REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS CIVIL APPLICATION NO. 45 OF 2016

SYLVESTER WANJE BOMU.....APPLICANT

VERSUS

KENYA POWER & LIGHTING CO. LTD.....RESPONDENT

RULING

1. Through the notice of motion dated 28th July, 2016 brought under sections 79G and 95 of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Section 59 of the Interpretation and General Provisions Act, the Applicant, Sylvester Wanje Bomu seeks leave to appeal out of time against the judgement delivered on 20th June, 2016 in Kilifi SRMCC No. 107 of 2014. The application is supported by the grounds on its face that:

> **"(a) That the judgement herein was delivered in open Court on 20th June, 2016 and immediately the proposed appellant requested for a typed copy of the judgement so as to appreciate the reasoning of the Honourable Magistrate and thereafter make an informed decision on whether or not to lodge an appeal.**
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> **(b) That the typed judgement was not received on time.**
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> **(c) That by the time sufficient instructions could be obtained from the proposed Appellant, the time allowed to file an Appeal had run out.**
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> **(d) That the delay is not so inordinate or so great as to be inexcusable.**
>
> **(e) That the proposed Respondent is unlikely to suffer any prejudice."**

2. The application is also supported by an affidavit sworn by the Applicant's counsel. The affidavit reiterates the grounds in support of the application and offers further explanation.

3. The Respondent, Kenya Power and Lighting Company Ltd opposes the application by way of the statement of grounds of opposition dated 30th May, 2018 for the reasons that:

> **"1. That the application is frivolous and an abuse of the process of this Honourable Court.**
>
> **2. That the application is bad in law, incompetent and fatally defective.**
>
> 3. That the application is filed after inordinate delay."

4. The advocates for the parties agreed to dispose off the matter by way of written submissions.

5. For record purposes it is noted that the Applicant appointed new counsel on 11th April, 2018.

6. Counsel for the Applicant relying on the decision in **Mwangi v Kenya Airways [2003] KLR** submitted that the grant of leave to appeal out of time is discretionary. In granting leave, the court considers the period of delay, the reason for the delay, whether the appeal is arguable, the degree of prejudice to be suffered by the respondent, the importance of compliance with time limits in the particular litigation, and the effect of the enlargement of time on the administration of justice or public interest.

7. Counsel for the Applicant proceeded to submit that the judgement to be appealed was delivered on 20th June, 2016 and the instant application was filed on 28th July, 2016 only eight days after the lapse of the time for filing an appeal. It is necessary to correct the Applicant straight away. Although the application is dated 28th July, 2016, the same was actually filed on 10th August, 2016 meaning there was delay of 20 days and not 8 days before the application was filed.

8. According to the Applicant's counsel, a delay of 8 days cannot be termed inordinate and no prejudice will be suffered by the Respondent if leave to appeal out of time is granted.

9. Further, that the reasons for the delay have been sufficiently explained in paragraphs 5, 6 and 7 of the supporting affidavit sworn by the Applicant's former counsel Wafula Cyprian Waswa.

10. On the submissions by the Respondent that the application is incompetent as no appeal has been filed, counsel for the Applicant relies on the decision of Joel Ngugi, J in **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another [2018] eKLR** and asserts that the application is competent and properly before this court.

11. Opposing the application, counsel for the Respondent submitted that the application is incompetent, bad in law and fatally defective as there is no appeal before this court for which time is sought to be enlarged. It is the position of counsel for the Respondent that a memorandum of appeal must first be lodged before an application for leave to appeal out of time can be brought. His view is that equity cannot act in a vacuum.

12. Counsel for the Respondent stresses that no pleading has been filed in court on which the court can base its decision to enlarge time. Counsel asserts that there is no appeal before the court upon which the court's discretion can be invoked. The decisions in the cases of **Ponderosa Logistics Ltd v Ayub Wesonga [2017] eKLR; Martha Wambui v Irene Wanjiru Mwangi [2015] eKLR;** and **Masoud M.Y. Noorani v General Tyres Sales Ltd [2014] eKLR** which cited with approval the decision in **Gerald M'Limbine v Joseph Kangangi [2009] eKLR** are quoted in support of this proposition. Counsel concludes on this issue by stressing that the application is a non-starter as no memorandum of appeal has been lodged.

13. Another point taken up on the alleged incompetency of the application is the fact that no certificate of delay has been exhibited. According to counsel for the Respondent, the time for lodging an appeal can only be enlarged where a certificate of delay has been obtained. The already cited cases of **Martha Wambui** and **Gerald M'Limbine** are cited in support of this submission.

