



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MISC APPLICATION NO 77 OF 2013

SUSAN CHEKATAM LIMARISPLAINTIFF

=VERSUS=

SUSAN KIPTURU.....RESPONDENT

RULING

1. What falls for this court's determination is the Applicant's Notice of Motion dated 22nd May, 2013 filed under a certificate of urgency on the following day the 23rd May, 2013.

Prayer 1 and 2 of the application which sought that the application be certified urgent and that there be stay of execution of the decree issued in **Kabarnet PMCC No 13 of 2012** pending the hearing and determination of this application are already spent. The only substantive prayer remaining for this court's consideration and determination is prayer 3 which reads as follows:

“THAT the Honourable court be pleased to grant leave to the Applicant to file an appeal out of time from the judgment and decree in KABARNET PMCC NO 13 OF 2012-SUSAN CHEPKATAM LIMARIS VERSUS SUSAN KIPTURU.”

2. The application is premised on the grounds stated on its face and is supported by an affidavit sworn by *Susan Kipturu*, the Applicant herein on 22nd May, 2013 together with annexures thereto.

In her supporting affidavit, the Applicant deposed that on or about 26th August, 2012, she was served with a notice of entry of judgment in **Kabarnet PMCC 13 of 2012** indicating that judgment had been entered against her on 8th August 2012; that this was the first time she learnt about existence of the suit as she had not been served with a plaint or summons to enter appearance; that upon her application, the exparte judgment was set aside on 5th December, 2012 but on condition that she deposits the entire decretal sum of Ksh. 330,000 in court within one month. She further averred that due to her financial status and despite her best efforts, she was unable to raise the money to comply with the condition precedent to setting aside the interlocutory judgment.

3. It is the Applicants case that she filed an application dated 3rd January, 2013 seeking variation of the orders aforesaid or a reduction of the money to be deposited in court but the application was heard and dismissed on

18th April, 2013.

According to the Applicant, she is aggrieved by the judgment of the lower court and subsequent decree and intends to appeal against the whole of that judgment. But that as the prescribed time within which she ought to have lodged her appeal expired while she was litigating in the lower court, she now seeks leave to file her appeal out of time.

The Applicant contends that the delay in filing the appeal is excusable and that her intended appeal has high chances of success. To support her claim, She annexed to her affidavit a memorandum of Appeal marked as ***annexture SK4***.

4. The application was canvassed by way of written submissions. In written submissions dated 6th November, 2014 filed on the Applicants behalf by Messrs M.K. Chebii & Company Advocates, the Applicant reiterated her depositions in the supporting affidavit and added that her intended appeal is not only arguable but has high chances of success as can be discerned by the grounds in the annexed memorandum of appeal; that if the application is not granted, she will suffer irreparable loss – a loss that is not only financial but is also emotional as the claim in the lower court emanated from a family dispute.
5. In further submissions, the Applicant contended that the delay in filing the appeal was not inordinate and was caused by the following factors;
 - i. That she was labouring under the mistaken belief that the lower court would grant her a fair opportunity to defend the suit on merit.
 - ii. That the lower court placed insurmountable conditions in setting aside the exparte judgment.
 - iii. That the lower court took long to deliver its ruling in two applications filed by the Applicant.

The Applicant further asserted that allowing the application will not occasion any prejudice to the Respondent. In urging the court to allow the application, She relied on the following authorities: ***Nairobi HC Misc Application No 656 of 2010 Peter Githu Kamu VS Suleiman Ndua Kiarie and three others and Civil Appeal No. 16 of 1998 Hon John Njoroge Michuki and Another VS Kentazuga Hardware Limited.***

6. In opposing the application, the Respondent filed a replying affidavit on 28th June 2013 and a notice of preliminary objection on 19th June, 2014.

The gist of the Respondents replying affidavit is that the application is not merited and ought to be dismissed as the delay of one year in filing the application is inexcusable; that the Applicant failed to exercise due diligence by filing the application immediately after her application for review was dismissed on 18th April 2013; that allowing the application will be an exercise in futility as the Applicant has demonstrated a tendency of not complying with court orders.

Lastly, the Respondent claimed that allowing the application would be prejudicial to her considering the period she has waited to be accorded justice.

In the notice of preliminary objection, the Respondent only challenged the competence of the prayer for stay of execution of the orders of the lower court which as I have stated earlier, is now spent. The prayer was only meant to prevent execution of the decree of the lower court pending the hearing and determination of the application. In the circumstances, I do not find it necessary to deal with the issues raised in the preliminary objection since they are no longer relevant.

7. In the written submissions filed on behalf of the Respondent by her advocates Messrs Kipkenei &

company Advocates dated 17th September, 2014, the Respondent replicated the grounds supporting the notice of preliminary objection and maintained her reliance on the averments in her replying affidavit. In addition, she claimed that the application was an afterthought meant to delay execution of the decree and termination of the case. She invited the court to dismiss the application for lack of merit.

8. Having carefully considered the application, the affidavits filed herein and the written submissions filed by the parties as well as the authorities cited, I find that the main issue for determination by this court is whether the Applicant should be granted leave to file an appeal out of time.

