the application is granted. These matters are repeated in the affidavit of **Daniel Gachau Mwangi** who describes himself as the Managing Partner at **Daniel, Henry and Co. Advocates**.
3. On behalf of the Respondents and Defendants in the lower court suit, a replying affidavit was sworn by **Mutua Emmanuel Bara** the advocate in the firm of **Kairu and Mc Court, Advocates** responsible for the conduct of this matter. He deposes that subsequent to the lower court judgment of 19<sup>th</sup> April 2017, the Applicant had effected execution of the decree through proclamation and attachment of the Respondent's goods and that the entire decretal sum was paid out as at 27<sup>th</sup> July, 2017, the matter resting with a consent in the lower court to the effect that the marked be marked as settled. It is further deposed that Daniel Gachau Mwangi was the only counsel having conduct of this matter at all times and that any allegations to the contrary are false; moreover that the name of the advocate who allegedly left the firm of **Daniel Henry and Co. Advocates** is not stated.
4. In a further affidavit, Daniel Gachau Mwangi defended the execution in respect of the lower court decree and reiterated that counsel responsible for prosecuting the first application before this court for leave to appeal out of time left the firm.
5. The application was set down for hearing on 18/9/18 when, only the Applicant's counsel was represented by Mr. Kimani who urged the court to allow the application, as unopposed but the court, noting the existence of a replying affidavit on record reserved its ruling.
6. This is a fairly straight, forward matter. What the Applicant is essentially seeking is not the extension of the “grant of leave... to file.. appeal out of time” as the motion purports, but an extension of the time allowed for doing so, in this case, 7 days since the delivery of **Ngugi J's** ruling. The applicable provision is Order 50 Rule 6 of the Civil Procedure Rules which provides that:

**“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:**

**Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”**

7. The reason advanced by the Applicant for non-compliance with the time limit fixed by Ngugi J is that the counsel responsible for the conduct of the matter did not diarize the ruling date and left the instructing firm without handing over files and therefore Messrs **Daniel Henry and Co. Advocates** were unaware of the ruling date. The record of the proceedings relating to the said decision indicates that on 19<sup>th</sup> June 2017 and 12<sup>th</sup> July 2017 Mr. Gachau appeared for the Applicant. On subsequent dates, when directions were given and ruling date set, i.e. on 20/9/17 and 31<sup>st</sup> October 2017, respectively a Ms Mageo held Mr. Gachau's brief.

8. What I have found surprising is that despite being challenged by the Respondent to name the alleged offending counsel responsible for the failures alleged by the Applicant he has been reticent to do so. Nor has the said counsel sworn an affidavit in the matter, or the copy of diary of the concerned advocate/firm of advocates tendered to support the allegation of non-diarizing of the ruling date. Interestingly, in the period when the first application was pending, the Applicant was admittedly zealously pursuing the execution of the decree in the lower court, a process which rested with the consent executed by the parties on 27<sup>th</sup> July, 2017.

9. In **County Executive of Kisumu v County Government of Kisumu and 8 Others [2017] e KLR** the Supreme Court reiterated the principles applicable in the consideration of an application for the extension of time, as enunciated in its decision in the case of **Nicholas Kiptoo Arap Salat v Independent Electoral and Boundaries Commission and 7 Others [2014] e KLR** by stating that:

**“It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the *Nicholas Salat* case to which all the parties herein have relied upon. The Court delineated 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.”***

10. Applying the above principles to this case, the court notes that even after being granted leave to file an appeal out of time, the Applicant did not comply within the stipulated period of 7 days, and that the explanation given for the failure, while heaping blame on the alleged departed counsel, does not explain why the Applicant himself took no interest in the outcome of the application for over 3 months. Cases belong to parties and not to counsel, and long gone are the days when an indolent party would invariably be absolved from blame and the consequences of the tardiness of his counsel when he himself has failed to be actively involved in the progress of his case.

11. In this case, there is no affidavit sworn by the Applicant himself and no affidavit or other material furnished to the court to firm up allegations that the unnamed counsel who had the conduct of the first application failed to diarize the ruling, or why it took the instructing firm of advocates over three months since his/her departure (also not proven) to “realize” that the ruling of 1<sup>st</sup> February 2018 had been given. The vague depositions regarding the alleged counsel leave much to be desired.

12. Moreover, it is undisputed that execution in respect of the lower court decree has been completed and it cannot be said that the Respondents will not be prejudiced by further litigation in respect of a matter where a consent for settlement “of the matter” was recorded some two years ago in the lower court.

13. The court is not persuaded that this is a proper case for the exercise of its discretion in favour of the Applicant. The motion filed on 10<sup>th</sup> May 2018 is accordingly dismissed with costs.

**DELIVERED AND SIGNED AT KIAMBU THIS 18<sup>TH</sup> DAY OF JULY 2019**

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**C MEOLI**

**JUDGE**

**In the presence of:**

Miss Wanjira holding brief for Mr. Gachau

Respondent – No appearance

Court Assistant - Nancy