



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL MISC. APPLICATION NO. 33 OF 2018

MAUA KOMU MULI.....APPLICANT

VERSUS

KENYA WILDLIFE SERVICES.....RESPONDENT

R U L I N G

1. The Applicant herein approached the Court by way of Notice of Motion seeking to appeal out of time against the Ruling and orders of **Hon. R. Ombata (RM)** delivered on the **27th day of March, 2018** in **Kitui CMCC No. 20 of 2017** (as consolidated with **CMCC No. 21, 22, 23, 24, 25, 26, 27 & 28 of 2017**) and by extension of time, the Memorandum of Appeal dated **23rd May, 2018** be deemed to have been duly filed.

2. The application is premised on grounds that on being aggrieved by the decision of the Court, the Applicant wrote a letter on the **10th day of April, 2018** requesting for certified copies of the Ruling for purposes of lodging an Appeal and wrote a letter to the Respondent's Advocates on **9th May, 2018** informing them of the intention to appeal against the order. That certified copies of the Ruling were availed to the Applicant on the **22nd May, 2018** by the Court registry after time for filing of the Appeal lapsed on the **27th April, 2018**. That failure to file the Appeal was not inadvertent and orders sought will not prejudice the Respondent.

3. The Applicant deposed an affidavit in support of the application where he reiterated what is stated in the grounds on the face of the application.

4. The Respondent filed grounds of opposition where she stated that the delay has not been explained therefore it is inexcusable. That there is no requirement that the Memorandum of Appeal be filed with a copy of the Ruling appealed against therefore they did not have to wait for the Ruling and that there is no order consolidating **Kitui CMCC No. 20 of 2017** with **CMCC No. 21 to 28 of 2017**.

5. The application was canvassed by way of oral submissions. It was urged by learned Counsel for the Applicant **Mr. Karanja** that the Magistrate extended her orders in **CMCC 20 of 2017** to files **No. 21, 22, 23, 24, 25, 26, 27 & 28 of 2017** and relying on **Section 79G** of the **Civil Procedure Act** there is a good and sufficient reason why the Appellant was not able to appeal on time. He called upon the Court to administer justice without technicalities as enshrined in Article 159 of the Constitution.

6. Ms. Mati learned Counsel for the Respondent urged that the requirement of justice being done should not be a ticket by litigants to abuse the Court process. That **Article 159** of the **Constitution** should not be a fall back where Applicants file incompetent applications. That **CMCC No. 20 of 2017** was not consolidated with **CMCC No. 21 – 28 of 2017**.

7. The principle of extending time within which to appeal out of time is enshrined in **Section 79G** of the **Civil Procedure Act** that provides thus:

“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.”

8. However, to justify exercise of the discretion as precisely expressed by statute there are considerations that lay a solid foundation as aptly put in Supreme Court in the case of **Nicholas Kiptoo Korir Arap Salat vs. Independent Electoral & Boundaries Commission & 7 Others (2014) eKLR** as follows:

“The underlying principles that a court should consider in exercise of such a discretion are as follows;

- 1. Extension of time is not a right to a party. It is an equitable remedy available for a deserving party at the discretion of the court;*
 - 2. A party who seeks for 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. 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 respondents if the extension is granted;*
 - 6. Whether the application has been brought without undue delay; and*
-”*

9. The impugned Ruling was delivered on the 27th day of **March, 2018** in the absence of both parties. Circumstances in which both parties were absent is not captured. Fourteen (14) days later the Applicant wrote a letter to the Executive Officer, dated the 10th day of **April, 2018** requesting for the certified copies of the Ruling. The Ruling was certified on the 22nd **May, 2018**. Consequently the application was filed on the 31st day of **May, 2018**. The delay is stated to have been occasioned by the Court registry. Looking at the circumstances that prevailed, I find the application having been brought without undue delay.

10. The basis of the application is that the Appeal has a high chance of succeeding as the cause of action was predicated on a common law remedy. It will be wrong for this Court to deny him the opportunity of exercising his right of Appeal in the circumstances.

11. It is urged by the Respondent that the application is incompetent as there was no order consolidating **Kitui CMCC No. 20 of 2017** with **Kitui CMCC No. 21 to 28 of 2017**. The Ruling of the learned trial Magistrate was to apply with a similar effect to the series **No. CMCC 21, 22, 23, 24, 25, 26, 27 & 28 of 2017**. Therefore is an issue that should be addressed.

12. The result of the foregoing is that the application is meritorious. Therefore in exercise of the discretion bestowed upon me by the law, I do grant the Applicant leave to appeal out of time. The Appeal shall be filed and served upon the Respondent within fourteen (14) days of this date. The Applicant is directed to pay the Respondent minimal costs of the application.

13. It is so ordered.

Dated, Signed and Delivered at Kitui this 14th day of November, 2018.

L. N. MUTENDE

JUDGE