



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC CIVIL APPLICATION CASE NO. 136 OF 2016

WALTER ORWA OMWANGA

DANIEL ORWA OCHIENGAPPLICANTS

VERSUS

CALEB MADARA DONDO & FOSCA ABOLI DONDO

(suing as legal representatives to the

Estate of MADARA B EVANS OKANGA DONDO) DECEASED.....RESPONDENT

RULING

1. Before me for determination is the applicants' Notice of Motion application dated 20th December, 2016 brought under the provisions of **Order 50 Rule 6 and Order 51 rule 1 of the Civil Procedure Rules**, and **Sections 79 G, 3A and 63 (e) of the Civil Procedure Act**. The application seeks one main prayer for leave to be granted to the applicants to file their appeal in respect to Kisii CMCC No. 188 of 2013 out of time.
2. The application is predicated on the grounds inter alia, that the applicants were late in instructing their lawyers to file the appeal due to the mistake of the applicants' counsel who failed to diarise the judgment date. The application is also based on the ground that the intended appeal has high chances of success and raises serious triable issues of both law and fact. The applicant contends that the delay in filing the appeal was not inordinate and further, that no prejudice will be occasioned to anyone should the leave to extend time sought be granted.
3. The application is further supported by the affidavit of Nicholas Ongera Bosire sworn on 20th December 2016 in which he expounds on the grounds already listed on the body of the Notice of Motion application.
4. He deposes that the applicants' counsel was not present in court on the date that the judgment was delivered being 13th October 2016 and that the counsel's non attendance was due to his own inadvertence due to an honest mistake in failing to diarise the judgment date. He further avers that he came to learn about the delivery of the judgment on 15th December 2016 when he was served with the respondent's bill of costs. He deposes that he immediately informed the instructing client of the judgment and that on 19th December 2016, the client instructed him to prefer an appeal against the said judgment.
5. The respondent opposed the application through the replying affidavit of Ouma Maurice Otieno, counsel for the respondent dated 3rd February 2017. He deposes that the judgment date of 13th October

2016 was given by the court in the presence of both parties yet the applicant's advocates failed to attend court for the said judgment. He avers that he took the trouble to personally inform the applicants' counsel Mr. Bosire, of the judgment and that he, on at least 2 occasions, reminded the applicants' advocate to prompt his client settle the decretal sum in order to avoid the impending execution proceedings. He states that the applicants' counsel assured him that a settlement cheque was being prepared and it is on the basis of this assurance and mutual respect that they withheld any adverse action against the applicant only to realize later on 13th December 2016, that the applicants' counsel had not even notified the applicants about the judgment. That it is the above chain of events that jolted the applicants and their counsel into filing the instant application. He further avers that the applicants do not deserve the order sought as the delay has not been explained and that the applicants had squandered the opportunity to file an appeal. It is the respondent's contention that this application is solely intended to delay and frustrate the respondent's realization of the court's decree.

6. The applicants' counsel filed a further supporting affidavit dated 6th February 2017 in response to the respondent's replying affidavit in which he deposes that he was not personally present in court on 15th September 2016 when the judgment date was taken, but was represented by one Mr. Nyangosi who held his brief and relayed the information on the judgment date to him but that he inadvertently did not diarize the date. He denied having informed the respondents counsel that the applicant was aware of the judgment as he only informed his client of it on 15th December 2016 as shown in annexure "NOB2".

7. He reiterates that there was no communication to him from the respondent's counsel regarding the judgment and further states that he did not undertake to advise the applicant to settle the decretal sum. In sum the deponent denied having been aware of the outcome of the judgment until 15th December 2016. He adds that he has come to court at the earliest opportunity on 20th December 2016 after learning about the judgment on 15th December 2016. He contended that the intended appeal was merited and was not intended to delay the respondents realization of the fruits of his judgment but was rather intended to ensure that the respondent get the deserved fruits.

8. The application was argued orally and both parties filed their list of authorities.

9. Mr. Bosire for the applicant submitted that the applicant's right of appeal is a constitutional right which is the cornerstone of the rule of law. He added that the said appeal was not a sham, but raised triable issues which he craved for a chance to ventilate so that the same could be determined on merit. He contended that the delay in filing the instant application was not inordinate and has been satisfactorily explained. He relied on the following authorities:

- **Milimani Misc. Application No. 78 of 2015 – Edward Kamau & Another vs Hannah Mukui Gichuki & Another.**
- **Nyeri Misc. Application No. 50 of 2015 Mutahi Kiharangu vs Margaret Wangari Waweru & Another.**
- **Mombasa Misc. Application No. 40 of 2013 Gyka Fuel Mart Ltd vs Bwana Mshiri Sungura.**
- **Machakos Misc Appl. NO. 53 of 2016- Mursal Guleid and 2 others vs Daniel Kioko Musau.**

10. Mr. Otieno for the respondent submitted that the applicant and his counsel were indolent in approaching the court and as such, the court's discretion cannot be exercised in favour of a party who came to court with unclean hands.

