



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL APPEAL NO. 31 OF 2019**

**ANTHONY KONDE FONDO.....1<sup>ST</sup> APPLICANT**

**ENFORCER CAR ALARMS.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**ROSELYNE MWANATUMU CHIMEGA.....RESPONDENT**

**CORAM: Hon. Justice R. Nyakundi**

**Mr. Kimani for the applicant**

**Mr. Kenga for the Respondent**

**RULING**

The Notice of Motion application before me dated 10<sup>th</sup> August, 2019, was brought in terms of Order 50 Rule 6 of the Civil Procedure Rules. The Applicants are seeking orders that time for payment of court fees for the memorandum of appeal lodged on 4/6/2019 be extended and enlarged so that the payment by receipt number 0097768 on 11/6/2019 is deemed as proper and timely made and that the costs of this are ordered in favor of the Respondent in any event.

The Application is based on grounds couched on the face of the Application and further grounds contained in the supporting affidavit sworn by the Learned Counsel for the Applicant, Mr. Faiz Mohamed Noor. It is indicated that the Applicants were allowed to file the Appeal within 14 days from 23/5/2019 by Hon. Korir.J. That the memorandum of Appeal was presented for stamping with the Court stamp and assessment of Court fees on 4/6/2019.

The Applicants averred that it was due to Idd UI Fitr Public Holiday and Celebrations on the part of Muslim staff in the firm, the court fees were not requisitioned for and paid until the 11/6/2019. According to the Counsel for the Applicant, if time is to be reckoned excluding the first day and the public holiday, the time to file and pay for the memorandum of appeal was to lapse on 10/6/2019, consequently the requisite court fees was not processed and paid until 11/6/2019.

It is the Counsel's averment that the extension of time herein will not spring any surprises or occasion any prejudice to the respondent and the same memorandum of appeal was exhibited as an exhibit to the earlier application for leave to appeal out of time. Further that failure to pay court fees in time though regrettable, is not fatal to the intended appeal.

The Respondent filed statement of grounds of opposition on 10<sup>th</sup> September 2019 in response to the instant application. The Respondent contends that the application is misconceived and bad in law, that it is an abuse of the court process and/or fatally defective and thus wholly incompetent, frivolous, scandalous and if allowed will prejudice the Respondent hence it should be dismissed with costs.

**Determination**

Order 50 Rule (6) provides for extension of time in these terms:

***“Where limited time has been fixed for doing any act or taking any proceedings under the 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 time appointed or allowed:” (Emphasis added).***

In **County Executive Of Kisumu V County Government Of Kisumu & 8 Others [2017] eKLR** the Supreme Court of Kenya stated in an application for extension of time. The whole period of delay should be declared and explained satisfactorily to the Court.

The Court settled the principles that were to guide it in the exercise of its discretion to extend time. In **Nicholas Kiptoo arap Korir Salat – V- IEBC & 7 Others [2014] eKLR**, the Supreme Court delineated the following as the under-lying principles that a Court should consider in exercise of such discretion: -

- (i) 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;*
- (ii) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;*
- (iii) The Court's exercise of its discretion to extend time, is a consideration to be made on a case to case basis;*
- (iv) Where there is a sensible reason for the delay, the delay should be explained to the satisfaction of the Court;*
- (v) Whether there will be any prejudice suffered by the respondents if the extension is granted;*
- (vi) Whether the application has been brought without undue delay; and*
- (vii) Whether in certain cases, like election petitions, public interest should be a consideration for extending time.*

I have considered the notice of motion application, the affidavits in support and opposition of the application, I shall proceed to make the following findings. The Applicants have sought to give an explanation as to what caused the delay to pay the requisite court fees. Mr. Faiz Noor told the Court that the delay in requisition for and payment of court fees was as a result of intervening public holiday on 5/6/2019. He averred that he was out of office for three working days following the Idd UI Futr Holiday and did not manage to resume until the 10/6/2019. He produced a copy of the Gazette Notice as exhibit to substantiate support his claim, a fact which has not been controverted herein.

The Respondent, Kenga and Company Advocates opposed the foregoing claim citing that the ruling that granted the Applicants leave to file their memorandum of appeal was delivered on 23<sup>rd</sup> May, 2019 and the Appellants were given 14 days within which to file an appeal. Further that the Appeal in question ought to have been filed on or before 6<sup>th</sup> June, 2019 as the month of June has 30 days but the Applicants chose to file their Appeal on the 11<sup>th</sup> of June 2019, which was 5 days after the lapse of the leave period without seeking for an enlargement of time.

The Respondent alleges that the Applicants illegally and/or fraudulent changed the stamped date endorsed on the Memorandum of Appeal to read 4<sup>th</sup> June, 2019 before effecting service on the Respondent/Applicant, forgetting that the Memorandum of Appeal in the Court file could not be changed to favour or support the fraud.

Juxtaposing the principles espoused in the immediate foregoing authorities against the facts as discussed in the preceding discourse, this court is convinced that the failure to meet the due date for the payment of the requisite court fees was as a result of intervening public holiday on 5/6/2019. He averred that he was out of office for three working days following the Idd UI Futr Holiday. In any case, the delay occasioned by the Applicant was between a day to five days which I find not to be inordinate. Further, the Respondent has not shown this court that allowing this Application will cause prejudice or an injustice to Respondent.

In spite of existence of procedural technicalities like the one exhibited in this particular case, this Court in its wisdom has always taken the trajectory that justice be heard without undue regard to such technicalities. In that respect, justice cannot only be seen to have been done when all parties have been accorded to an opportunity to fully ventilate their disputes. That happens when parties have been accorded the opportunity to be heard and have their issues determined on merits. That is the spirit of the Constitution of Kenya, 2010.

The fraud allegation is an issue whose particulars ought to be proved by way of evidence beyond any reasonable doubt and we cannot however be able to ascertain the authenticity of the allegation at this stage of the suit.

In the upshot, I find that the application although vehemently opposed by the respondent the objection has no basis in law. For the foregoing reasons the notice of motion dated 10.8.2019 is hereby allowed with costs to abide the appeal.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 17<sup>TH</sup> DAY OF OCTOBER 2019.**

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**R. NYAKUNDI**

**JUDGE**