



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISCELLANEOUS APPLICATION NO. 42 OF 2018

KENYA POWER AND LIGHTING COMPANY LIMITED....APPLICANT

VERSUS

GEOFFREY ORINA OGANGA.....RESPONDENT

(from the judgment and decree of M. Nabibya in Hamisi Spmc's Civil Suit No. 26 of 2015 delivered on 2/3/2018)

R U L I N G

1. The applicant herein has filed an application dated 3rd May, 2018 seeking for orders that:-

(i) Spent

(ii) That this honourable court be pleased to enlarge the time limited for filing of the applicant's memorandum of appeal against the entire decision of M. Nabibya (SRM) in Srmcc No. 26 of 2015: Geoffrey Orina Oganga – vs – Kenya Power & Lighting Company Ltd.

(iii) That costs of this application be provided for.

2. The application is premised on the grounds on the face of the application and is supported by the affidavit of one Odada Justus, a legal assistant for the applicant. The main ground in support of the application is that the delay in filing the appeal on time was for the reasons that the advocates for the applicant who had come on record on 2nd February, 2018 needed time to peruse the court file and advise their client who in turn instructed them late to file an appeal.

3. Mr. Odada deponed in his affidavit that the matter came up for hearing before the trial Magistrate on 18th January, 2018 when the then advocates for the applicant walked out of the court and left the applicant without legal representation. That the matter then proceeded in the absence of the applicant's counsel. That the current advocates for the applicant went on record on the 21/2/2018 when the matter was pending judgment. Judgement was delivered on 2/3/2018. However that it was not until the 10/4/2018 when the applicant gave instructions to the current advocates to file an appeal against the entire judgment of the lower court.

4. It is argued in the application that the applicant had a right to fair hearing access to justice and to legal representation. That the administration of justice requires that the substance of all disputes be investigated and decided on merits and that a litigant ought not be frustrated owing to mistake of counsel.

5. That the applicant stands to suffer irreparable injustice if time for filing the appeal is not enlarged because it was not granted a fair hearing and its right to access to justice and legal representation were infringed upon.

6. That the time for instituting appeal was exceeded while the current advocates on record were obtaining pleadings, proceedings and judgment from the subordinate court to enable them render an opinion to the applicant.

7. It was further contended that the application has been brought in good faith and without inordinate delay. That the intended appeal raised triable issues and has reasonable chances of success. That among the issues raised in the appeal is whether the lower court had jurisdiction to hear and determine the case in the first instance.

8. The application was opposed by the respondent as per the respondent's statement of grounds of opposition dated 14th May, 2018. The grounds are that:-

(1.) The application goes against the overriding objective of the court.

(2.) The applicant's present advocates are guilty of conduct inconsistent with the remedy sought in this application which is discretionary being that:-

(a) Having come on record on 2nd February, 2018 when the proceedings were pending, they ought to have moved at that time to arrest the situation and correct the contempt for court exhibited by the previous lawyer who had walked out against the court.

(b) From the record of 2nd March, 2018, the applicant's present counsel were represented and applied for stay of execution for 30 days which they were granted and which was sufficient for them to have appealed if they were dissatisfied with the judgment.

(c) The purported appeal as demonstrated from the memorandum of appeal is not an appeal in search of justice but an attack on the institution of the lower court to justify the contempt played by the applicant's then counsel on record.

(3.) The subject appeal is inconsequential for the reasons that the applicant was never denied legal representation but that the applicant used the opportunity given by the court to hold the court in contempt after failing to secure adjournment on account of the applicant's unexplained non-attendance in court for hearing of the suit on the appointed date.

(4.) The present application and the said appeal are in effect brought in perpetration of contempt and an abuse of the court process. In the end the respondents pray that the application be dismissed and or struck out.

9. The applicant was represented by the firm of **C.B. Mwangela & Co. Advocates** while the firm of **A.B.L Musiega & Co. Advocates** appeared for the respondents. Both advocates filed written submissions for the respective parties.

10. The applications is brought under the provisions of Sections 1A, 1B, 3A, 65(1) and 79 G and 95 of the Civil Procedure Act. Section 79G provides 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.

11. Section 95 provides that:-

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

Determination.

12. The substantive issue that requires to be determined is whether the application for leave filed herein to enlarge time to file the appeal is meritorious.

13. The factors which aid our courts in exercising the discretion whether to extend time to file an appeal out of time were laid out by the Court of Appeal in **Thuita 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.

The judges however stated that that list is not exhaustive.

