



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. MISC. APPLN. NO. 70 OF 2019

RAVAS PAUL KYALO MUTISYA.....APPLICANT

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

RULING

1. This is an Application by the Applicant seeking leave to file an Appeal out of time from a Ruling entered against him and delivered on 31st October, 2019 in Kitui CMCC No. 12 of 2019.

2. The Application is supported by the Affidavit of the Applicant who deponed that the delay in filing the Appeal was due to the fact that there was a change of advocates from M/s Mochere & Co Advocates to M/s Momanyi and Co. Advocates; that the Notice of Change of Advocates was effected on 29th October, 2019 and that the time for filing an Appeal lapsed on 30th November, 2019.

3. The Application was opposed. The 1st Respondent deponed that the Application is frivolous, vexatious and an abuse of court process; that there is no sufficient cause to warrant the orders sought and that the Applicant is guilty of inequitable delay.

4. The Application was canvassed by way of written submissions. The Applicant's counsel submitted that the Chief Magistrate's Court at Kitui did not serve the Applicant's advocate with the notice of the date of the Ruling and that the Ruling was delivered on 31st October, 2019 in the absence of the Applicant, a factor which substantively accounted for the four (4) days' delay in filing the Appeal.

5. Counsel submitted that Section 79G of the Civil Procedure Act 2012 gives a window for extension of time to file an Appeal on grounds of good and sufficient reasons. Counsel quoted the provisions of Section 79 G of the Civil Procedure Act which states as follows:

“Time for filing appeals from subordinate courts 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. The Appellant's counsel argued that the four (4) days' delay is not a long period of delay and that the delay is well explained and is not unreasonable or inordinate. Reliance was placed on the case of *Itute Ingu & Anor vs. Isumael Mwakavi Mwendwa (1994) eKLR*, where Omolo, JA held that:

“Whereas advocate's bona fide error is a special reason for extension of time within which to appeal, the nature and quality of the mistake must be considered. It is therefore clear that whereas inadvertence may be a ground for extension of time, the nature and quality of the inadvertence must be disclosed for consideration by the Court. It therefore does not suffice to simply state that the failure to comply with the prescribed timelines was due to inadvertence, as the Applicant did in this case.”

7. Reliance was placed also on the case of *Leo Sila Mutiso vs. Rose Hellen Wangare Mwangi Civil Application No. NAI 255 of 1997 (ur)* where the court held that:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are:

first, the length of the delay; secondly, the reason 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.”

8. Counsel also cited the case of *Mwangi vs. Kenya Airways Ltd [2003] KLR* where the Court of Appeal held that the factors to be considered in extension of time to Appeal were as follows:

- a. The period of delay;
- b. The reason for the delay;
- c. The arguability of the Appeal;
- d. The degree of prejudice which could be suffered by the Respondent if the extension is granted;
- e. The importance of compliance with time limits to the particular litigation or issue; and
- f. The effect if any on the administration of justice or public interest if any is involved.

9. In response, learned counsel for the 1st Respondent submitted that there was no certified copy of the Decree or Order appealed against that was filed with the Memorandum of Appeal. It was submitted that the Appellant/Applicant did not have an automatic right of Appeal by dint of Order 43 of the Civil Procedure Rules. Reliance was placed on the case of *Lawrence Nguthiru Riccardahw vs. George Ndirangu (2015) eKLR*. The court was urged to dismiss the Application.

10. The only issue for determination is whether the Applicant should be granted an extension of time to lodge his Appeal. Section 79G of the Civil Procedure Act is the law applicable in deciding whether the prayer for leave to file the Appeal out of time is merited or not. The Section 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 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.”

11. The power to grant leave to a party to file an Appeal out of the statutory period is discretionary, which discretion must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised in his favour.

12. The Court of Appeal in *Mwangi vs. Kenya Airways Ltd [2003] KLR* listed the factors which the court should consider in exercising the discretion whether to extend time to file an Appeal out of time or not. They include: the period of delay; the reason for the delay; arguability of the Appeal; the degree of prejudice which could be suffered by the Respondent if the extension is granted; the importance of compliance with time limits to the particular litigation or issue; and the effect, if any, on the administration of justice or public interest.

13. Vide his Ruling dated 29th October, 2019, the lower court upheld the Respondent’s Preliminary Objection and dismissed the Respondent’s Application and the suit with costs. Considering the provisions of Section 79G of the Civil Procedure Act, the Appellant/Applicant was required to file the Memorandum of Appeal challenging the decision of the lower court within thirty (30) days.

14. Whereas the Applicant should have filed the Memorandum of Appeal on or before 28th November, 2019, it was not until 5th December, 2019 that the current Application was filed, meaning that the delay in filing the Application was for four (4) days.

15. The Applicant deponed that the delay in filing the Appeal was due to the fact that there was a change of advocates from M/s Mochere & Co Advocates to M/s Momanyi and Co. Advocates; that the Notice of Change of Advocates was effected on 29th October, 2019 and that the time for filing an Appeal lapsed on 30th November, 2019.

16. Indeed, the record shows that the Applicant’s advocate was in attendance when the court delivered its Ruling on 29th October, 2019. After the delivery of the Ruling, the Applicant’s current advocate sought for the leave of the court to allow them come on record for the Applicant, which leave was granted on 29th November, 2019, by which time the thirty (30) days within which the Applicant should have filed the Memorandum of Appeal had lapsed.

17. Considering that the Applicant’s delay in filing the Appeal was necessitated by the change of the advocates, and in view of the lapse of only four (4) days, it is my finding that the delay in filing the current Application was not inordinately long and the said delay has been sufficiently explained.

18. For those reasons, I allow the Applicant's Application dated 4th December, 2019 as follows:

a. Leave be and is hereby granted to the Applicant to file his Memorandum of Appeal out of time, and in any event within fourteen (14) days of the date of this Ruling.

b. Each party to bear his/its own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 9TH DAY OF OCTOBER, 2020

O.A. ANGOTE

JUDGE