11. He argued that no genuine or sufficient grounds had been advanced by the applicant to explain the delay in filing the appeal and that the claim that the applicant's counsel had not diarized the judgment date could not be confirmed through any document such as a copy of their diary page for the judgment date.

12. He insisted that the timelines set by the court are not set in vain and should be obeyed at all times. On this point he relied on the case of **Nicholas Kiptoo Arap Salat vs Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** in which the court observed that orders to extend time to appeal are not automatic as there needs to be strong grounds to support such an application.

13. **Section 79G, of the Civil Procedure Act** under which the instant application has been brought provides:

“79G. Time for filing appeals from subordinate courts

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.”

14. Under the above provisions, the applicant is required to satisfy the court that he has good and sufficient reasons for not filing the appeal within the stipulated period/time.

15. In the present case the applicant’s counsel concedes that he inadvertently forgot to diarize the judgment date and as a consequence, did not advise his client on time or at all, of the court’s judgment delivered on 13th October 2016 until 15th December 2016 when he became aware of the judgment when he was served with the respondent’s bill of costs.

16. The applicant ought to have filed his appeal on 13th November 2016 and I note that there was therefore a delay of about 1 month and 6 days between the date on which the appeal should have been filed and the date when the instant application was filed.

17. Under the above circumstances, the questions which this court needs to determine are:

a) Whether the delay in filing the instant application was inordinate and by extension if sufficient reasons have been advanced to explain the delay and

b) Whether the applicant has an arguable appeal.

18. As can be discerned from the applicant’s counsel’s affidavit in support of the application, he blames himself for failing to inform his clients in time of the judgment date and the judgment itself as he did not diarize the said judgment date. In the respondent’s own replying affidavit to this application, he concedes that he realized later on 13th December 2016 that the applicant’s counsel had in fact not informed his clients of the judgment in question.

19. From the above foregoing, it is clear to me that the applicant’s counsel was squarely to blame for failing to inform his client of the judgement. Courts have held time and again that the mistakes of a counsel should not be visited on the client- See **Philip Keipto Chemwelo & Another vs Augustine Kubende (1986) KLR 495.**

20. I therefore similarly find that the applicant should not bear the brunt of the mistake or inadvertence by his advocates.

21. On the issue whether or not the delay in filing this application was inordinate or unreasonable, I refer to the case of **Jaber Mohsen Ali & Another vs Priscillah Boit & Another [2014] eKLR** in which it was held:

“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of Christopher Kendagor vs Christopher Kipkorir, [6] the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied the court holding that application ought to have come before expiry of the period given to vacate the land”

22. As I have already found in this judgment the delay in filing the appeal has been explained.

23. On the issue of whether or not the applicants intended appeal is arguable, I note that the applicant attached a copy of the intended Memorandum of appeal to his affidavit as annexure “NOB3”. I have perused the Memorandum of Appeal and noted that it faults the trial court’s findings on both liability and quantum. Upon perusing the lower court’s judgment and the grounds listed on the intended appeal, I am convinced that the intended appeal raises issues that need to be heard and determined.

24. In this regard, I align myself with the observations of Aburili J. In the case of **Edward Kamau & Another (supra)** when she stated that:

“The right of appeal, it has not been held time and again, is a Constitutional right which is the cornerstone of the rule of law. To deny a party that right, would in essence be denying them access to justice which is guaranteed under Article 48 of the Constitution and also a denial of a right to a fair hearing guaranteed under article 50 (1) of the Constitution which latter right cannot be limited under article 25 of the said Constitution.”

25. Having found that the delay in filing the appeal was not inordinate and has been explained to the satisfaction of this court, and that the intended appeal is not a frivolous or a sham, I am persuaded that the applicant herein deserves to be given a chance to pursue his appeal in the superior court. I also find the instant application was brought timeously within 5 days from the date the applicant learned about the judgment.

26. Accordingly, I allow the applicant’s applications to file an appeal out of time. The said appeal shall be filed and served within 7 days from the date of this ruling. The respondent shall have the costs of this application.

Dated, signed and delivered in open court this 4th day of April, 2017

HON. W. A OKWANY

JUDGE

In the presence of:

- Miss Mutirie for the Applicant
- N/A Mr. Otieno for the Respondent
- Omwoyo: Court Clerk