



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELENOUS CIVIL APPLICATION NO. 452 OF 2015

GAGAN SUDARSHAN DADYALA.....APPLICANT

VERSUS

RAJIV SURENDRANATH KAPILA.....RESPONDENT

RULING

1. Before this court is the Notice of Motion dated 22nd October, 2015. It is brought under Article 159 (1) and (2) (a) and (d) of the Constitution and sections 3A, 79G and 95 of the Civil Procedure Act and order 50 rule 6 of the Civil Procedure Rules. She seeks leave to file an appeal out of time.
2. The judgment the Applicant seeks to appeal against was delivered on 30th April, 2015 in Milimani Chief Magistrates Divorce Cause No. 215 of 2014. It is her contention that the judgment was delivered without notice to her or to her advocate. That she came to know about the existence of the judgment towards the end of July, 2015 and that his counsel Mr. Odhiambo who was in conduct of the matter passed on.
3. In response thereto, the respondent filed a replying affidavit on 1st February, 2016. He contended that the appeal is an afterthought. That the Applicant's advocate died after the judgment had been delivered. That the cause list dated 30th April, 2015 and notices dated 29th April, 2015 are irrelevant as they do not reveal any material evidence to show that the Applicant was not aware of the judgment date. That although her advocate died, her then advocate was in a firm with several other advocates who could have been contacted to know the outcome of the matter. That the marriage has been long dissolved and the decree absolute was issued on 23rd October, 2015. That this, shows that matrimonial ties with the Respondent have long been severed and the judgment delivered on 30th April 2015 has been effective since the said date.
4. The submissions by the parties herein are a reiteration of the averments in the affidavits.
5. I have given due consideration to this motion. The time within which to file an appeal is 30 days after delivery of judgment see Section 79G of the Civil Procedure Act. The said 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 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.

6. It follows therefore that the discretion whether or not to give such orders is with the court. The Supreme Court in the case of **Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others, SC, Appl. 16 of 2014** laid down principles that a court should consider while exercising discretion thus:

- a. Extension of time is not a right of a party. It is an equitable remedy only available to a deserving party at the discretion of the court;
- b. The party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. As to whether the court should exercise the discretion to extend time, is a consideration to be made on a case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e. Whether there will be any prejudice to be suffered by the respondents if the extension is granted;
- f. The application should have been brought without undue delay; and
- g. In certain cases, like election petitions, public interest should be a consideration for extending time.

7. According to the Applicant, she was unaware of the existence of the judgment since the advocate who was in conduct of the matter died. This fact has not been contested by the Respondent only that the Respondent stated that the advocate died after delivery of judgment. I must say I do not agree with the Respondent since the judgment was delivered on 30th April, 2015. Considering the said dates, the advocate is said to have died on the 9th of April, 2015 which was before the delivery of the judgment. She further stated that judgment was scheduled to be delivered on 7th April, 2015 but was not delivered on the said date, and that it was delivered on 30th April, 2015 without notice to the Applicant or her advocate. The Respondent has not denied the Applicant's contention that the judgment was delivered without notice to the Applicant.

8. The next issue is whether the delay in filing this application and the appeal was inordinate. Having considered the reason given by the applicant for failure to file the appeal on time, I find that though the delay is inordinate, it has been explained. As to whether the appeal has merits or not, that is within the jurisdiction of the court that will hear the appeal. Any prejudice that the Respondent may suffer can be compensated by award of costs in the event that the appeal shall not succeed.

9. In the upshot, the application dated 22nd October, 2015 is hereby allowed.

Dated, signed and delivered at Nairobi this 19th day of January 2017.

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L NJUGUNA

JUDGE

In the presence of

..... *for the Appellants/Respondents*

..... *for the Respondents/Applicant*