



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**

**MISCELLANEOUS APPL NO. 7 OF 2016**

**GEORGE MWENDA MUTHURI.....APPLICANT**

**-VS-**

**MAMA DAY NURSERY AND PRIMARY SCHOOL**

**LIMITED.....RESPONDENT**

**RULING**

**Enlargement of time to file appeal**

[1] By a Notice of Motion dated 29<sup>th</sup> January, 2016 the Applicant has sought for enlargement of time within which the Applicant should file an appeal against the ruling of the Hon C. Kutwa Principal Magistrate, delivered on the 10/12/2015 in CMCC NO.250 of 2014; Mama Day Nursery School Limited be enlarged.

[2] The application is expressed to be brought pursuant to Sections 1A, 1B and 95 of the Civil Procedure Act CAP 21 of the Laws of Kenya, Order 50 Rule 6 Order 51 Rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of the law. The application is based on the set out in the application, the submissions filed herein as well as the supporting affidavit sworn by the Applicant.

**Applicant's case**

[3] In a nutshell, the Applicant's case is that he is the defendant in CMCC NO. 250 of 2014 and that on 10<sup>th</sup> August 2015, he made an application to amend his defence and introduce a counterclaim in the lower court, but, on 10<sup>th</sup> December 2015, Hon C Kutwa delivered a ruling dismissing the said Applicant's Application with costs. Soon thereafter, on 15<sup>th</sup> December 2015, he applied for typed copy of the said ruling and proceedings for purposes of lodging an appeal. But, he received a copy of the said ruling late and could only hand it over to his advocates on 18<sup>th</sup> January 2016 when his advocate resumed office. He contended that he was desirous of appealing against the said ruling as it was prejudicial to his case as without it crucial facts and evidence will be locked out thus denying the court all the necessary material to enable it make a just decision. He explained that the delay in filling the appeal was not inordinate as time did not run during the period from 21<sup>st</sup> December 2015 to 13<sup>th</sup> January 2016.

**Application was opposed**

[4] The Application was opposed via a replying affidavit filed in court on 9<sup>th</sup> February 2016 and which

was sworn by one Beatrice Muriithi a director of the Respondent. It was deposed inter alia that the application was full of falsehoods, it was an abuse of the process of court and the issues being raised now had been raised severally and refused by the courts including the Court of Appeal. Finally, the Respondent was of the view that the Applicant has not explained the delay herein save that he has only told court lies to enable him get leave to appeal out of time.

## **Directions**

[5] When the matter came up for hearing on 7<sup>th</sup> April 2016, it was agreed between the parties and the court accordingly directed that that the matter shall be disposed of by way of written submissions.

## **Submissions by parties**

[6] The Applicant submitted that the court has powers to extend time for filing appeals under section 79G of the Civil Procedure Act. And in so doing, the court should be guided by the principles that were set out by the Court of Appeal in **CIVIL APPLICATION NO. NAI 259 OF 2014 NATIONAL CEREALS AND PRODUCE BOARD V PETER GITHINJI** as follows:

***“First the length of the delay, secondly the reasons 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.”***

Consequently it was submitted for the Applicant that he had satisfied the conditions set out in the above case and that therefore the application should be allowed as prayed.

[7] On the other hand it was submitted for the Respondent that the Application was muddled up and the prayer sought was not clear. They argued further that the time for filing appeal is not fixed by the court but by law, thus, the court has no jurisdiction to grant the prayer sought. In any event, they urged that the ruling was clear as to why the application was rejected and that allowing appeal in this matter will serve to delay the substantive suit. Consequently, the Respondent urged the court to dismiss the application.

## **DETERMINATION**

[8] I have carefully considered this application and the rival submissions by the parties. Contrary to the submissions by the Respondent, under section 79G this court has jurisdiction to admit an appeal out of time as long as the appellant has satisfied the court that he had good and sufficient cause for not filing the appeal in time. But, that remedy is not granted as a matter of right; it is a matter of discretion of the court. And like any other discretion the court must exercise it upon defined principles of law; not capriciously or whimsically or out of sympathy. I will set out the principles of law which govern the exercise of discretion in extension of time which are now abundantly clear. I will summarize them to be:

- (a) The period of delay, and the reasons for the delay,***
- (b) The degree of prejudice to the respondent and interested parties if the application is granted,***
- (c) The possibility or chances of the success of the appeal, and***
- (c) Whether the matter raises issues of public importance.***

On this see the case of **NICHOLAS KIPTOO ARAP KORIR SALAT v INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 7 OTHERS [2014] eKLR** (Ibrahim, & Wanjala SCJJ); Court of Appeal **CIVIL APPLICATION NO. NAI 259 OF 2014 NATIONAL CEREALS AND PRODUCE BOARD V PETER GITHINJI** and **COURT OF APPEAL PAUL WANJOHI MATHENGE v DUNCAN GICHANE MATHENGE [2013] eKLR**.

[10] I will now place the facts of this case of the above legal scale. The decision that the Applicant

intends to appeal against was delivered on 10<sup>th</sup> December 2015 whereas the instant application was filed in court 29<sup>th</sup> January 2016. This was approximately a gross period of 49 days from the date of the impugned ruling. However, according to Order 50 Rule 4 of the Civil Procedure Rules 2010, the period between 21<sup>st</sup> December 2015 and 13<sup>th</sup> January 2016 does not run for the purposes of computation of time. With that allowance, the delay is quite minimal. Again, the contention by the Applicant that he received the impugned ruling late in December and at time that his advocates had closed office for Christmas festivities is, therefore, another important consideration. It is a known practice that most law firms close for December holidays and so I must say that I have no reason to doubt his allegation that he handed the ruling over to his advocate on 18<sup>th</sup> January 2016. In any case, these facts are also not disputed. In applying the above test, I am satisfied that the length of the delay herein is not inordinate and has been sufficiently explained by the Applicant to the satisfaction of the court.

[11]I will nonetheless consider the other factors. What are the prospects of the appeal? There are arguments which are not clear to the court especially the contentions by the Respondents director that the issues that the Applicant is now raising had been severally refused by the courts including the Court of Appeal and that the Applicant had been condemned to pay costs by the Court of Appeal, High Court and the Magistrate's Court but had paid none. Also, no proper arguments were advanced on the prospects of the appeal. I am not, therefore, able to comment authoritatively on whether the appeal has chances of succeeding. I would rather lean towards giving the Applicant an opportunity to test the ruling on appeal. I am aware that the court will have another opportunity to consider the prospects of the appeal at the time of admission of appeal under section 79B of the Civil Procedure Act. I am however aware that there are allegations that the Applicant intends to use this appeal to delay the lower court proceedings. This is just an interlocutory appeal and there is no stay of proceedings; that worry should rest. But in view of the requirement of the overriding objective of the court I will give very clear directions to obviate delay. First, I allow the Applicant to file and serve the memo of appeal and certified copy of the decree or order, the ruling appealed from and all required documents within 14 days of today. Second, the appeal that shall be filed pursuant to this ruling shall be placed before me for admission within 14 days of the filing ordered herein. Third, the leave granted shall automatically lapse if there is any default on the part of Appellant on any of the things commanded in this ruling. The Applicant will however bear the costs of this application.

**Dated, signed and delivered in open court at Meru this 9<sup>th</sup> day of November 2016**

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**F. GIKONYO**

**JUDGE**

**In the presence:**

M/s. Mbaikata advocate for respondent.

M/s. Ndungu Njoroge advocate for applicant – absent

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**F. GIKONYO**

**JUDGE**