



**REPUBLIC OF KENYA**

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

**MISC APPLN. NO. 474 OF 2019**

**SHARALLY SULTANALI MEGHJI ..... APPLICANT**

**VERSUS**

**NAWAAZ GULAM ..... RESPONDENT**

**RULING**

1. The applicant, *Sharally Sultanali Meghji* filed the Notice of Motion dated 2<sup>nd</sup> July 2019 seeking this court's leave to file an appeal out of time. The applicant had also sought an alternative prayer urging the court to deem the memorandum of appeal allegedly filed by the applicant out of time as duly filed and served. This prayer was subsequently withdrawn after learned counsel for the applicant realized that no such memorandum of appeal had been filed.

2. The application is supported by an affidavit sworn by the applicant on 2<sup>nd</sup> July 2019 and an affidavit sworn by the applicant's counsel on even date. In the two affidavits, the deponents seek to explain the reason why the applicant was unable to file the intended appeal within the time prescribed by the law.

They contended that though the ruling intended to be challenged on appeal was scheduled to be delivered on 28<sup>th</sup> March 2019, it was delivered on 15<sup>th</sup> March 2019 without notice to the applicant's counsel; that the applicant's efforts and those of her counsel to peruse the court file to get details of the ruling were unsuccessful till around June 2019 when the court file, which had been misplaced was traced in the lower court registry; that upon perusing the ruling, counsel realized that it related to an application which had been determined earlier and dismissed but had now been allowed in the subsequent ruling.

3. The applicant stated that she was aggrieved by this new development and wanted to challenge the legality of the second ruling which her counsel only became aware of when the time limited for filing of appeals had already expired; that it is in the interest of justice to allow the applicant a chance to be heard on appeal.

4. The application is opposed. *Awa Muhindi*, the respondent's learned counsel filed a replying affidavit denying the applicant's claim that the court file was misplaced at the lower court registry after ruling was delivered on 15<sup>th</sup> March 2019. Counsel averred that she was able to access the said file in the court registry at the time the applicant alleges that the same was missing. In addition, counsel confirmed that the impugned ruling was apparently delivered in error as it was in respect of the respondent's application dated 9<sup>th</sup> March 2018 which had been determined on 18<sup>th</sup> September 2018; that an appeal had already been filed against the ruling of 18<sup>th</sup> September 2018 which fact was communicated to the applicant's counsel and there was thus no need to file another appeal on the same subject matter. The respondent urged the court to find that the applicant was not deserving of the orders sought and dismiss the application with costs.

5. The application was prosecuted by way of oral submissions on 25<sup>th</sup> July 2019.

I have carefully considered the application, the affidavits on record, the annexures thereto and the rival submissions made by learned counsel for the parties. The submissions basically reiterated and buttressed the positions taken by the parties in support and in opposition to the motion as summarized hereinabove.

6. In *Thuita Mwangi V Kenya Airways Limited, [2003] eKLR* and in *Edith Gichugu Koine V Stephen Njagi Thoithi, [2014] eKLR*, the Court of Appeal gave guidance on the factor a court should consider in deciding how to exercise its discretion in determining whether or not to allow an application for leave to file an appeal out of time. Those factors include but are not limited to a consideration of the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application was granted, the chances of the appeal succeeding if the application was allowed and whether the matter in contention raises issues of public importance.

7. In this case, the applicant's contention that the reason he was unable to file the intended appeal on time was because the lower court file went missing and only resurfaced in June 2019 when the time to file the intended appeal had expired was disputed by the respondent who maintained that the file was available in the registry as the respondent's counsel was able to access and peruse it.

There is however evidence in the form of a letter annexed to the applicant's counsel's supporting affidavit which shows that as of 16<sup>th</sup> April 2019, she was still looking for the lower court file.

8. Under *Section 79 G of the Civil Procedure Act*, appeals to the High Court should be filed within 30 days from the date the judgment or order appealed against was delivered. In this case, the impugned ruling was delivered on 15<sup>th</sup> March 2019. The intended appeal therefore ought to have been filed on or before 16<sup>th</sup> April 2019. As noted earlier, the applicant has availed evidence to show that by that time, her counsel was yet to access the lower court file to verify the contents of the ruling delivered on 15<sup>th</sup> March 2019. In the circumstances, I am satisfied that the applicant's explanation for the delay is plausible.

9. The respondent has claimed that he has already filed an appeal with respect to the earlier ruling delivered on 18<sup>th</sup> September 2018 which declined his request for mediation and that therefore, there was no need for the applicant to file another appeal against the ruling delivered on 15<sup>th</sup> March 2019 since the issues to be raised in both appeals are similar.

10. Though none of the parties availed the said two rulings to the court for its perusal, from what I gathered from the parties' pleadings and submissions, the two rulings gave rise to two different and contradictory orders and if the applicant feels that justice would be better served if she filed her own separate appeal, she should be given an opportunity to do so. This court being an impartial arbiter should allow parties to ventilate their cases to the full and should not be seen to be standing in the way of any litigant in the pursuit of justice unless there is evidence of abuse of the court process. In this case, there is no such evidence. In any event, if the application is allowed, the respondent is not likely to suffer any prejudice which cannot be compensated by way of costs.

11. In view of the foregoing, I find merit in the Notice of Motion dated 10<sup>th</sup> July 2019 and it is hereby allowed in terms of prayer 4. The intended appeal shall be filed and served within 14 days of today's date.

12. Costs of the application are awarded to the respondent.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI** this 14<sup>th</sup> day of November, 2019.

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Ms Kareithi for the applicant

Mr. Wachira holding brief for Mr. Muhindi for the respondent

Mr. Salach: Court Assistant