



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

MISC. CIVIL APPEAL NO. 7 OF 2018

IN THE MATTER OF: AN INTENDED APPEAL BY OMAR SAID ABDALLA AND MENASIRI MWINYIHAJI NASSIR;

AND

IN THE MATTER OF: SECTION 27 & 28, LIMITATION OF ACTIONS ACT, CAP. 22, LAW OF KENYA;

AND

IN THE MATTER OF: AN APPLICATION FOR ENLARGEMENT OF TIME TO APPEAL

OMAR SAID ABDALLA.....APPLICANT

-VERSUS-

KOMBO HASSAN KOMBO.....RESPONDENT

RULING

1. For determination is the notice of motion dated 22nd February 2018 and brought under the provisions of Order 50 rule 6, sections 1A, 1B, 3A & 95 of the Civil Procedure Act and Article 159 of the Constitution together with all enabling laws. The applicant seeks for orders:

1. Spent

2. That time for filing an Appeal against the Ruling delivered on 31/08/2017 in ELC NO. 560 of 2011 KOMBO HASSAN MOMBO =VS= OMAR SAID ABDALLA & ANOTHER be enlarged;

3. That the Notice of Appeal annexed hereto be deemed to have been filed within time;

4. That the costs of this Application be in the cause.

2. The application is supported by the grounds listed on its face and the affidavit of Omar Said Abdalla the applicant together with the written submissions. The application is contested vide the grounds of opposition filed on 20.3.2018 which listed inter alia the following:

1. The Application is a non starter, hopelessly incompetent, frivolous and an abuse of the Court process.

2. The intended appeal has no likelihood of success as no grounds of appeal have been adduced by the Applicant herein.

3. The application does not meet the threshold of enlarging the time to file an appeal as set by law.

3. The Respondent has also filed written submissions taking issue that the annexures to the supporting affidavit do not have the stamp & seal as required under Rule 9 of the Oaths & Statutory Declarations Act. However upon perusal of the pleadings filed, I found that each of the annexures were stamped with stamp of a commissioner of oaths. The objection is therefore unsupported.

4. Section 7 of the Appellate Jurisdiction Act Cap 9 gives this Court discretionary powers to entertain an application to extend time such as this. Therefore all that is required of applicant is to give a plausible and satisfactory explanation for the delay to unlock the flow of the Court's discretion favourably. In the case of **Mwangi vs Kenya Airways Ltd (2003) KLR 486** the Court of Appeal held that, "the list of

factors a Court would take into account in deciding whether or not to grant an extension of time is not exhaustive.”

5. In the present case, the applicant states that they were never made aware of the date of delivery of the impugned ruling as the notice served if at all was served on his former advocates. That he only became aware of the impugned ruling in January 2018 when he was served with a bill of costs for taxation. The Respondent has stated that this application brought 7 months after delivery of the ruling is indeed inordinate. The Respondent has however not contested that there was a change of advocates by the applicant. It appears the Respondent also did not notify the applicant of the decision until 18th January 2018 when they served their bill for taxation.

6. The applicant soon made the present application but which time (1 month) the Respondent still feels is inordinate. Given that the failure to file the appeal was a consequence of not being aware of the delivery date of the decision complained of and the reason for the lack of information is satisfactorily explained. Consequently, I find the applicant has given a reasonable justification why the time to file his appeal should be enlarged.

7. The Respondent submitted on the applicant’s failure to annex a notice of appeal in the supporting affidavit. He however fell short of stating which rules provide for such a requirement and the consequences of such an omission. Whether or not a notice of appeal was lodged together with the filing of this application in my opinion would not have changed the fact that the time for filing an appeal had lapsed. Such an omission is not fatal as what was important was to persuade the Court that there were satisfactory explanation for the delay and if the time for filing an appeal should be extended and the effect of that delay on the Respondent. The omission is thus curable under article 159 of the Constitution.

8. In the case of **Edward Njane Ngang & Another vs Damaris Wanjiku Kamau & Another (2016) eKLR**, Waithaka J discussed in detail what a Court need to take into account when exercising its discretion. The facts in that case were close to the issues obtaining herein. The Judge found that the Respondents had not demonstrated what prejudice if any they would suffer if the application is allowed. She exercised her discretion by allowing the application and extended time for filing the appeal.

9. Accordingly, I am also persuaded to find as the Edward Njane Ngang’a case supra as the Respondent herein has not informed this Court of what prejudices he will suffer if the application is allowed. The application is thus granted in terms of prayer (2) of the motion. The applicant shall file and serve the Notice of Appeal with 14 days from the date of this ruling. If the applicant fails to do so, the window granted to file the appeal shall automatically lapse. Each party to meet their costs of this application.

Dated, signed & delivered at Mombasa this 30th day of July 2018

A. OMOLLO

JUDGE