The starting point in considering whether the Applicant has met the threshold required to warrant granting of leave to file an appeal out of time is an examination of the law which regulates the filing of appeals to the High Court against the judgment, order or decree of the subordinate courts and the time within which such appeals should be filed.

The relevant law is contained in **Section 79G** of the **Civil Procedure Act** which states 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 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.”

9. From the above provision of the law, it is clear that this court has unfettered discretion to admit an appeal out of time filed by an aggrieved party who for some reason failed to file his or her appeal to the High Court within the prescribed time provided that the person seeking to have such discretion exercised in his or her favour satisfies the court that he had good and sufficient cause for not filing the appeal within time. This discretion must however be exercised judiciously in accordance with the law and on the basis of sound legal principles depending on the circumstances of each case.

10. The supreme court in **Nicholas Kiptoo Arap Korir Salat Vs IEBC and 7 others Supreme Court Application No. 16 of 2014** laid down the principles which should guide courts in exercising their discretion in deciding whether or not to extend time for filing an appeal out of time. Those principles were enumerated as follows:-

- ***Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;***
- ***A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;***
- ***Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;***
- ***Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;***
- ***Whether there will be any prejudice suffered by the respondents if the extension is granted;***
- ***Whether the application has been brought without undue delay; and***
- ***Whether in certain cases, like election petitions, public interest should be a consideration for extending time.***

11. The question that this court must now resolve is whether the Applicant has demonstrated sufficient cause for not filing her appeal in time to warrant the exercise of this court's discretion in her favour by granting her the orders sought.

I have considered the reasons advanced by the Applicant in explaining her failure to file her intended appeal within the time limited by the law and why she thinks she deserves to be given an opportunity to file her appeal out of time.

The most striking of those reasons in my view is her contention which is not disputed that the judgment sought to be appealed against is an *ex parte* judgment entered against her without her knowledge or participation simply because she was not served with the plaint and summons to enter appearance.

12. If this contention is true and I have no reason to doubt it since it is not disputed, the Applicant was entitled to the setting aside of that judgment as a matter of right. The Applicant has explained that she chose to apply for setting aside of that judgment and for review of orders made in the ruling delivered in respect of her application to set it aside instead of filing an appeal as she had hoped that she would be given an opportunity to defend the suit on the merits in the lower court; that the time to appeal lapsed as she was waiting for the trial court to determine his two applications.

13. In my considered view, the explanation given by the Appellant is both plausible and satisfactory since the two applications are annexed to his supporting affidavit and the dates on which the rulings in respect of the applications were delivered are disclosed. It is important to note that the last ruling was delivered on 18th April, 2013 and the instant application was filed on 22nd May, 2013 about a month later. Given the steps taken by the Applicant from the time she learnt of entry of *ex parte* judgment against her, it cannot be validly said that the Applicant did not act diligently or moved without alacrity in the manner in which she conducted herself before the lower court.

14. The Respondent has argued that the Applicant ought to have filed an appeal immediately she learnt of the existence of the *ex parte* judgment and that the application before the court is an afterthought and an abuse of the court process. With due respect, I am unable to agree with this argument because in my view, the Applicant cannot be faulted for having chosen to exhaust all the avenues available to her in the lower court to challenge the *ex parte* judgment and to seek an opportunity to defend the suit and have it determined on its merits instead of rushing to file an appeal. That was the most prudent thing to do.

Similarly, the fact that the Applicant was unable to comply with the terms set by the trial court in setting aside the *ex parte* judgment or the fact that the process in the lower court took a long time to exhaust are matters that cannot be visited on the Applicant.

15. Another point raised by the Respondent is that if the application was allowed, she would suffer prejudice as she would have to wait longer to enjoy the fruits of her judgment. This may be so but the sword of justice is double-edged. It cuts both ways. In as much as the Respondent is entitled to enjoy the fruits of her judgment, the Applicant is also entitled to pursue all legal options available to her to challenge the validity of that judgment including the option of lodging an appeal. This is more so when one considers that the judgment sought to be appealed against is an *ex parte* judgment.

16. In the new constitutional dispensation, the courts are enjoined to administer substantive justice. And it would be against the interests of substantive justice to slam shut the doors of this court in the face of the Applicant by denying her a right of appeal given the reasons advanced for her delay in lodging her intended appeal. In any event, if this application was allowed, the Respondent is not likely to suffer any prejudice which cannot be adequately compensated by way of costs.

17. For the foregoing reasons, I am satisfied that the Applicant has demonstrated sufficient cause warranting extension of time within which to file her intended appeal. I am inclined to exercise my

discretion in her favour. I consequently allow the application in terms of prayer 3. The Applicant is granted 30 days from today to file and serve the memorandum and record of appeal. Cost of this application shall abide the outcome of the intended appeal.

Orders accordingly.

C.W GITHUA

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 3RD DAY OF DECEMBER, 2014 in the presence of:-

Mr. Miyienda holding brief for Mr. Chebii for the Applicant

Paul Ekitela Court Clerk

No appearance for the Respondent.