



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT.**

**AT KERICHO**

**CIVIL APPEAL NO. 3 OF 2014**

**JOHN KOECH MUGUN.....APPLICANT**

**-VERSUS-**

**PAUL KIPLNGAT KETER.....RESPONDENT**

**RULING**

**Introduction**

1. The applicant herein filed a memorandum of appeal on 3rd January 2014 in respect of the judgment of the Resident Magistrate Nancy Barasa RM delivered on 26.6.2013 in Sotik RMCC No. 191 Of 2012. He subsequently filed a Notice of Motion dated 17<sup>th</sup> April 2018 and filed on the same date seeking the following orders :-

I. That leave be granted to extend time for filing the Memorandum of Appeal against the judgment delivered by Hon. Nancy Barasa on 26<sup>th</sup> June 2013 in Sotik RM Civil Case no. 191 of 2012 .

II. Memorandum of Appeal filed in Kericho ECL Civil Appeal no. 3 of 2014 filed on 3rd January 2014 be validated and deemed to have been duly filed.

III. The honourable Court be pleased to give temporary stay of execution of judgment issued on 26<sup>th</sup> June 2013 in civil case no. 191 of 2012 pending hearing and final determination of this application and thereafter pending hearing and determination of the intended appeal against the judgment.

IV. The honourable Court be pleased to give temporary stay of contempt proceedings in Kericho Misc. Application no. 3 of 2014 pending hearing and final determination of this and thereafter pending hearing and determination of the of the intended appeal against the said judgment.

2. The respondent advocate subsequently filed a Preliminary Objection dated 2<sup>nd</sup> May 2018 opposing the said application on the following grounds:

1. That there is no appeal and the purported Memorandum of Appeal is null and void. The purported Memorandum of Appeal was filed without leave of the Court on 3.4.2014, whereas judgment was delivered on 26.6.2013 hence 30 days had elapsed and leave of the Court was required before filing and the same ought to be struck out.

2. The entire application is manifestly incompetent, bad in law and is based on a non-existent appeal and is overtaken by events as the decree has been executed fully and this is not the right forum to stop contempt proceedings.

3. The entire application is frivolous, an abuse of the process of the Court , brought in bad faith and is intended to defeat justice and disobedience of the Court Order of Contempt and to test legal intelligence and is contrary to the law of Civil Procedure

4. The application has been prompted by contempt proceedings in ELC Misc Application No. 10 of 2017 and there is no good faith or seriousness.

5. The entire application and Memorandum of Appeal should be dismissed with costs.

3. The Preliminary Objection was canvassed by way of written submissions and counsels for both parties filed their submissions.

#### 4. Issues for determination

- I. Whether the appeal filed on 3.1.2014 is legally valid.
- II. Whether the appeal filed out of time should be allowed.
- III. Whether the decree has been executed.
- IV. Whether the Court has jurisdiction to grant a stay of conviction on Contempt of Court order by a contemnor so that the contemnor can continue in violation of the court order.
- V. Whether the application is aimed at defeating the contempt proceedings.

#### Analysis and Determination

##### I. Whether the appeal filed out of time should be allowed

5. Section 79G of the civil procedure Act states that:

*“ Every appeal from a subordinate court to the High Court 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 filling appeal in time”*

6. In the case of **Asma Ali Mohammed v Fatime Mwinyi Juma [2014] eKLR** Justice Mary Kasango in allowing appeal file out of time stated that:

*“ . . . . a party who wishes to obtain leave to file appeal out of time such a party must file an appeal and as provided in the proviso of section 79G , then must seek leave to admit that the appeal out of time appellant here has done that . She filed her appeal and seeks leave for it to be admitted out of time. She gives credible and sufficient reason why she delayed with one day in filling appeal. The reason she gave was that the former advocate failed to inform her of the entry of the magistrate’s judgment. she is to be credited for being a diligent litigant because she did not just wait for the former advocate to inform her but went to the advocates office and that and that was when she was given the letter of demand for that decretal sum . It is for that reason that this court shall, in exercise of its discretion grant her leave to file her appeal out of time.”*

7. Supporting Affidavit dated 17<sup>th</sup> April, 2017 averred that he instructed his advocates to file an appeal and believed that the appeal was filed within the statutory time only to later learn of the court proceedings citing him for contempt. Upon learning that he instructed the advocates on record to inquire the status of appeal only to find that the matter was filed though beyond the statutory time limit and which the same had not been prosecuted.

8. He submits that the delay in filing the appeal and prosecuting was occasioned by the mistakes on part of the advocate who were previously in conduct of the matter and the same should not be visited on the client.

9. He submits that the delay in filing and prosecuting this appeal was solely occasioned by the former advocates and not the client . The client should not be punished for the mistakes made by the advocate.

