



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
MISC. CIVIL APPLICATION NO 50 OF 2015

Mutahi Kiharanga.....Applicant

versus

Margaret Wangari Waweru.....1st Respondent

Ephantus Mugi Wanyaga.....2nd Respondent

(Sued as the legal representative of the estate of Willy Wanyaga Muugi)

RULING

By an application filed on 24th September 2015, the applicant moved this court under the provisions of Sections **79 G** and **95** of the Civil Procedure Act^[1] and Order **50** Rule 5 & Order **51** Rule 1 of the Civil Procedure Rules, 2010 seeking orders that that this honourable Court may be pleased to grant the applicant leave to file appeal out of time against the judgement in CMCC No. **228** of **2013**.

The grounds relied on are that immediately after the judgement was delivered on 19th August 2015, the applicant was informed through the insurer about the judgement, that the appellant was dissatisfied with the said judgement and desired to appeal, that due to re-organization at the insurance company's offices the relevant file was misplaced, that the respondents will not suffer any prejudice and that the delay is not inordinate.

The application is opposed. The Respondent argues in his replying affidavit that the applicant has not given a satisfactory explanation for the delay and that the application is an abuse of court process intended to deny a successful litigant the success of his litigation.

Both counsels filed written submissions which I have considered.

Section **79G** of the Civil Procedure Act^[2] it provides:-

“79G: 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 a good and sufficient cause for not filing the appeal in time”.

The provisions of the above section are clear. The applicant is required to satisfy to the court that he had a good and sufficient cause. What does the term "sufficient cause" mean.? The Court of Appeal of Tanzania in the case of *The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others*[3] discussing what constitutes sufficient cause had this to say:-

“It is difficult to attempt to define the meaning of the words ‘sufficient cause’. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant” (Emphasis added)

In *Daphene Parry vs Murray Alexander Carson*[4] the court had the following to say:-

‘Though the court should no ‘doubt’ give a liberal interpretation to the words ‘sufficient cause,’ its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy,’ (Emphasis added)

In the present case the applicant states that his insurer was undergoing some re-organization and the relevant file was misplaced, hence the delay. The delay was for 6 days and to me it has been explained. I have no reason to doubt the said explanation.

Unreasonable delay depends on the circumstances of each case. In *Jaber Mohsen Ali & Another vs Priscillah Boit & Another*[5] the court 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 judgement could be unreasonable delay depending on the judgement 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”*

As observed above, an explanation has been offered for the 6 days delay in filing this application. In *Mbogo Gatuiku vs A.G.*[7], **Mwera J** stated that *‘even a delay of a day or two calls for an explanation’*. As mentioned above, an explanation for the delay has been offered and I find no reason to doubt it.

The Supreme Court of Uganda in the case of *G.M. Combined (U) Ltd vs A.K. Detergents (U) Ltd*[8] following the Court of Appeal decision in *Degeya Trading Stores (U) Ltd vs Uganda Revenue Authority*[9] alluded to the principle to be applied in applications of this nature where their Lordships stated:-

“An applicant seeking leave to appeal must show either that his intended appeal has reasonable chance of success or that he has arguable grounds of appeal and has not been guilty of dilatory conduct”.

Therefore for this application to succeed, the applicant is also required to show that there are grounds of appeal which merit serious judicial consideration. In practice judges and courts are probably not as reluctant to grant extensions of time as the authorities may suggest. Consideration will usually be given to the merits of the appeal before declining to grant an extension of time.

The policy of the court is to exercise latitude in its interpretation of the rules 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. I have carefully studied the judgments of the lower court and the draft grounds of appeal and I am persuaded that the intended appeal raises issues worth proceeding for trial.

In *Abdirahman Abdi alias Abdirahman Muhumed Abdi v. Safi Petroleum Products Ltd. & 6 others*, [10] the Court of Appeal had this to say:-

“The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice..... In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. The court in that regard exercises judicial discretion.”

Each case has to be considered on its own circumstances and merits. I have considered carefully the application before me and I am persuaded that the applicant has offered good grounds for failing to file the appeal out of time. Accordingly, I allow the application and order as follows:-

- a. *The applicant be and is hereby granted leave to file his intended appeal out of time.*
- b. *That the said appeal be filed and served within the **next 14 days** from the date of this ruling.*
- c. *No orders as to costs.*

Orders accordingly

Dated at **Nyeri** this **11th** day of **March** 2016

John M. Mativo

Judge

[1] Cap 21, Laws of Kenya

[2] Cap 21, Laws of Kenya

[3] Civil Appeal No. 147 of 2006 (Munuo JA, Msoffe JA and Kileo JJA)

[4] {1963} E.A. 546

[5] High Court ELC No. 200 of 2012 or {2014} eKLR

[6] HC ELC 919 of 2012, Eldoret

[7] HCCC 1983 of 1980, High Court, Nairobi.

[8] *Civil Appeal No. 23 of 1994*

[9] *Civil Application No. 16 of 1996*

[10] **Nairobi Civil Application No. 173 of 2010.,**