



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU

MISC. APPLICATION NO 4 OF 2017

GEOFFREY LIGARE ABUNG'ANA PROPOSED APPELLANT

VERSUS

OPPORTUNITY KENYA LIMITED.....RESPONDENT

RULING

By a notice of motion dated 30.1.17 brought under Order 49 Rule 5 of the Civil Procedure Rules and Sections 79G and 95 of the Civil Procedure Act Cap 21 Laws of Kenya ; the applicant/proposed appellant prays for orders that

- a. THAT the proposed appellant be granted leave to appeal out of time against the whole judgment of Hon. Mr. H. Adika Chief ,Magistrate delivered on 29th July 2016
- b. THAT the Notice of Appeal and Memorandum of Appeal annexed hereto be deemed as duly filed and served
- c. THAT the costs of this application be provided for

The application is based on the grounds that:

- a. The proposed appellant requested for typed proceedings and a copy of judgment on 20th August 2016 which were not supplied due to shortage of typists
- b. By the time a handwritten copy of judgment and sufficient instruction could be obtained from the proposed appellant, the time to file an appeal had run out
- c. The proposed respondent is unlikely to suffer any prejudice
- d. The delay occasioned herein is not so inordinate or so great as to be inexcusable

The application is supported by the affidavit of Geoffrey Ligare Abung'ana, the proposed appellant, sworn on 30th January 2017 in which he reiterates the rounds on the face of the application. Annexed to the supporting affidavit are three letters marked **GLA 1**, received in the court registry on 17th January 2017 requesting for typed judgment and copy of handwritten judgment which is marked **GLA 2**.

The application is opposed on the grounds set out in a replying affidavit sworn on 4th February 2017 by Michael Peter Otieno Okelloh advocate for the respondent who avers that the applicant has not adduced satisfactory evidence to enable this court to exercise discretion in his favor. Attached to the affidavit is a letter dated 29.7.16 received in the court registry on 1.8.16 applying for typed and certified copy of

judgment and a receipt for payment thereof issued on 15.8.16 marked **MPOO 1 A** and **B** respectively. Annexure **MPOO 1 A** is a letter dated 31.8.16 forwarding a draft decree to the court while **MPOO 1 B** is a decree that was issued by court on 14.9.16.

I have considered the provisions of Order 42 of the Civil Procedure Rules which states:-

1. (1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading

I have further considered the provisions in Section 79G of the Civil Procedure Act Cap 21 Laws of Kenya which states:-

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

I have further considered Order 42 of the Civil Procedure Rules which states:-

(2) Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed.

From the reading of the law; the applicant was only required in the first instance to file a memorandum of appeal within 30 days. Thereafter, the applicant would have applied for leave to file the certified copy of the decree or order appealed against if they were not ready as at the time 30 days lapsed. In the instant application, the applicant does not explain the mishap of not lodging the memorandum of appeal before the expiry of the 30 day period from 29.7.26. And even if one were to accept the fact that the decree and typed copy of judgment were not supplied within 30 days from 29th July 2016, there is no explanation why the applicant did not move the Court soon after 30th August 2016 (when the memorandum of appeal should have been lodged) for extension of time or leave to file the memorandum of appeal out of time. Instead, the applicant waited for six months and it was not until 30th January 2017 when the applicant made the application herein. I am content to cite the case of **CIVIL APPLICATION NO. NAI 98 OF 2013 AVIATION CARGO SUPPORT LIMITED v ST. MARK FREIGHT SERVICES LIMITED** where G.B.M. KARIUKI, J.A. held:-

Even where an appeal is meritorious, if the delay is too inordinate and has not been explained at all, leave ought not to be granted to lodge record of appeal out of time. An aspiring appellant ought to be zealous and to take the initiative to comply with the law.

I observe that the respondent applied and was issued with the decree on 14th September 2006 yet the applicant has to date not obtained the said decree. From the foregoing; I find that the applicant has been indolent. The foregoing notwithstanding; the overriding objective of the court is to exercise latitude in its interpretation of the law so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out. Section 3A of the Civil Procedure Act Cap 21 Law of Kenya provides that:

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

In **CITY CHEMIST (NBI) & ANOTHER V. ORIENTAL BANK LIMITED Civil Application No. Nai 302 of 2008 (UR 199/2008)**; the court held:-

“the overriding objective thus confers on the Court considerable latitude in the interpretation of

the law and rules made thereunder, and in the exercise of its discretion always with a view to achieving any or all the attributes of the overriding objective. The overriding objective does not however facilitate the granting of orders seeking leave or extension of time to file record of appeal where the applicant has not shown to the satisfaction of the Court that the delay is not inordinate or has been explained to the satisfaction of the Court. In the instant application, the applicant is guilty of inordinate delay and has failed to explain it to the satisfaction of the Court. Consequently, I am unable to exercise my discretion in favour of the applicant as his application lacks merit.”

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. A party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court. For the reasons hereinabove stated, I find that the delay on the part of the applicant has been inordinate and has not been satisfactorily explained. As a result, the notice of motion dated 30.1.17 is dismissed with costs of the application to the respondent. It is so ordered.

DATED AND DELIVERED THIS 7th DAY OF February, 2017

T. WANJIKU CHERERE

JUDGE

In the presence of: -

CC. Felix

Ms Agesno for the Applicant

Mr Okelloh for the Respondent