14. Finally, counsel for the Respondent submitted that the application should not succeed as there was inordinate delay in bringing the application. It is the Respondent's case that the Applicant's counsel was in court when the judgement was delivered and obtained a copy of the judgement three weeks after the delivery of the same and there is therefore no single explanation given for the delay in filing the appeal. Counsel for the Respondent also asserts that a letter dated 15th May, 2018 copied to the Deputy Registrar of this court indicates that the Applicant failed to serve the application for close to two years after filing the same.

15. Counsel for the Respondent contends that there being no explanation for the delay, there is no sufficient cause shown as to why the court should exercise its discretion in favour of the Applicant. Counsel points out that in **Ponderosa Logistics Ltd** (supra), a delay of 56 days was found to be inordinate and the application to enlarge time was rejected. He urged this court to follow the decision of the Court of Appeal in **Aviation Cargo Support Ltd v Mark Freight Services [2017] eKLR** where it was stated that leave ought not to be granted where there is no explanation for the delay in applying for enlargement of time.

16. The question herein is whether the Applicant has met the conditions for granting leave to appeal out of time. The principles governing the granting of leave to appeal out of time were distilled by the Supreme Court in the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** as follows:

> **"From the above caselaw, it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.**
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> **This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:**
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> > **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 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**

7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

17. Discretion is not exercised to give effect to the will of the Judge. It is exercised for the purpose of giving effect to the will of the law – see **Osborn v Bank of United States, 22 U.S. 738 (1824)**. In moving a court to exercise discretion in his favour, an applicant must demonstrate that the law supports the exercise of discretion in his favour.

18. Two issues emerge in the submissions namely the competency of the application and whether there was inordinate delay in bringing the application. Logic requires that I first address the question of the competency of the application.

19. The case of **Ponderosa Logistics Ltd** (supra) is cited by the Respondent in support of the assertion that the appeal should first be filed before an application for enlargement is filed. In the cited case Janet Mulwa, J stated that:

> **"I further agree that the correct procedure to approach the court under Section 79G of the Civil Procedure Act is to first file the Memorandum of Appeal as is the case here, then seek that the same be deemed filed within time, if the court finds merit and grants leave. I note that the Memorandum of Appeal was filed on 6th October, 2016 together with this application, 56 days after the statutory period."**

20. In **Gerald M'Limbine** (supra), M.J. Anyara Emukule, J stated that an application to enlarge time for filing an appeal could only ride on an already filed appeal. Let him speak for himself:

> **"My understanding of the proviso to Section 79G is that an applicant seeking "an appeal to be admitted out to time" must in effect file such an appeal and at the same time seek the Court's leave to have such an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the Court's permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the Court's process which under Section 79B says –**
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> **"79 B- Before an appeal from a subordinate Court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding Section 79C, reject he appeal summarily"**
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> **It seems to me therefore, it is not open to the Court to exercise its discretion under the proviso to Section 79G of the Civil Procedure Act except upon the existence, and perusal of the appeal to be "admitted" not to be "filed out of time". Admission presupposes that the appeal has been filed, and will be "admitted" for hearing after a judge has established under Section 79 B, that there is "sufficient ground for interfering with the decree party of a decree or order appealed against."**
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> **To allow the Applicant's Motion would be to defeat entirely the requirements of Section 79 B of the Civil Procedure Act, and indeed Section 79 G itself upon which the applicant relies – the requirement for a Certificate of delay in the preparation and delivery to the appellant of a copy of a decree or order. The Applicant's Motion is bereft of such explanation or Certificate. Default by the Applicant's former Advocate would then have been properly anchored on such certificate."**

21. As for the failure to provide a certificate of delay, counsel for the Respondent urges the court to adopt the position in the **Martha Wambui** case. I have perused the decision delivered on 2nd February, 2017 by Lucy Njuguna, J, as availed to the court by the Respondent, and I do not find any statements about a certificate of delay.

