



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. APP. NO. 115 OF 2018

IRIGA JANE.....APPLICANT

VERSUS

HOWARD NGUHU MUTHONI.....RESPONDENT

RULING

1. The Applicant filed a Notice of Motion dated 9th February, 2018 under the provisions of sections 1A, 1B, 3, 3A and 79G of the Civil Procedure Act, Order 42 Rule 6(1), and Order 51 Rule 1 of the Civil Procedure Rules 2010. The Applicant seeks orders that:-

1. ...spent

2. ...spent

3. The Applicant be granted leave to lodge an appeal out of time against the judgment in MILIMANI CMCC NO 6498 of 2012

4. Upon grant of prayer 3 above, there be a stay of execution of the said judgment and decree in MILIMANI CMCC NO 6498 of 2012 pending the hearing and determination of the Applicant's intended appeal.

5. That the costs of this application be in the cause.

2. The Application is based on the grounds on the face of the application and on the supporting affidavit of GIBSON KAMAU, the Claims manager of Heritage Insurance. He depones that, he was informed of the judgment on 22nd December, 2017 by their Advocate following which he sought instructions from his superiors on the way forward but it took time to get instructions from them as the file was brought back on 25th January, 2018 with instructions and authority to appeal. The deponent therefore informed his advocates on 29th January, 2018 of the said instructions. The Applicant avers that failure to appeal in time was not willful and apologises for the delay.

3. It is further deponed that should the appeal be admitted out of time, then it would be necessary for the court to grant a stay of execution pending the hearing and determination of the Appeal so that it is not rendered nugatory. The Applicant further depones that if the orders are not granted they will suffer substantial loss as the Respondent's earnings and financial status are unknown and therefore he would not be able to refund the decretal sum. The Applicant has offered to deposit the entire decretal sum either in court or in a joint interest earning bank account to be opened by the Applicant's and Respondent's Advocates.

4. The Application was opposed by the Respondent vide a Replying Affidavit dated 27th February, 2018 wherein it is deponed that the judgment herein was delivered on 5th December, 2017 and the Respondent extracted a decree and served the Applicants on 21st December, 2017 and on 8th January, 2018, they wrote a letter to the Applicant requesting for the payment. It is further deponed that the time for appeal lapsed on 29th January, 2018 and since the claims manager had been given authority by his superiors to appeal on 25th January, 2018, he should have done so promptly rather than wait till 29th January, 2018 when he instructed the advocates to proceed with the Appeal. The respondent further depones that the Applicant did not testify in the lower court nor did they call any witness to rebut the evidence adduced and therefore the intended appeal has no chances of success.

5. On the prayer for stay of execution, the Respondent depones that he is not a man of straw and can comfortably settle the decretal sum of Kshs.839,053.97 in the event of a successful appeal. He further depones that he has a registered business dealing with supply of wines and spirits within Nairobi and has annexed a bank statement showing that in the months of December, 2017, January, 2018 and part of February, 2018 the business turnover was over Kshs. 47,659,535.62. Since the decree is a monetary one, he depones that the appeal cannot be rendered nugatory if the stay orders are not granted.

6. The Application was canvassed by way of written submissions. The Applicant filed his submissions dated 24th April, 2018 and submitted that they are seeking leave since the appeal was not filed within 30 days. The Applicant cited the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** where the court held that ,

“To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this Court’s Registry. This is irregular as that document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time, the much he can do is to annex the draft intended petition of appeal for the Court’s perusal when making his application for extension of time; and not to file an appeal and seek to legalize it. Petition No. 10 of 2014 having been filed out of time and without leave (an order of this Court extending time), is expunged from the Court’s Record.”

7. The Applicant also submitted that it is not possible to establish the profitability of the Respondent’s business since what was filed was a bank statement with no information regarding the cost of running and tax liability. He therefore depones that he would suffer substantial loss if the stay is not granted.

8. The Respondent filed submissions dated 24th April, 2018 and submitted that the Applicant was aware of the judgment all along but they did not file the appeal in time. That the Applicant has not established a good and sufficient cause for not filing the appeal in time. It was also submitted that the power to extend time is a discretionary one and the Respondent relied on **Kenya Shell Company Ltd v Charles [2003] eKLR** where the Court of Appeal held that,

“As far as this Court is concerned, 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 the 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. So is the question as to when and the circumstances in well settled.”

9. The Respondent maintained that he is a man of means having produced his bank statement and is capable of refunding the decretal sum in case of a successful appeal.

10. I have read and considered the application, the affidavits on record and the submissions made by both parties. The relevant provisions of law applicable in an application for extension of time are section 79G of the Civil Procedure Act and Order 50 Rules 4 and 5 of the Civil Procedure Rules.

11. Section 79G of the Civil Procedure Act provides for the timelines for filing an appeal where it states that, “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.”

12. Order 50 Rule 4 of the Civil Procedure Rules provides that Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act: Provided that this rule shall not apply to any application in respect of a temporary injunction.

13. Order 50 Rule 5 of the Civil Procedure Rules provide 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:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

14. It is trite that, extension of time to file an appeal is a discretionary remedy which the court ought to exercise judiciously and in accordance with the law. The law provides that appeals from subordinate courts to the High Court should be so lodged within 30 days. The only consideration for accepting an appeal out of time is where the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.

15. I have considered the substance of the application. It has been explained by the Applicant that the reason for the delay in filing the Appeal in time is because the Claims Manager of Heritage Insurance Company forwarded the judgment and the file to his superiors who took long to get back with the instructions to appeal and the Applicant has urged the court to accept the delay as not being willful. It is not denied that the Applicant became aware of the judgment and the decree in time but what emerges is that the delay is attributable to the Applicant’s Insurance Company’s laxity. None the less , and as submitted by the Respondent, the Claims manager received the approval on 25th January, 2018 and waited until 29th January, 2018 to forward the same to his advocate which advocate waited until 9th February to file the instant application. This subsequent delay has not been explained at all.

16. The orders sought herein are discretionary which a Court will only grant where a sufficient cause has been shown. The Supreme Court Decision in **Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others [2015] eKLR** laid down the guideline for extension of time to file an appeal out of time where it was held that , “As regards extension of time, this Court has already laid down certain guiding principles. In the *Nick Salat case*, it was thus held:

1. “... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

- a. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court
- b. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
- c. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;
- d. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
- e. whether there will be any prejudice suffered by the respondents, if extension is granted;
- f. whether the application has been brought without undue delay; *and*
- g. whether in certain cases, like election petitions, public interest should be a consideration for extending time” [emphasis supplied].”

17. The requirement of an applicant to give a satisfactory explanation for delay in filing of appeal in time cannot be over emphasized. The Court of Appeal in the Case of **Stanley Kahoro Mwangi & 2 others v. Kanyamwi Trading Company Limited (2015) eKLR** also held that “*The principles guiding the court on an application for extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour.*”

18. In the prevailing circumstances, I find the explanation given by the Applicant not very convincing but in the interest of justice the court shall grant prayer 3 of the application and allow the Applicant to file the Appeal out of time. The Appeal to be filed within 14 days from the date of this ruling.

19. With regard to prayer 4, I find in favour of the Respondent. This is because he has established himself to be a man of means with liquid assets (cash and stock) worthy more than 40 million within a period of less than 3 months. This means that refunding the decretal sum of KShs. 839,053 would not be a challenge to him and therefore the appeal would not be rendered nugatory. Since the application has partially succeeded, no order is made on costs.

Dated, Signed and Delivered at Nairobi this 7th Day of June, 2018.

.....

L. NJUGUNA

JUDGE

In the Presence of

.....For the Applicant

.....For the Respondent