



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C MISC APPLICATION NO. 2 OF 2018

IN THE MATTER OF AN APPLICATION TO APPEAL OUT OF TIME

AND

IN THE MATTER OF THE SENIOR RESIDENT MAGISTRATE'S COURT AT KIGUMO

CIVIL CASE NO 143 OF 2008

AND

IN THE MATTER OF SECTION 79 OF THE CIVIL PROCEDURE ACT

BETWEEN

NGUGI NJURUMBE.....APPELLANT

VS

DINAH WAIRIMU NJOGU.....RESPONDENT

RULING

1. Ngugi Njurumbe (hereinafter referred to as the Appellant) filed the Notice of Motion dated 1/9/2017 seeking leave to file an appeal out of time against the ruling /decision of Hon A. Ogonda Resident Magistrate Kigumo in Civil Case Number 143 of 2008 delivered on 11/9/2009. The application is brought under Order 43(1), (3) of the Civil Procedure Rules and section 75 and 3A of the Civil Procedure Act.

2. The application is premised *inter alia* on the grounds that the Appellant is not satisfied with the judgment of the subordinate Court. That the Appellant has an unassailable ground of appeal with high chances of success. Further that an appeal is his right and it is in the interest of justice that his appeal be heard.

3. The application is supported by the affidavit of the Appellant where he deponed that the case in the lower Court was duly heard and was dissatisfied with the judgment and upon perusing the proceedings and the judgment he formed the considered opinion that he possesses unassailable grounds of appeal with high chances of success. Further that it is in the interest of justice that leave be so granted.

4. The deponent has annexed the following documents to the further supporting affidavit: -

a) A copy of a letter to the Chief Magistrate Kigumo Law Courts dated the 3/4/2017, through which the request for certified copies of proceedings was made;

b) A copy of the Memorandum of Appeal filed on 22/3/2018;

c) A copy of a letter to the Deputy Registrar of this Court dated 22nd September, 2015 through which the Appellants sought a certified copy of the order/judgment hereto.

5. In reply and opposition to the application, the Respondent filed the grounds of opposition dated 9/3/2018 in which he contended that the 8 years delay from the 11/9/2009 to date is not explained. That the Appellant had earlier filed and lost an appeal to wit; HCCA No. 107 of 2009. He explained that the appeal was struck out in Nyeri and he is seeking a second bite at the cherry. That he has come to the

Court with dirty hands. He urged the Court to strike out the application.

6. When the parties appeared before me on the 7/5/18 they elected to argue the application orally which they did on the 22/5/2018.

7. Mr. Karuga Wandai, the learned Counsel for the Appellant relied on the supporting affidavit and further affidavit of the Appellant dated the 1/9/2017 and 19/3/2018 respectively. He sought to explain that the proceedings were applied for on 4/4/2017 and only supplied in August of 2017 and duly filed the application on the 5/9/17. That the appeal has merits as seen in the draft memorandum of appeal annexed. That the delay was caused in the typing of the proceedings in the registry.

8. Mr. Mbutia Learned counsel for the Respondent argued that the application is misconceived and bad in law. That the ruling being sought to be appealed is almost 10 years old. That since the Appellant had exhausted an appeal process vide Civil Appeal No. 107 of 2009, he cannot seek to appeal a second time. That this fact has not been rebutted by the Appellant.

Determination

9. The Court of Appeal in the Case of **Stanley Kahoro Mwangi & 2 Others vs. Kanyamwi Trading Company Limited (2015) eKLR** set out the principles that guide a Court in considering an application for leave to file an appeal out of time as thus:-

“The principles guiding the Court on an application for extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the Court in deciding such an application are discretionary and unfettered. It is, therefore, upon an Appellant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour.”

10. The cases of **Mwangi vs. Kenya Airways Ltd, {2003} KLR 486** and **Fakir Mohammed vs. Joseph Mugambi & 2 others, Civil Application No. Nbi 332 of 2004** (unreported) further set out the parameters of granting leave to file an appeal out of time;

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the structure of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors.”

11. It is upon the Appellant to place sufficient material before the Court which would explain why there was delay in filing the Memorandum and Record of Appeal. The Court has to balance the competing interests of the Appellant with those of the respondent. This was well stated in the case **M/s Portreitz Maternity v James Karanga Kabia, Civil Appeal No. 63 of 1997** where the Court of Appeal stated:

“That right of appeal must be balanced against an equally weighty right that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.”

12. A plausible and satisfactory explanation for delay is the key that unlocks the Court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercised. There have been numerous judicial pronouncements on this precise point. Aganyanya, JA in **Monica Malel & Anor V R et al, Eldoret Civil Appl. No. Nai 246 of 2008**, stated:

“When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the Appellants appears to show ... the Appellants are not quite sure of why the delay in filing the notice of appeal within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay.”

13. In this particular case the Appellant has explained that the reason for the appeal is that he is dissatisfied with the impugned ruling and wants leave to appeal out of time. The Appellant has attributed to filing the appeal on time to the delay in being supplied with the typed proceedings. It is on record that the Appellant applied for proceedings vide the letter dated the 3.4.2017. He has further explained that he was supplied with the same in August 2017. He has not attached a copy of the certificate of delay by the lower Court to explain or to demonstrate to the Court that indeed the delay was attributed to the Registry. That notwithstanding, the ruling was delivered on the 11/9/2009. If that be the case he ought to have filed an appeal by 26/9/09. It was not filed. He is coming to Court 8 years later. I find and hold that the Appellant has not explained the reason for this delay.

14. In the draft Memorandum the application refers to a ruling delivered on 11/4/16 as the impugned ruling however the Notice of Motion refers to the ruling of 11/9/09. This Court will go with the ruling of 11/9/2009. No explanation has been given for this state of confusion.

15. This Court has been invited to note that the Appellant had filed another appeal in Nyeri CA No 107 of 2009 which appeal was struck out. No details were availed to the Court in that regard. The Appellant did not deny this as well. I make no finding on this one.

16. Guided by the above principles, given the inordinate time taken to appeal and the lack of a reason to explain the inordinate delay and the likely prejudice that allowing the application would visit the Respondent, the Court finds the application bereft of merit. It is dismissed with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 13TH DAY OF SEPTEMBER 2018

J.G. KEMEI

JUDGE

In the presence of:

Mr Githinji HB for Mr Wandai for the Applicant

Ms Kiama HB for Mr Mbutia for the Respondent

Ms.Irene and Ms Njeri, Court Assistants.