



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CIVIL APPEAL NO.4 OF 2015

YUNUKE GESARE MONDA.....APPELLANT

VERSUS

JOSEPHAT ONSERIO OCHOKI.....RESPONDENT

(Being an appeal from the Judgment of the Principal Magistrate's Court at Sotik, Hon. S.R.Rotich delivered on 12th May 2011 a decree thereof dated 24th June, 2011 and all consequential orders.)

RULING

1. The Respondent/Applicant has brought an application (Notice of Motion) dated 30th April, 2015 under **Section 79G** of the **Civil Procedure Act**, **Order 51 Rule 1**, of the **Civil Procedure Rules**, **Section 3A** of the **Civil Procedure Act** seeking an order dismissing and/or striking out the instant appeal as it is filed out of time and without leave of this court.

He also prays to be awarded costs of the application.

2. The application is premised on the grounds on the face of the application and the affidavit of the Respondent/Applicant.
3. The Appellant/Respondent opposed the Application through the Replying Affidavit filed on 28th May, 2015. In her affidavit she states that;

(i) The learned trial Magistrate granted her leave of three (3) months to appeal under Section 80 of the Civil Procedure Act.

(ii) The lower court has discretion under Section 95 of the Civil Procedure Act to enlarge time/period for filing an appeal.

(iii) That Article 159 (d) of the Constitution empowers this court to dispense justice without undue regard to technicalities as the one raised by the Respondent/Applicant in the Notice of Motion dated.

(iv) That her appeal raises triable legal issues.

4. Both Counsels addressed the court on the issues raised in the Notice of Motion dated 30th April, 2015.
5. Section 79 G of the Civil Procedure Act provides;

“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.”

6. This Section sets out the period within which an appeal from the Subordinate court to the High Court should be filed.

There is however provision for admission of an appeal filed out of time. **Section 95** of the **Civil Procedure Act** gives the court the power to enlarge time. Section 95 of the Civil Procedure Act provides as follows;

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

7. It is therefore the duty of the appellant to satisfy the court that he/she had good and sufficient cause for the delay in filing the appeal within the time provided under Section 79 G of the Civil Procedure Act.
8. Order 50 Rule 6 of the Civil Procedure Rules provides; –

“The time for delivering, amending, or filing any pleading, answer or other document of any kind whatsoever may be enlarged by consent in writing of the parties or their advocates without application to the court.”

From this provision it is clear that it is party who wishes to have time enlarged, who moves the court for such orders by way of an application under Order 51 of the Civil Procedure Rules.

9. Has the Appellant/Respondent done this? The judgment/decreed appealed from was pronounced on 12th May, 2011. This appeal was filed on 30th January, 2015 i.e over three and a half (3 ½) years after the pronouncement, of the said judgment. It is indicated in the Memorandum of Appeal that the appeal was filed pursuant to leave granted by Hon. P. Olengo (P.M) on 19th December, 2014. In other words the Principal Magistrate granted leave to the Applicant/Respondent to file an appeal out of time!
10. I have had a chance to peruse the Subordinate court Ruling of 18th December, 2014 and the leave granted on 19th December, 2014 which is annexed as “J00-1”.
11. The Ruling by Hon. P. Olengo dated 18th December, 2014 related to the application for review and/or setting aside of the judgment of 12th May, 2011. The leave for appeal that was granted on 19th December, 2014 was in respect of the Ruling of 18th December, 2014 and not the judgment of 12th May, 2011. Further more it was the stay of execution that was limited to three (3) months and not the filing of the appeal.

- 12.The appeal before this Court is in respect of the judgment and decree of 12th May 2011, and not the ruling of 18th December, 2014. I am making this distinction because of the contents of the Replying Affidavit filed herein.
- 13.The Appellant/Respondent could not therefore use the stay of execution granted on 19th December, 2014 by the Subordinate court as basis of filing the present appeal out of time.
- 14.Secondly, according to Section 79G of the Civil Procedure Act it is only the Court that is admitting the appeal that can enlarge the time of filing the appeal after it being satisfied of the cause of delay. The subordinate court cannot therefore purport to enlarge time on behalf of the High Court.
- 15.The time lines have been set by statute and must be complied with or extended by leave of the court. It is therefore not about technicalities so as to be covered under Article 159 of the Constitution.
- 16.I therefore find that the Appeal herein was filed out of time and without leave of the court.
- 17.The same is struck out with costs to the Respondent/Applicant.

Dated, signed and delivered in open court this 3rd day of July, 2015.

H.I.ONG'UDI

JUDGE

In the presence of:

Mr. Gekonga for Respondent/Applicant

Mr. Karanja for Mr. Nyanyuki for Appellant/Respondent

Robert- court assistant