



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION NO. 429 OF 2016

CHARO CHAI NDORO PLAINTIFF/APPLICANT

VERSUS

ELEGANT HOLDINGS LIMITED DEFENDANT/RESPONDENT

RULING

1. The application before me is a Notice of Motion dated 20th May, 2016. It has been brought under section 1A, 3A, 79G and 95 of the Civil Procedure Act and the Court's inherent jurisdiction. It seeks the following orders:-

- (i) That this Honourable Court be pleased to grant the plaintiff/applicant leave to file an appeal out of time against the whole Judgment of Honorable C. Njagi in Kwale PMCC No. 116 of 2016 (sic) (Charo Chai Ndoro vs Elegant Holdings Ltd.) delivered on 4th March, 2015;
- (ii) That consequent to granting prayer one, this Honourable Court do deem the attached filed Memorandum of Appeal herein as duly and properly filed; and
- (iii) The cost (sic) of this application be provided for.

The application is anchored on the grounds on the face of the application and the supporting affidavit of Charo Chai Ndoro dated 20th May, 2016.

APPLICANT'S SUBMISSIONS

2. Mr. Mwanguya, Learned Counsel for the applicant submitted that he seeks orders for leave to appeal out of time against the judgment of C. Njagi. He explained that the delay in filing an appeal within the required timelines was occasioned by the applicant who did not give them instructions until November, 2015. Counsel cited the case of **John Peter Kiria & Another vs Pauline Kagwiria**, [2013] eKLR where the High Court held that under article 50 of the Constitution of Kenya, any person who has a dispute should have the case determined on merit. In the said case, the court granted the applicants leave to appeal out of time despite inordinate delay on their part. Counsel prayed that the application be allowed.

ANALYSIS AND DETERMINATION

3. This court notes that the respondent did not attend court for the hearing of the application. The explanation given for its non-representation was that the respondent did not enter appearance at the lower court, thus it was not served with the present application.

The issue that calls for determination is if there has been inordinate delay in filing this application.

4. Section 79 G of the Civil Procedure Act 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 to the appellant 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.”

5. The delay in filing the appeal herein has been explained in paragraph 6 of the affidavit of Charo Chai Ngoro, the applicant. He deposes that he was awaiting the typing and certification of the proceedings and Judgment of the Resident Magistrate at Kwale. He attached a certificate of delay marked as CNN 3. This court notes that the said certificate of delay indicates that typed certified copies of proceedings were received by the applicant on 29th September, 2015. He thereafter obtained a certificate of delay on 8th March, 2016.

6. In the case of **Branco Arabe Espanol vs Bank of Uganda** (1999) 2 EA 22, Oder JSC, stated:-

“The administration of justice should normally require that the substance of all disputes should be investigated and decided on all their merits and that errors, lapses should not necessarily debar a litigant from the pursuit of his right and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely, the hearing and determination of disputes should be fostered rather than hindered.”

7. In the case of **Kariuki Network Limited & Another vs Daly and Figgis Advocates**, Civil application No. 293 of 2009, the Court of Appeal held that the application of the overriding objective principle does not uproot established principles and procedures but embolden the court to be guided by a broad sense of justice and fairness.

8. This Court has taken into consideration the provisions of sections 1A and 1B of the Civil Procedure Act which confer on the courts latitude in the exercise of its discretion. In the circumstances of this case, I find that the delay on the part of the applicant was not too inordinate to the extent of this court denying him an opportunity to ventilate his dissatisfaction with the Judgment of the lower Court.

9. I hereby make the following orders:-

(i) The application dated 20th May, 2016 is hereby allowed;

(ii) The applicant will file a memorandum of appeal within 14 days from today's date; and

(iii) Costs in the cause.

DELIVERED, DATED and SIGNED at MOMBASA on this 15th day of September, 2016.

NJOKI MWANGI

JUDGE

Delivered in the presence of:-

Mr. Mwanguya for the applicant

No appearance for the respondent

Rose Echor Court Assistant