**REPUBLIC OF KENYA**

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

**MISC. CIVIL APPLICATION NO. 119 OF 2018**

**FK (**Minor suing through his mother and next friend **NMK.....APPLICANT**

**VERSUS**

**JONES MUTUA.....1ST RESPONDENT**

**PETER WAMBUA DAUDI.....2ND RESPONDENT**

**BUSWAYS KENYA LTD.....3RD RESPONDENT**

**DAVID MUASA WAMBUA.....4TH RESPONDENT**

**RULING**

1. This is an application by the Applicant seeking this court to enlarge time within which to file an appeal from a ruling given in **Machakos CMCC No. 1418 of 2010**. The ruling was delivered on 3.10.2017. The Applicant did not lodge this Application until 28.03.2018. This was more than thirty-one days after the lapse of the time allowed to lodge appeals.

2. The Applicant says in the supporting affidavit that she became aware of the decision on 31/1/2018 when the firm was served with a letter forwarding the draft decree. The Applicant has annexed the said letter. About three months later they filed the present Application in which they annexed a Draft Memorandum of Appeal exhibiting their grounds of dissatisfaction with the Learned Trial Magistrates ruling.

3. The simple explanation for the delay is that the advocate who was holding their brief failed to inform them of the orders of the court.

4. The Application is opposed. The Respondent finds this appeal to be frivolous, vexatious, an abuse of the court process, lacks merit and ought to be dismissed. First, they point out that the applicant was aware of the ruling in January and filed the application two months later, thus showing lack of interest in prosecuting the parent suit. Secondly, they find the delay in-excusable. Third, the Respondent argues that the parent suit was filed seven years ago and has never proceeded for hearing thus will prejudice the respondents. In this regard, the Respondents relied on the case of **Edward Njane Nganga and Another v Damaris Wanjiku Kamau and Another [2016]eKLR.**

5. The Applicant seeks orders for enlargement of time to file Memorandum of Appeal out of time. The intended appeal is from a ruling delivered in **Machakos CMCC No. 1418 of 2010** on 3.10.2017. The Application is supported by a Supporting Affidavit by Caroline M. Bosco, an advocate in the firm that was handling the suit in the lower Court.

6. The Application was canvassed by way of written submissions. I have considered the said submissions and authorities cited.

7. The issue for determination is whether the Applicant is entitled to an extension of time to lodge his appeal.

8. Section 79G of the Civil Procedure Act is the law applicable in deciding whether the prayer to enlarge time to file the appeal is merited. The section provides as follows:

> ***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***.

9. The first point taken up by the Respondent is that the Application is frivolous, vexatious, an abuse of the court process, lacks merit and

ought to be dismissed. They have not substantiated this claim, thus I am unable to agree with the Respondents that the Application is frivolous, vexatious, an abuse of the court process, lacks merit and ought to be dismissed.

10. Having concluded that the Application is not frivolous, vexatious, an abuse of the court process and lacks merit, I will now consider the Application on its substance. Case law has provided guidelines on what will be considered "good cause" for purposes of permitting a party who is aggrieved by a lower court judgment or ruling to file an appeal out of time. The most important consideration is for the Court to advert its mind to the fact that the power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be granted on a case by case basis. While not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised on its behalf and in their favour. This was stated in the case of **Nicholas Kiptoo Arap Korir Salat v IEBC and 7 Others (2015) eKLR.**

11. The Court of Appeal in ***Mwangi v Kenya Airways Ltd [2003] KLR*** listed the factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time, they include the following:

***a. The period of delay;***

***b. The reason for the delay;***

***c. The arguability of the appeal;***

***d. The degree of prejudice which could be suffered by the Respondent if the extension is granted;***

***e. The importance of compliance with time limits to the particular litigation or issue; and***

***f. The effect if any on the administration of justice or public interest if any is involved.***

I will now consider the Applicants' application for extension of time against these factors.

12. The Application was brought almost 5 months after time had run out and the advocate has not explained satisfactorily the reason for the delay. The advocate who held her brief has not deponed an affidavit to the effect that he did attend court and forgot therein to give the details of the court order. I do find this delay to be inordinate under the circumstances and the reasons unsatisfactory.

13. Looking at the Draft Memorandum of Appeal filed, I am unable to say that the intended appeal is in-arguable. Of course, all the Applicants have to show at this stage is arguability – not high probability of success. At this point, the Applicant is ***not*** required to persuade the Appellate court that the intended or filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal. The Applicants have easily met that standard. I believe that the Applicant has discharged this burden. I also find that the intended appeal raises a germane issue namely that there had been a selected test case with a stay of proceedings in other cases in that series.

14. The respondent in their replying affidavit has stated that the parent suit was filed in 2010 and has not been heard since and thus they are likely to suffer prejudice if the dismissed suit is revived. I am unable to see any substantial adverse effects granting this order will have on the Respondent as they shall be compensated by an award of costs since it will be unfair to shut out the Appellant without giving them a right to ventilate their case that had been stayed.

Lastly, while the statutory timelines are certainly important to ensure the due and efficient administration of justice, they are not, in themselves a core substantive value in the same sense, for example, that the Constitution and the Elections Act place on the timelines for filing Elections Petitions. Hence the suit involving Appellant and Respondents allows same timeline flexibility and the court has discretion to enlarge time to file pleadings.

15. In the result, I allow the Applicant's Application dated 27/3/2018 in terms of prayer 2 thereof on the following conditions:-

***(a) The Applicant is ordered to lodge his Memorandum of Appeal within seven (7) days from the date of this ruling.***

***(b) The costs of the Application shall be awarded to the Respondents.***

It is so ordered.

Dated, delivered and signed at Machakos this **5th** day of **December,** 2018.

**D.K. KEMEI**

**JUDGE**