14. The same were echoed in **Alice Wamaitha vs Jane Wanjiru [2018] eKLR** which adopted the holding in the case of **Wachiuri Wahome vs Festus Gatheru Wahome & 6 others [2016] eKLR** where the Court of Appeal held that:

“The exercise of this Court's discretion under rule 4 has followed a well-beaten path since the stricture “sufficient reason” was removed by amendment in 1985. As it is unfettered there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance – are all relevant but not exhaustive facts: see Mutiso v Mwangi Civil Application No. NAI 255 of 1997 (UR), Mwangi v Kenya Airways Limited [2003] KLR 486, Major Joseph Mwereri Igweta v Murika M'ithare and Attorney-General Civil Application No. NAI 8 of 2000 (UR) and Murai v Wainaina (No. 4) 1982 KLR 38.”

The court will consider whether the facts of this case fit the aforesaid principles.

15. Judgement in the suit was delivered on the 2nd March 2018. This application was filed on 3rd May 2018 which was two months after the delivery of the said judgement and a month after the expiry of the prescribed period of 60 days. The question is whether the delay of one month was inordinate and whether the delay has been explained.

16. It is the applicant's case that the delay in filing the appeal on time was due to the reason that its advocates who had come on record on 2nd February 2018 needed time to peruse the court file and advise the client who in turn instructed them late to file an appeal.

17. In **George Kagima Kariuki & 2 others v George M. Gichimu & 2 others [2014] eKLR** Mohammed J (as he then was) dealt with the question of delay and held that:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favorably exercisable.”

In **Alice Wamaitha v Jane Wanjiru [supra]** it was held that a delay for a period of one month was not inordinate.

18. In the instant suit, the application was filed upon the instructions of the client. It is noteworthy that having just come on record for the applicant, it was only fair for the advocates on record to properly acquaint themselves with the facts of the case before they could advise the client whether to appeal or not.

19. It is also obvious that at the time they came on record for the applicant, the court file was in the custody of the trial magistrate pending judgment and thus the advocates could not have been able to peruse it. In view of the foregoing there is sufficient explanation for the delay in filing the appeal. The delay of one month in filing the appeal was not inordinate.

20. The next question is whether the intended appeal is arguable. The applicant has annexed to the application a draft memorandum of appeal. The same has 4 grounds of appeal. The grounds of appeal relate to right to legal representation, access to justice and jurisdiction of the court. In my view all these are arguable points that require determination. It has to be noted that an arguable appeal does not necessarily mean that which will succeed. It has been held that an issue of jurisdiction is an arguable point in an appeal. In **Kiragu Mwangi vs James Mwangi Kagera [2018] eKLR** the Court of Appeal held that:

“It is evident that the intended appeal raises an issue of law regarding the jurisdiction of the judge in making the orders of 25th November, 2011. It would only be fair and just that this arguable point be considered and determined on merit.”

The appeal is therefore arguable.

21. The other question is whether the respondent will be prejudiced if the application is allowed. In the case of **D. Chandulal K. Vora & Co. Ltd v Kenya Revenue Authority [2017] eKLR** the Court of Appeal held that where prejudice will not be occasioned to any party then the application ought to be allowed. The court said that: -

“Taken in totality, the circumstances herein should entitle the parties in this suit to have their day in court to fully ventilate the claims they have against each other and bring it a meritorious closure. This is especially since a hearing would cause no greater prejudice to either party. However, lack of it, would greatly prejudice the appellant.”

22. The applicant herein have in their application shown the nature of prejudice they are likely to suffer should the application be denied. The respondent has not mentioned the same in his grounds of opposition. It is clear that should the application be denied, the applicant will not be able to prosecute its intended appeal which in my view will occasion great prejudice to them. On the other hand the respondent has not demonstrated that he will suffer any prejudice on his part.

23. In the foregoing, the delay of one month in filling the appeal was not inordinate. The delay has been satisfactorily explained. The respondent will not suffer any prejudice if the prayers sought are granted. The application to enlarge time for filing of an appeal out of time is merited. The application dated 3rd May, 2018 is thereby allowed in terms of prayer (ii) of the notice of motion. The applicant is hereby directed to file and serve the appeal within two weeks of the delivery of this ruling.

Orders accordingly.

Costs to be in the cause.

Ruling delivered, dated and signed in open court at Kakamega this 21st day of November, 2018.

J. NJAGI

JUDGE

In the presence of:-

Miss Kimitei HB Mwangolafor Applicant

Arwandafor Respondent

JumaCourt Assistant

Parties:

Applicant –Absent

Respondent –Absent