



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

MISC. APPLICATION NO.80 OF 2019

BETWEEN

SAMWEL JUMA KEYA.....1ST APPLICANT

NAFTALI AKEYO2ND APPLICANT

AND

CHEMELIL SUGAR COMPANY.....1ST RESPONDENT

LUKE OMULLO OMOLLO.....2ND RESPONDENT

RULING

1. By a notice of motion dated 14th May, 2019 and filed on 15th May, 2019, the Applicants pray for orders that

1) Leave be granted to the Applicants to lodge appeal out of time

2) Costs do abide the intended Appeal

2. The application is based on the grounds among others that:

a) The applicants were constrained by uncontrolled natural and financial problems

b) The Respondents will not suffer any prejudice

3. The 1st and 2nd Respondent by their grounds of opposition dated filed on 12th June, 2019 and 03rd June, 2019 respectively opposed the application and argued that it was incapable of being granted.

4. When the application came up for direction on 18.06.19, I directed that the application be disposed off by way of written submissions which the 2nd Respondent dutifully filed.

Analysis and Determination

5. The main issue for determination is whether the applicants ought to be granted leave to appeal out of time. The powers of the court in deciding an application for extension of time to file an appeal are discretionary and unfettered.

6. The law on extension of time is to be found in Section 95 of the Act which states as follows:

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

7. Order 50 of the Civil Procedure Rules on the other hand states 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”

8. The parameters for exercise of court’s discretion were concisely laid out in the case of *Mwangi v Kenya Airways Ltd [2003] KLR* where the Court of Appeal expressed itself thus: -

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted”.

9. In determining this application; I will endeavor to address each of the principles laid down in the above cited case.

i. Length of delay

10. Section 79G of the Civil Procedure Act Cap 21 Laws of Kenya which states: -

“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 anytime 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”.

11. The judgment from which the Applicants propose to appeal against though purported to have been delivered on 29.03.17 was indeed delivered on 29.03.19. The applicants had up to 29.04.19 to file the intended appeal. The present application was filed on 15.05.19 which is about 16 days outside the time limited for filing the appeal.

ii. Reason for delay

12. The Applicant’s assertion that were constrained by uncontrolled natural and financial problems has not been proved and neither is it a reasonable cause for failure to file an appeal in time.

iii. The chances of appeal succeeding if the application is granted

13. Determining at this juncture that the appeal does or does not raise triable issues will amount to deciding on a matter not before this court.

iv. Prejudice to the respondent if the application is granted.

14. The Applicants case was dismissed and it is therefore unlikely that the Respondents are likely to suffer prejudice if the orders sought are granted.

15. Although the 16 days’ delay has not been explained to the satisfaction of the court, this court has power under Section 3A of the Civil Procedure Act to make such orders as may be necessary for the ends of justice.

16. Consequently and for the reasons stated hereinabove, I find that it would be in the interest of justice to exercise my discretion in favour of the applicants so that they can have an opportunity to prosecute the intended appeal.

17. As a result, the notice of motion dated 14th May, 2019 is allowed on the following terms:

- 1. The applicants are granted leave to appeal out of time**
- 2. The Applicants have 30 days from the date hereof to file and serve the record of Appeal**
- 3. Applicants do within 30 days’ deposit in court costs ordered in the lower court**
- 4. Costs of this application shall be costs in the Appeal**

DATED, DELIVERED AND SIGNED ON THIS 09th DAY OF October 2019

T.W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Amondi/Okodoi

For the Applicants - Mr Amule/Mr Rahura

For the 1st Respondent - N/A

For the 2nd Respondent -N/A