22. Responding to the issue of the incompetency of the application, counsel for the Respondent urges the court to follow the decision of Joel Ngugi, J in **Samwel Mwaura Muthumbi** (supra) where he stated that:

> **"10. I will begin by dealing with this aspect of the Respondent's complaint. I am aware of this line of cases by the High Court on this question. I have, however, taken a different view of the provision. I do not take the phrase "*an appeal may be admitted out of time*" to mandatorily require that a party who is late to file an appeal must first file it and then approach the Court for the filed appeal to be admitted out of time. At best I find such a constrained reading of the statute to be an impermissible raising of a procedural technicality above substance. At worst, that reading of the statute is not in accord with our practice and may be out of place with the "mischief rule" of statutory interpretation in this case. It appears obvious that the intention of the statute was to provide a mechanism for a party who did not, for good cause, file an appeal on time, to approach the Court to be allowed to file such an appeal. To deny such a party leave to file the appeal merely because they did not, first, file the appeal which would have been, in the first place, out of time as a way of preserving their right to approach the Court seems a touch too formalistic for our jurisprudence in this day and age."**

23. I have perused the cited decisions and I am in agreement with Joel Ngugi, J that an applicant need not file a memorandum of appeal before seeking leave to appeal out of time. It is sufficient to exhibit, as the Applicant has done in this case, the memorandum of appeal intended to be filed. The issue before the court at this stage is whether leave should be granted to the applicant to appeal out of time. Whether an appeal is arguable or not is one of the factors to be taken into account in deciding whether or not to grant leave. It is not the only factor to be taken into account and I dare say it is not one of the important factors. Contrary to the opinion expressed by Anyara Emukule, J in **Gerald M'Limbine** (supra) I hold the view that failure to file the memorandum of appeal before seeking leave to appeal out of time does not in any way take away the power granted to the court by Section 79B of the Civil Procedure Act to summarily reject an appeal. The power granted to the court under Section 79B of the Civil Procedure Act can only be exercised once there is a proper appeal before the court. An appeal is only properly before the court if it is filed within 30 days from the date of the decree or order appealed against as required by Section 79G of the Civil Procedure Act or if the same has been filed out of time with the leave of the court as per the proviso to Section 79G.

24. Indeed, the Supreme Court in the already cited case of **Nicholas Kiptoo Arap Korir Salat** while dealing with an application to appeal out of time stated that:

> **"Secondly, upon issuance of the above 'order' by the Court of Appeal, the applicant moved to this Supreme Court on 24th April, 2014 and filed this Application seeking extension of time to file his appeal out of time, together with a Petition of Appeal No. 10 of 2014. In his submissions, counsel for the applicant acknowledged having already filed his appeal. He now prays for extension of time and urges that once so granted, the Petition of appeal already filed be deemed to have been duly filed.**
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> **What we hear the applicant telling the Court is that he is acknowledging having filed a 'document' he calls 'an appeal' out of time without leave of the Court. Pursuant to rule 33(1) of the Court's Rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the Court's Rules, this Court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires.**
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> **By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such 'an appeal', is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.**
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> **To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the Court. Such a filling renders the 'document' so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that *Petition No. 10 of 2014* has been accorded a reference number in this Court's Registry. This is irregular as that document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time, the much he can do is to annex the draft intended petition of appeal for the Court's perusal when making his application for extension of time; and not to file an appeal and seek to legalize it. Petition No. 10 of 2014 having been filed out of time and without leave (an order of this Court extending time), is expunged from the Court's Record."**

25. Leave should therefore be sought before an appeal can be filed. I therefore do not find merit in the Respondent's submission that the Applicant's application is incompetent.

26. I also do not see why the Applicant should have exhibited a certificate of delay from the trial court. I do not get the Applicant to be saying that the delay in filing the appeal was caused by delay in obtaining a typed judgement. There was therefore no reason for the Applicant to provide a copy of a certificate of delay.

27. Has sufficient cause been shown for the delay in filing the appeal on time? The averment by the former advocate for the Applicant is that the typed judgement was obtained after three weeks. Instructions were then given for the filing of an appeal but it appears the Applicant's advocates then on record failed to act swiftly occasioning a delay of about twenty days. Such a delay cannot be termed inordinate and mistakes of counsel should not be visited upon the client. I thus find that the delay in seeking leave to appeal out of time was not inordinate.

28. There is another issue about the delay in effecting service of the application upon the Respondent. The letter allegedly copied to the Deputy Registrar by the Applicant is not on record. The court record will however show that when this matter was mentioned on 30th November, 2016 both the Applicant and Respondent were represented by their advocates. The Respondent was therefore aware of the application as of 30th November, 2016 and it cannot be said the Applicant took a long time before serving the application on the Respondent.

29.Considering what I have stated above, it follows that the Applicant has convinced this court that it should exercise discretion in his favour.

30. The Applicant is therefore granted leave to file his appeal within 30 days from today's date. The costs of this application shall abide the outcome of the intended appeal. However, if no appeal is filed, the Respondent shall have the costs of this application.

Dated, signed and delivered at Malindi this 17th day of December, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT