



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT EMBU**

**MISC. CIVIL APPLICATION NO. 65 OF 2018**

**EMILY MUTHONI MWANIKI & JANE JACKLINE GAKII GATAVI**

(as legal representatives of the estate of **ANTONY MUKUDI GATAVI [DCD]**....**APPLICANTS**

**VERSUS**

**CHARLES NYAGA KIBUI**.....**RESPONDENT**

**R U L I N G**

**A. Introduction**

1. This ruling pertains to the application dated 22<sup>nd</sup> October 2018 in which the applicant seeks leave to appeal out of time against the judgement of Honourable Court in Runyenjes SPMCC No. 39 of 2017 delivered on the 23/08/2018.
2. It is the applicant's case that the judgement sought to be appealed from was read without notification to them and as such they were not aware that judgement had been entered until they were served with a letter of assessment of costs by the respondent's advocate on the 3<sup>rd</sup> October 2018. The applicant also seeks to have his draft memorandum of appeal admitted as being duly filed and served.
3. It is the applicant's case that he stands to suffer substantial and irreparable loss and damage as there is a likelihood that he will recover the decretal sum together with costs awarded to the respondent and that the instant application is brought without any unnecessary delay.
4. The applicant also states that he has an arguable appeal with chances of success and that the respondent will not suffer any prejudice or damage that cannot be compensated by way of costs.
5. In rejoinder, the respondents' advocate deposed that the application for leave in its entirety was defective, inept, prejudicial and an abuse of court process and ought to be dismissed and further that no reason had been tendered to warrant extension of time given the instant application was brought 60 days from the judgement.
6. It is further deposed that the applicants were informed vide the letter of assessment of costs on the 19<sup>th</sup> September 2018 and not on the 3<sup>rd</sup> as alleged and when they were informed, they still had four days within which to lodge an appeal.
7. Parties were to proceed way of written submissions however only the respondents filed their submissions.

**B. Respondents' Submissions**

8. It is submitted that the supporting affidavit to the applicant's application is defective as it is amended by handwriting at paragraphs 3,4, and 7 and as such it ought to be struck out or at the least the aforementioned paragraphs expunged.
9. It is also submitted that the instant motion ought to be dismissed as it is being asked to abate the applicant's laches which it should not.

**C. Analysis & Determination**

10. I have considered the issues raised by the respondents' advocate regarding the applicant's supporting affidavit. It is my considered view that the corrections made therein are in no way whatsoever prejudicial to the respondents' case. Article 159 (2) (d) demands that justice be administered without undue regard to technicalities. The same is echoed by the overriding objectives of the Civil Procedure Act.

11. **Accordingly**, the singular issue for determination is whether the Applicant is entitled to an extension of time to lodge his appeal.

12. Section 79G of the Civil Procedure Act is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. The section provides as follows:

***“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 any time 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:***

***Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”***

13. Therefore, an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so, since as was held in **Feroz Begum Qureshi and Another v Maganbhai Patel and Others [1964] EA 633**, there is no difference between the words “sufficient cause” and “good cause”.

14. It was therefore held in **Daphne Parry v Murray Alexander Carson [1963] EA 546** that though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of *bona fides*, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy and proceed to dismiss the appeal as time-barred, even at the risk of injustice and hardship to the appellant.

15. Kenyan case law provides for guidelines on what should be considered “good cause” for purposes of permitting a party who is aggrieved by a lower court judgment or ruling to file an appeal out of time. The most important consideration is for the Court to direct its mind to the fact that the power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be granted on a case by case basis. While not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised on its behalf and in their favour.

16. Our case law has developed a number of factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in **Mwangi v Kenya Airways Ltd [2003] KLR**. They include the following: -

***a) The period of delay;***

***b) The reason for the delay;***

***c) The arguability of the appeal;***

***d) The degree of prejudice which could be suffered by the Respondent if the extension is granted;***

***e) The importance of compliance with time limits to the particular litigation or issue; and***

***f) The effect if any on the administration of justice or public interest if any is involved.***

17. I will now consider the applicants’ application for extension of time against these factors. It is noted that this court is not favoured with the proceedings before the subordinate court by the applicant.

18. First, I note that the application was brought on the 24<sup>th</sup> October 2018 whereas the judgement was entered on the 23<sup>rd</sup> August 2018 about two months later. The applicant claims and it is unrebutted by the respondents that judgement was delivered without notification to him and that he only became aware that judgement had been entered after receiving a letter of assessment of costs from the respondents’ advocate. Accordingly, I do not find this to be inordinate under the circumstances.

19. Secondly, I am of the view that no prejudice will be caused to the respondent in the event that the orders sought are granted.

20. Thirdly, looking at the draft memorandum of appeal in the absence of the proceedings or at least a copy of the judgment, I am not in a position to determine that the intended appeal is not arguable. At this point, the applicant is *not* required to persuade the court that the intended appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal: a demonstration that the appellant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict. The applicants have basically passed that test. I believe that the applicant has discharged this burden.

21. Lastly, while the statutory timelines are certainly important to ensure the due and efficient administration of justice, they are not in themselves a core substantive value to an extent that the right of hearing will be denied for non-compliance.

22. The upshot of the above is that I find the application dated 22<sup>nd</sup> October 2018 to be meritorious and it is hereby allowed as follows:

***a) That the applicant is granted leave to appeal out of time against the judgment of Honourable Court in Runyenjes SPMCC No. 39 of 2017 delivered on the 23/08/2018.***

*b) That the appeal be filed within seven (7) days.*

*c) That the applicant meets the costs of this application.*

23. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 11<sup>TH</sup> DAY OF DECEMBER, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Muriuki for Kihara for Applicants**

**Mr. Onyango for Ogweno for Respondent**