



**REPUBLIC OF KENYA**

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

**MISC APPLICATION NO. 4 OF 2018**

**WILSON KARUTA GATANA.....APPELANT**

**-VERSUS-**

**BETH NYARUIRU KAREGA.....RESPONDENT**

**(Suing as legal representative of the**

**estate of James Kahi-Deceased)**

**RULING**

1. The appellant has through his notice of motion dated 26<sup>th</sup> March, 2018 applied for leave to appeal out of time under sections 79(a) and 95 of the Civil Procedure Act [Cap 21] Laws of Kenya and under orders 50 rule 6 and 51 rule 1 of the Civil Procedure Rules. In his application he has sought the following orders:

- 1) That the appellant be granted leave to appeal out of time against the whole judgment of the Honourable T. Gesora, Senior Principal Magistrate delivered on the 19<sup>th</sup> day of December, 2017 at Narok.
- 2) That, the memorandum of appeal annexed hereto be deemed as dully filed and served.
- 3) That, the costs of this application be provided for.

2. The application is supported by 5 grounds that are set out on the face of the notice of motion and by the appellant's supporting affidavit dated 26<sup>th</sup> March, 2018. The major grounds in support of the application are as follows. First, by the time sufficient instructions could be obtained from the appellant the time allowed for an appeal had ran out. Second, the delay occasioned is excusable. Third, the appellant is ready to provide security for the decretal sum and that the respondent is unlikely to suffer any prejudice.

3. Furthermore, the appellant has deponed to a 15 paragraphs supporting affidavit. The major matters in that affidavit are as follows. First, the judgement appealed against was delivered on 19<sup>th</sup> December, 2017 in which the court made an award of Kshs.1,782,000 in favour of the respondent. Second, the advocate for the appellant sought instructions from the insurer of the appellant through their letter dated 8<sup>th</sup> January, 2018. In response to which the insurer requested to be furnished with a copy of the judgement appealed against.

4. Furthermore, the appellant has deponed that his proposed appeal raises fundamental issues of both law and fact. And that the appeal has high chances of success. Additionally, the appellant has deponed that he stands to suffer great prejudice and injustice if he is denied an opportunity to argue his appeal. Finally, he has deponed that the respondent will not suffer any prejudice since he has offered to deposit the entire decretal amount in a joint interest earning account.

5. The appellant through his counsel Mr. Modi has filed written submissions in which he has urged the court to grant leave to his client to file an appeal out of time. He has submitted in part that the grant of leave involves an exercise of judicial discretion. He has further submitted that the respondent's replying affidavit contains superficial arguments in response to the merits of the intended appeal. Counsel for the appellant has cited *Urbanus K. Wambua v. Briggitta Ndila Musau (2016) eKLR (Machakos) in which the High Court (Nyamweya, J) granted leave to appeal out of time to the appellant therein. In that case the High Court cited a number of authorities including Nicholas Kiptoo Arap Salat -vs- IEBC & 7 others, (2014) eKLR. In the latter case the Supreme Court laid down the principles to be followed in extending time to an appellant who intends to file his appeal out of time. The principles cited in that case were as follows:*

- 1) *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;*
- 2) *A party who seeks for extension of time has the burden of laying basis to the satisfaction of the court;*

- 3) *Whether the court should exercise the discretion to extend, is a consideration to be made on a case basis;*
- 4) *Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;*
- 5) *Whether there will be any prejudice suffered by the respondent if the extension is granted*
- 6) *Whether the application has been brought without undue delay; and*
- 7) *Whether in certain cases, like election petitions, public interest should be a consideration for extending time*

6. The respondent has filed a 13 paragraphs replying affidavit in opposition to the appellant's application. She has deponed to the following major matters. First, she has deponed that she is the wife and administrator of the estate of the deceased. She has also deponed that the damages in sum of Kshs.1,855,719 which were made in her favour were not excessive in view of the injuries sustained by her husband. She has further deponed that the appellant was given an opportunity to file his appeal within the prescribed time but failed to do so. And that the applicant slept on his rights. She has further deponed that the draft memorandum of appeal is premised on speculations and lacks merit. She has also deponed that the appellant's application is only intended to delay and deny her from enjoying the fruits of the judgement. The respondent has not filed any written submissions.

7. I have considered the affidavit evidence of both parties. I have also considered the authorities cited by both parties. As a result I find that in the light of the affidavit evidence of the parties and the applicable law that the following are the issues for determination:

- 1) Whether or not the court should exercise the discretion vested in it by section 79 (G) of the Civil Procedure Act by granting leave to the applicant to file his appeal out of time.
- 2) Who should bear the costs of this application?

#### **ISSUE 1**

8. Section 65 (1) (b) of the Civil Procedure Act gives an aggrieved party a right of appeal to the High Court on both issues of fact and law. Furthermore, section 79 (G) requires the aggrieved party to file his appeal to the High Court within 30 days from the date of the decree or order appealed against. However, there is a provision to the said section 79 (G) that vests in the High court discretion and power to admit an appeal out of time, if the appellant satisfies the court that he has: "*good and sufficient cause for not filing the appeal in time.*"

9. I find that the judgement that is sought to be appealed against was delivered on 19/12/2017. I further find that application seeking leave to appeal out of time was filed on 27/3/2018. There has been a delay of about three months. The delay has been explained on the basis that the applicant through his counsel sought instructions from the insurer of the appellant to appeal against the magisterial judgement. The delay cannot be said to be inordinate in the circumstance of this case. I further find on the basis of the appellant's affidavit evidence that he has offered to deposit the entire decretal amount in a joint interest earning account. In the circumstances I find that the respondent will not suffer any prejudice if the application is granted.

10. Furthermore, I find from the draft memorandum of appeal that the proposed appeal raises weighty matters of law.

11. The upshot of the foregoing is that the appellant has demonstrated good cause that entitles this court to exercise its discretion in granting him leave to appeal out of time.

#### **ISSUE 2**

12. As regards costs I find that it is in the interest of justice that the costs of this application should be costs in cause.

13. I therefore allow the application in terms of prayer (1) and (2) of the notice of motion dated 26/3/2018.

14. The appellant to deposit the entire decretal sum in a joint interest bearing account within 45 days.

**Judgement delivered in open court** this 10<sup>th</sup> day of **July, 2018** in the presence of Mr. Langat holding brief for Mr. Modi for the applicant and in the absence of the respondent.

**J. M. BWONWONGA**

**JUDGE**

**10/7/2018**