



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISC. CIVIL APPLICATION NO. 108OF 2017

SAMUEL MWAURA MUTHUMBI.....PLAINTIFF

VERSUS

JOSEPHINE WANJIRU NGUGI.....1ST DEFENDANT

JOSEPHINE KARANI.....2ND DEFENDANT

RULING

1.This is a simple application for the Applicant to enlarge time within which to file an appeal from a judgment given in Gatundu PMCC No. 24 of 2016. The judgment was delivered on 19/04/2017. The Applicant did not lodge this Application until 19/06/2017. This was more than thirty-one days after the lapse of the time allowed to lodge appeals.

2. The Applicant says in her supporting affidavit that she was immediately dissatisfied with one limb of the judgment (on quantum) and immediately instructed the lawyer to file an appeal. However, the lawyer needed copies of the judgment and proceedings in order to file the appeal. The Applicant has annexed a letter from the Gatundu Law Courts dated 17/05/2017 showing that the proceedings were ready by then but that no communication was made to them. Hence, communication was only made after June, 2017 immediately after which they filed the present Application in which they annexed a Draft Memorandum of Appeal exhibiting their grounds of dissatisfaction with the Learned Trial Magistrates.

3. The simple explanation for the delay is that the Application says he did not have copies of the proceedings and judgment.

4. The Application is opposed. The Respondent finds this appeal to be in bad faith and to be an afterthought. First, they point out that the Applicant has executed part of the judgment and balks at the idea that he can blow hot and cold at the same time. Secondly, they find the delay in-excusable. Third, the Respondent argues that the law is that a party is first expected to file an appeal and then seek leave afterwards and not the other way as the Applicant has done here. In this regard, the Respondents have called to their aid two judicial authorities that are of persuasive value: *Asma Ali Mohammed v Ftime Mwinyi Juma [2014]eKLR* and *Gerald Mlimbiwe v Joseph Kingangi [2009] eKLR*.

5. The Applicant seeks orders for enlargement of time to file Memorandum of Appeal out of time as well as a stay of execution of the judgment rendered between the parties in the lower Court. The intended appeal is from a judgment delivered in Kiambu CMCC No. 135 of 2016 on 30/03/2017. The Application is supported by a Supporting Affidavit by Caroline Kimeto, the Head of Legal Department at Britam General Insurance Company, the insurer of the Applicants' motor vehicle which was involved in a road traffic accident which was the subject of the suit in the lower Court.

6. The Application was canvassed by way of written submissions.

7. The singular issues for determination is whether the Applicant is entitled to an extension of time to lodge his appeal.

8. 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.

9. The last point taken up by the Respondent is that the Application is incompetent because the Applicants ought first to have filed a Memorandum of Appeal and then seek for its admission out of time. The claim is that the plain reading of section 79G is to that effect. Further, the Respondent relied on the interpretation to that section given by the High Court in **Gerald M'Limbine v Joseph Kangangi [2009] eKLR** and **Asma Ali Mohamed v Fatime Mwinyi Juma**.

10. I will begin by dealing with this aspect of the Respondent's complaint. I am aware of this line of cases by the High Court on this question. I have, however, taken a different view of the provision. I do not take the phrase "*an appeal may be admitted out of time*" to mandatorily require that a party who is late to file an appeal must first file it and then approach the Court for the filed appeal to be admitted out of time. At best I find such a constrained reading of the statute to be an impermissible raising of a procedural technicality above substance. At worst, that reading of the statute is not in accord with our practice and may be out of place with the "mischief rule" of statutory interpretation in this case. It appears obvious that the intention of the statute was to provide a mechanism for a party who did not, for good cause, file an appeal on time, to approach the Court to be allowed to file such an appeal. To deny such a party leave to file the appeal merely because they did not, first, file the appeal which would have been, in the first place, out of time as a way of preserving their right to approach the Court seems a touch too formalistic for our jurisprudence in this day and age.

11. Having concluded that the Application is not incompetently before the Court, I will now consider the Application on its substance. Our case law has now provided guidelines on what will 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 advert 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.

12. 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.

13. I will now consider the Applicants' application for extension of time against these factors.

14. The Respondent complains that this Application is in bad faith because the Applicant has executed part of the decree. I do not think there is any such principle that says that if you have succeeded from part of the decree you are precluded from challenging another aspect of the judgment.

15. Looking at all the factors in totality, I am unable to agree with the Respondent that this Application is an abuse of the

Court's process and has been brought as an afterthought.

First, I note that the Application was brought merely a month after time had run out and that a request for proceedings was made within days of the judgment. I do not find this to be inordinate under the circumstances.

16. Lastly, looking at the Draft Memorandum of Appeal filed, I am unable to say that the intended appeal is in-arguable. Of course, all the Applicants have to show at this stage is arguability – not high probability of success. At this point, the Applicant is **not** required to persuade the Appellate court that the intended or filed 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 easily met that standard. I believe that the Applicant has discharged this burden.

17. Fifth, I am unable to see any substantial adverse effects granting this order will have on the Respondent other than permitting the Applicants to exercise a preciously cherished right of appeal. 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 in the same sense, for example, that the Constitution and the Elections Act place on the timelines for filing Elections Petitions.

18. Consequently, I will grant prayer 2 in the Applicants Notice of Motion but with the requirement that the Applicant pay the costs of this Application.

Dated and delivered at Kiambu this 1st day of February, 2018.

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JOEL NGUGI

JUDGE