



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 273 OF 2017

BILHA GAHUYA AKATSA PLAINTIFF/RESPONDENT

VERSUS

HON. ATTORNEY GENERAL

NELSON MULANDADEFENDANT/APPLICANT

RULING

The application is dated 27th May 2020 and is brought under Order 9 Rule 9 (3) of the Civil Procedure Rules and Section 7 of the Appellate Jurisdiction Act seeking the following orders;

1. That the present application be and is hereby certified urgent and be heard on priority basis.
2. That the firm of M/s. M. Ananda & Co. Advocates be granted leave to come on record for the defendant/applicant in place of M/s. Shitsama & Co. Advocates.
3. That the time for filing notice of appeal in this matter be and is hereby extended.
4. That costs hereof be in the cause.

It is grounded on the annexed affidavit of Angelina Shikokoti and grounds that judgment herein was delivered on the 16th day of April, 2020. That the applicant was represented by the form of M/s. Shitsama & Co. Advocates. That the applicant wishes to change representation. That notice of appeal was supposed to be filed within 14 days of the judgment. That the applicant learnt of the judgment on 22nd day of May, 2020 when she was served by the decree. That the time within which to file notice of appeal had expired. That this court has jurisdiction under section 7 of Cap 9 to extend time within which to file and serve the notice of appeal. That delay in filing the notice was not deliberate. That mistake of counsel should not be visited upon the applicant. That the time within which to file an appeal to the court of appeal is still subsisting as 60 days shall expire mid of June. That the respondent shall not be unduly prejudiced by the grant of this application. That it is in the interest of justice that the orders sought be granted.

That respondent submitted that she has no objection to the defendant being granted an order to bring on record the said incoming advocates. That the defendant has not given sufficient and valid reasons explaining the delay in filing Notice of Appeal within the prescribed period. That judgment was delivered herein electronically by consent of our respective advocates on record. That the defendant who is legally represented is thus presumed to have knowledge of when the judgement was delivered. That the defendant also had a personal duty to follow up on the fate of this case with her advocates and not wait until she is served as alleged. That the defendant has not disclosed what steps she took to find out about the judgment before she was served with the decree. That the reasons given by her are excuses for her failure to exercise diligence. That the allegation by the applicant that she was not informed by her advocate of the judgment herein is a mere allegation not supported by any proof or statement on oath from the defendant's previous advocates on record. That the estate of the deceased plaintiff will thus be prejudiced. That the defendant cannot transfer the blame of the failure of her advocate who was acting as her agent and she is bound by such act. That a Notice of Appeal is an essential step meant to put on notice the person who has a judgment in his/her favour so that such person does not end up being prejudiced by acting on the judgment as is apparent in this case. That she opposes the extension of the notice period as requested and prays for costs of the application.

This court has considered the application and the submissions therein, in the case of Leo Sila Mutiso vs. Rose Hellen Wangare Mwangi Civil Application No. NAI 255 of 1997 the court held that;

"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are:

first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted”.

The principles to be considered in exercising the discretion whether or not to enlarge time can also be found in the case of First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 (2002) 1 EA 65 the Court set out the factors to be considered in deciding whether or not to grant such an application and these are:

I. the explanation if any for the delay;

II. the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;

III. whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

The applicant submitted that he learnt of the judgment on 22nd day of May, 2020 when she was served with the decree. That the time within which to file notice of appeal had expired. That this court has jurisdiction to extend time within which to file and serve the notice of appeal. That delay in filing the notice was not deliberate. That mistake of counsel should not be visited upon the applicant. He now wishes to change his advocate. It is not in dispute that the applicant’s advocate on record was well aware of the judgement date. I find the reason given for the delay is not acceptable.

Section 79G of the Civil Procedure Act provides that:

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.

I find that the reasons from the delay not being acceptable. I grant prayer 2 of the application only. I find the application prayer 3 is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 28TH DAY OF JULY 2020.

N.A. MATHEKA

JUDGE