



**REPUBLIC OF KENYA**

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

**(CORAM: R. MWONGO, J.)**

**MISCELLANEOUS CIVIL APPLICATION NO. 105 OF 2018**

**ESTHER WANGARI KAMAU.....APPLICANT/PROPOSED APPELLANT**

**VERSUS**

**KANURI ZAKAYO.....1<sup>ST</sup> RESPONDENT**

**MAINGI KANORI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. This is a Notice of Motion dated 22<sup>nd</sup> November, 2018 in which the Applicant seeks leave to appeal out of time against the ruling of Hon. Bidali, Chief Magistrate delivered on 18<sup>th</sup> July, 2018 dismissing the suit for want of prosecution. In his Ruling, the learned Magistrate identified and set out seven principles which other courts rely on for dismissal of a suit for want of prosecution.

2. The application is stated as having been made under **Article 159 (2) of the Constitution, Section 95** of the Civil Procedure Act and **Order 51 Rule 1** of the **Civil Procedure Rules**. **Section 95 of the Civil Procedure Act** grants courts the discretion to enlarge time for the doing of any prescribed act. **Order 51 Rule 1** of the **Civil Procedure Rules**, is not kernel to this application. However, **Order 50 Rule 6** which was not invoked, concerns applications, such as the present one, for enlargement of time. **Order 50 Rule 6** of the **Civil Procedure Rules** provides:-

*“(6) where a limited time has been fixed for doing any act or taking any proceeding 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 cost of any application to extend such time and of any order made thereon shall be borne by the parties making such application under the court orders otherwise.”* (underlining added)

3. The Respondents filed a Replying Affidavit dated 2<sup>nd</sup> July, 2017 in response to the motion. Essentially, they impugn the application on the grounds that: the law firm acting for the Applicant has no audience for failure to file a notice of appointment; that the intended appeal is untenable as its grounds are based on untrue facts; and that the appeal is frivolous and an abuse of the court's process. In addition, they argue that no good and sufficient reason has been given for failing to file the appeal on time.

4. The court's jurisdiction to enlarge time is extremely wide, and correctly so, in order to pre-empt the technicality of lateness from becoming the bedrock for denial of substantive justice. Thus, **Article 159** of the **Constitution** comes to the aid of a late party, with regard to ensuring substantive justice trumps procedural technicality. In addition **Order 51 Rule (6)** of the **Civil Procedure Rules**, enables the court to set conditions for enlargement of time and to require the Applicant to pay the costs of such application.

5. It is generally unsafe to deny a party the right to be heard in matters involving late filing except in exceptional circumstances or for well-grounded reasons. Such reasons could include: where the delay is so inordinate or inexplicable even to a reasonable person considering the issue; where there would be prejudice suffered by the other party if the application were allowed; where there is clear and certain evidence of abuse of the court process. These are not all inclusive situations.

6. As far as the issue of the applicant's advocates' audience before the court is concerned, I have seen on the High Court file a Notice of Change of advocates dated 2<sup>nd</sup> July, 2019 and filed by them on 3<sup>rd</sup> July, 2019. Accordingly, the said advocates do have due audience in this matter. The only outstanding issue is for the applicants to serve the said notice on the Respondents, which they are hereby ordered to do forthwith.

7. In light of the foregoing and the provision of **Order 51 Rule 6** of the **Civil Procedure Rules**, I am inclined to exercise my discretion to allow enlargement of time to the applicant, which I hereby do, on the following conditions:

- a) Time is enlarged for the filing by the Applicant of their Memorandum and Record of Appeal not later than fourteen (14) days from the date hereof.
- b) The applicant shall bear the costs of this application in any event.
- c) This Miscellaneous Application file shall stand closed upon extraction of this order.

8. Orders accordingly.

**Dated and Delivered at Naivasha this 8<sup>th</sup> Day of October, 2019.**

---

**RICHARD MWONGO**

**JUDGE**

Delivered in the presence of:

1. No representation for the Applicant/Proposed Appellant
2. Geno holding brief for Maiyo for the Respondents
3. Court Clerk – Quinter Ogutu