10. He has cited the case of **Apa Insurance Limited V Michael Kinyanjui Muturi {2016}** eklr where Justice R. E Aburili in admitting the appeal filed out of time as deemed to have been duly filed and served within the stipulated statutory time relied on the case of **Banco Arabe Espanol V Bank Of Uganda, [ 1999] 2, EA 22** where it was held that

*“ The administration of justice should normally require that the substance of the dispute should be investigated and decided in their own merits and that errors, lapses should not necessarily debar a litigant from the pursuant of his rights unless lack of adherence to rules renders the appeal process difficult and inoperative . it should seem that the main purpose of litigation namely, the hearing and determination of disputes should be fostered rather than hindered”*

11. On the other hand learned counsel for the Respondent has submitted that an appeal form a subordinate Court to the High Court must be filed within 30 days from the date of the decree or order appealed from. He further submits that **where time has been expended and is certified by the lower Court as having been required for preparation of the decree or order**, such time may be excluded from computation of time for appeal. He submits that where time for filing appeal has expired, the appeal may be admitted out of time if the appellant satisfied the Court that he has good and sufficient ground for failing to file th appeal in time. He submits that in this case the appellant did not produce a certificate form the lower court to show how long it took to prepare the decree or order so as to enable the Court to exclude the period in computation of time given for lodging the appeal. Instead the applicant just filed a Memorandum of Appeal without a Certificate of delay.

12. Counsel submits that the Court has a discretion to admit the appeal where time for filing an appeal has expired by filing an application.

The appellant must satisfy the Court that he has good and sufficient grounds for failing to file the appeal in time. He submits that in order for one to benefit from the Court's discretion, a miscellaneous application ought to be filed first and a draft Memorandum of Appeal annexed to the supporting affidavit. Compelling reasons for failure to appeal in time must be stated in the affidavit in support of the application.

13. Counsel has referred to the case of **Mwangi Kinuthia V Joseph Njoroge Mwangi Civil Application No. 397 OF 1996** where the Court of Appeal at Nairobi stated as follows:

*“that it is to be remembered that the burden lies on a party who seeks the exercise of a court’s discretion in his favour to place some material before the Court upon which the court’s discretion is to be exercised. T simply say it is the mistake of his counsel is really no answer”*

14. Counsel also cited the case of **Mugo Njogu V Mary Githinji (2010) eKLR** where the court observed as follows:

*“There was a delay of 7 months in making an application to extend time for lodging a Notice of Appeal. In dismissing the application the court observed that “ with the overriding objective in place, it is no longer acceptable for the Court to automatically excuse the mistakes and lapses of counsel. Counsel have a role and duty to assist the Court in realizing the overriding objective and incompetency and lapses of counsel derogate from the objective.. Thus the unexplained delay in this particular case does not in my view assist eh just, expeditious and propotionate and affordable resolution of this appeal”*

15. In yet another case cited by learned counsel for the respondent **Bismach Engineers Ltd V James Kahoro Mwangi ( 2011) eKLR** the applicant sought extention of time to appeal and the court dismissed his application and held *inter alia* that:

*“ The applicant had a duty to pursue his advocates to find out the position on the litigation , but there is no disclosure that the applicant bothered to follow up the matter with the erstwhile advocates. It is not enough to simply accuse the advocate of failie to inform him as if ther is no duty on the client ot pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the Court may consider with sympathy. The client has a remedy against such an advocate”*

16. In the case of **Floris Pierro & Another V Giancarlo Falasconi 2014 eKLR** the Court held: *“Article 159 of the Constitution of Kenya enjoins Court to administer justice without undue regard to procedural technicalities Failure to include in eh record of Appeal a primary document or to formally apply for leave to file a supplementary record cannot be wished away as a procedural technicality. Otherwise there will be no orderly conduct of business in court. Nor was the article in the Constitution meant to be a panacea for advocates negligence or casual approach in dealing with appeals to this Court..... “Similarly these provisions were not aimed at camouflaging the indolence and/or negligence of parties to appeal. Neither were they meant to throw out of the window, the well- known rules of the Court.”*

17. From the foregoing and particularly the Court of Appeal decisions cited by counsel for the Respondent which are binding on this court, it is my finding that the applicant has not placed sufficient material before me to explain the delay in filing his appeal in time.

18. With regard to the third issue, I agree with Counsel the Respondent that Court orders must be obeyed and failure to do so is a violation of the administration of justice.

19. I am aware that the applicant is in blatant violation of the order of this Court in ELC Misc Application No. 10 of 2017 and he cannot purport to circumvent the contempt proceedings by filing an application for leave to appeal out of time against a judgment that was delivered 5 years ago, which has already been executed.

20. Accordingly, I uphold the Preliminary objection by the Respondent and dismiss the application with costs to the Respondent.

**Dated, signed and delivered at Kericho this 17<sup>th</sup> day of July 2018**

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**J. M. ONYANGO**

**JUDGE**

**In the presence of**