



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 44 of 2012

REPUBLIC.....APPLICANT

AND

THE PERMANENT SECRETARY,

MINISTRY OF HOUSING.....RESPONDENT

AND

JANE JUMA OGOT.....EX-PARTE APPLICANT

NATIONAL HOUSING CORPORATION

PAUL OMONDI MUGANDA

THE HON. ATTORNEY GENERAL.....INTERESTED PARTIES

RULING

1. The matter herein was heard and determined. The judgment was delivered on 30th April 2008. The ex-parte applicant was aggrieved by the decision therein and sought to lodge an appeal against the same. However, the time for instituting the appeal has run out and the applicant, now, by way of a notice of motion dated 12th June, 2018 seeks to lodge an appeal out of time pursuant to Section 95 of the Civil Procedure Act, Order 50 Rule 6 of the Civil Procedure Rules, 2010 and Section 7 of the Appellate Jurisdiction Act.

2. The Applicant contends that she instructed her advocates to file an appeal but they did not do so in time. The applicant therefore lays the blame for the delay squarely on her on advocates and urges the court not to visit the mistake of her advocates on her.

3. The Applicant also urges the court to consider that the delay between the expiry of the statutory period of filing the appeal and the application herein is not inordinate. Further, the Applicant claims that enlargement of time to file the appeal is in the interest of justice and the same will not prejudice the Respondents.

4. The 1st Interested Party opposed the application by way of Grounds of Opposition dated 2nd July, 2018. The 1st Interested Party states that the application is a mere forethought, it lacks merits and is fatally defective as the grounds for the intended appeal have not been attached to the application.

5. The rest of the parties/respondents did not respond to the application.

Hearing and Submissions

6. The application came up for hearing on 10th July, 2018 and parties made oral submissions.

7. Mr. Maundu, counsel for the applicant submitted that after delivery of the judgment on 30th April, 2018, the Applicant issued instructions that an appeal should be filed. However, Counsel admitted that he did not file a notice of appeal and only filed one after the statutory period had lapsed. Counsel urged the court to allow the application as it was in the interest of justice.

8. Ms. Mwangi, counsel for the 1st Interested Party submitted that although Section 7 of the Appellate Jurisdiction Act grants this court unfettered discretion to allow the instant application, the applicant must satisfy the court that there is need for the court to exercise its discretion. Counsel argued that the Applicant had not given any reason for the delay in filing the appeal pointing out that the Applicant had not filed a certificate of delay. Further, Counsel contended that the Applicant had not filed any grounds of appeal to show that the appeal has merits.

9. In rebuttal, Mr. Maundu argued that the delay was occasioned by the advocate and not the Applicant therefore the application should be allowed.

The Determination

10. The issue arising herein is whether this court should allow the Applicant to file an appeal against the decision delivered on 30th April in this matter out of time. The only reason given for the delay in filing the appeal by the Applicant is that the delay was occasioned by her advocate.

11. Section 7 of the Appellate Jurisdiction Act reads as follows:

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.

Under Section 95 of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules this court is granted the power to extend time for doing any act prescribed under the Act once the time granted for doing the act has expired.

12. In the case of **Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others [2015] eKLR**, the Supreme Court opined that while a court has the discretion to extend time, the following principles should be considered:

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

- 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 extension of time has the burden of laying a basis, to the satisfaction of the Court;**
- 3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;**
- 4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;**
- 5. whether there will be any prejudice suffered by the respondents, if 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”**

The same principles although expressed differently were reiterated by the Court of Appeal in the case of **Imperial Bank Limited (In Receivership) & Kanother v Alnashir Popat & 18 others [2018] eKLR** where M’Inoti observed as follows:

“Some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration, it must be born in mind that it is not really the role of the single judge to determine definitively the merits of the intended appeal”.

13. The decision against which the appeal is being preferred was delivered on 30th April 2018. The application herein for extension of time to file an appeal out of time was filed on 13th June 2018. It is evident that the statutory period for lodging the appeal lapsed and this application was made 13 days after the statutory time.

14. Is the Applicant deserving of an order of extension of time? The Applicant has stated that the delay in filing the appeal was occasioned by her advocate. Her advocate in this case Mr. Maundu, admitted that the Applicant had instructed him on time to file an appeal but failed to do so. However, Mr. Maundu did not give any reason for the failure to lodge the notice of appeal on time. Counsel only urged the court not to visit his mistake on his client, the Applicant. The reason given by the Applicant is not satisfactory. The Applicant through her advocate, Mr. Maundu ought to have demonstrated circumstances that occasioned delay in lodging the notice of appeal.

15. Be that as it may, the reason for the delay is not the only consideration in an application for extension of time. The Applicant herein has a

right to appeal. This right should not be unnecessarily curtailed. The courts ought not to shut their doors to legitimate litigants. If this is done, then justice will not be seen to be done. In the case of **Kamlesh Mansukhalal Damji Pattni vs. Director Of Public Prosecutions & 3 others [2015] eKLR**, the Court of Appeal held that:

“It must be realized that courts exist for the purpose of dispensing justice. Judicial Officers derive their judicial power from the people or, as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of the Constitution which succinctly states that “judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.” Judicial Officers are also State officers, and consequently are enjoined by Article 10 of the Constitution to adhere to national values and principles of governance which require them whenever applying or interpreting the Constitution or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity are upheld. For these reasons, decisions of the Courts must be redolent of fairness and reflect the best interest of the people whom the law is intended to serve”. (emphasis added)

16. The Respondents have not established how they will be prejudiced if this application is allowed. The 1st Interested Party argued that it will spend public money defending an appeal which has no merits. This court cannot speak on the merits of the appeal as the grounds of appeal have not been attached to this application and even if the grounds were present in the application, the court should assess the same with caution to avoid appearing as if the court is determining the appeal.

17. In my view, in order to balance the interests of both parties, this application should be allowed. In doing so, the Applicant will be allowed to fully litigate this dispute and the Respondents will have an opportunity to challenge the appeal. Indeed justice will be served to both parties.

18. The application dated 12th June, 2018 is allowed. Orders are issued as follows:

- a) The Applicant to file the Notice of Appeal within seven (7) days from the date of this ruling.
- b) The Applicant to bear the costs of this application.

Dated, Signed and Delivered in Mombasa this 15th day of October, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

M/s Mwangi for 1st Interested Party

No appearance for Applicant

Mr. Mkok for Respondents

Mr. Kaunda Court Assistant