



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

MISC. CIVIL APPLN. NO. 21 OF 2015

JOHNSTONE CHACHA MURIMI.....APPLICANT

-VERSUS-

FLORENCE CHACHA.....RESPONDENT

RULING

1. Before me is an application by way of the Notice of Motion dated 23/07/2015 seeking leave to file an appeal out of time as well as costs.
2. The application was made on the grounds as appearing on the face thereof and was supported by the Affidavit sworn by the Applicant on 23/07/2015 as well as a Further Affidavit sworn on 25/08/2015 upon grant of leave by this Court.
3. The Respondent in opposing the application filed a Replying Affidavit on 11/09/2015.
4. The application was thereafter heard by way of oral submissions where Counsels further relied on various judicial authorities in support of their rival positions. That culminated into this ruling.
5. The jurisdiction of this Court in dealing with an application for leave to lodge an appeal out of time is *inter alia* donated by **Section 79G of the Civil Procedure Act**, Chapter 21 of the Laws of Kenya. That jurisdiction however must be exercised upon reason since it is discretionary and dependent upon the fulfillment of settled cardinal principles. (See: **Mwangi Kimenyi Mugwe vs A.H. Kamau, Court of Appeal Civil Appeal No. NAI. 357 of 2003 at Nakuru (unreported)**).
6. Judicially speaking, the principles for consideration in applications for leave to appeal out of time are now well settled. The Court of Appeal in considering an application for extension of time to file and serve a Record of Appeal under the Court of Appeal Rules (which principles equally apply in the current instance) in **GACHERO & ANO -VS- POINEER HOLDINGS (A) LTD & ANO.(2008) KLR 315** had the following to say: -

“The powers of the Court (of Appeal) in an application for extension of time (under the Court of Appeal Rules, Rule 4) were discretionary and unfettered. However in executing its discretion, this Court would consider the length of the delay, the explanation or reason given for it (and) whether the intended appeal was arguable.....”

The above was restated in the decision of M.S.A Makhandia, J (as he then was) in **Benjamin G. Ndegwa vs C.N. Murungaru (2009) eKLR**.

7. Other factors for such consideration were stated by the Court of Appeal in **Civil Application No. Nai. 41 of 2014 Samiyan Kaur Devinder Singh vs Speedway Investment Ltd & CFC Stanbic Bank Limited (UR 31/2014)** to include: -

- a. The effect of the delay in public administration of justice;*
- b. The importance of compliance with time-lines in litigation;*
- c. The resources of the parties;*
- d. Whether the matter raises issues of public importance;*
- e. If the Applicant has been diligent.*

8. The net effect of all the above considerations is to foster a quicker, fair and equitable disposal of disputes between parties, a calling which all persons and this Court is constitutionally-bound to uphold.

9. I will now consider some of the said principles as hereinbelow: -

a. **The period of the delay:**

10. As judgment was delivered on 03/06/2015, the Applicant pursuant to **Section 79G** of the **Civil Procedure Act**, Chapter 21 of the Laws of Kenya, had 30 days, that is upto 02/07/2015, to lodge an appeal, if desired.

11. Be that as it may, the application under consideration was filed in this Court on 23/07/2015. The period from 02/07/2015 upto the filing of the application translates to around 21 days. For the purposes of the application under consideration, this Court shall go by the period of **21 days** as the period of delay herein.

b. **The reasons for the delay:**

12. The main reason put forth by the Applicant herein for the delay is that since the delivery of the judgment the Applicant has been and continues to be unwell hence did not manage to instruct his Counsel to prefer an appeal timeously.

13. The Respondent was not about to agree with the Applicant on that issue. He cites lack of any evidence by the Applicant in support of the allegation. To her that averment is therefore unsubstantiated and is for rejection.

14. This Court indeed agrees with the Respondent that the Applicant did not tender any evidence of his ill-health. That however does not mean that the Applicant may not have been unwell. This Court takes notice of the fact that one can be unwell and be attended to without the intervention of modern medical intervention. But regardless of the mode of intervention, the Applicant since he seeks a discretionary order is under a duty to clearly explain the delay.

15. In the singular circumstances of this case and in view of the length of the delay, I will reluctantly grant the Applicant the benefit of doubt and find that indeed he was unwell during the period in issue. That finding therefore settles this issue in the Applicant's favour.

c. **On whether the appeal or intended appeal is arguable and is not frivolous:**

16. The Applicant annexed an intended Memorandum of Appeal as Exhibit JCM-2. It raises 5 grounds of appeal including the issue of the Applicant's liability while discharging official duties.

17. Without going into the merits or otherwise of the intended appeal and going by the grounds in the

draft Memorandum of Appeal, the intended appeal raises at least one serious issue of law and fact, that of liability. It is therefore an arguable intended appeal in law and is not frivolous. That does not however mean that the appeal must succeed. It only means that it is an arguable issue which its determination may go either way. It would hence remain a fair thing to test the issue in a substantive appeal before an appellate Court.

d. If the Respondent would suffer prejudice if the application is granted:

18. The application under consideration is for leave to appeal out of time. The decree in issue is a money-decree. Since the Applicant has not sought for an order of stay of execution, this Court does not see any possible prejudice upon the Respondent in the grant of the orders sought.

Disposition:

19. As I come to the end of this ruling, I wish to specifically refer to the Court of Appeal decision of **Mwangi Kimenyi Mugwe vs A.H. Kamau, Court of Appeal Civil Appeal No. NAI. 357 of 2003 at Nakuru (unreported)** which was tendered by the Respondent in her submissions. Respectfully, the same clearly deals with the principles which I am bound to follow in applications for extension of time. I will however distinguish its final finding from this matter on two fronts. First, the delay was for 23 months unlike the 21 days in this matter. Second, unlike in this matter, the delay was not sufficiently explained.

20. In light of the above considerations, it is my finding that the application by way of Notice of Motion dated 23/07/2015 is meritorious. With a view of an early disposal of the intended appeal, this Court do hereby make the following orders:

- a. The Applicant herein be and is hereby granted leave to file and serve a Memorandum of Appeal within 7 (seven) days of today.*
- b. The Applicant herein shall file and serve the Record of Appeal within the next 60 days of today.*
- c. The Appeal shall be listed for directions within 30 days of compliance of (b) hereinabove.*
- d. The costs of this application shall be borne by the Applicant in any event.*

Orders accordingly.

DATED and DELIVERED at MIGORI this 1st day of OCTOBER 2015.

A. C. MRIMA

JUDGE

In the presence of:

Mr. Kisia for the applicant

No appearance for S. Onyango & Company for the Respondent

Court Clerk Mongare

Court: Ruling delivered in Open Court.