



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 398 OF 2017

JONATHAN KIPKORIR KENDUIYWA..... APPELLANT

VERSUS

CHARLES KIPKOECH KIGEN.....RESPONDENT

RULING

(Application seeking admission of appeal filed out of time; no good and sufficient cause shown for not filing the appeal in time and for not applying for admission within a reasonable period; application dismissed)

1. This ruling is in respect of appellant's Notice of Motion dated 20th January 2017. The application is brought under sections 3A, 79G and 95 of the Civil Procedure Act and Order 42 Rule 6(1) of the Civil Procedure Rules. The orders sought in the application are:

THAT this honourable court be pleased to grant the applicant leave to file appeal out of time.

2. The application is supported by the affidavit of the appellant/applicant in which he deposes that the judgment in respect of which the appeal was filed was delivered on 16th September 2015.

3. The application is opposed by the respondent through his replying affidavit filed on 9th March 2017. The respondent deposed that the judgment having been delivered on 16th September 2015, the delay of over one year in filing the appeal was inordinate and inexcusable. Further, that prejudice will be occasioned to the respondent who has not been able to enjoy the fruits of the judgment if the application is allowed.

4. Parties opted to dispose of the application by way of written submissions. In that regard, the applicant filed his submissions on 29th August 2017. In his submissions, the applicant urged the court to admit the appeal out of time since it had already been filed by the time the application was filed.

5. On his part, counsel for the respondent chose not to file written submissions as earlier agreed. Instead, counsel opted to rely entirely on the replying affidavit.

6. I have considered the application, the affidavit on record and the submissions thereon. I have also perused the record of appeal. The appellant was defendant while the respondent was plaintiff in SPMCC No. 56 of 2014 (Molo). Being dissatisfied with the judgment delivered in the said case, the applicant filed Memorandum of Appeal on 12th April 2016. There is some confusion as to the exact date when the judgment appealed against was delivered. Whereas the applicant and the respondent refer to 16th September 2015 as the date of delivery in their affidavits, and whereas the memorandum of appeal states

the date of delivery as 29th October 2015, my own perusal of the record of appeal reveals that judgment was delivered on 16th November 2015.

7. The appeal herein was initially filed and the High Court but was later transferred to this court pursuant to an order made by the High Court on 22nd March 2017. Section 79G of the Civil Procedure Act provides:

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.

8. Similarly, Section 16A of the Environment and Land Court Act provides

(1) All appeals from subordinate courts and local tribunals shall be filed within a period of thirty days from the date of the decree or order appealed against in matters in respect of disputes falling within the jurisdiction set out in section 13(2) of the Environment and Land Court Act, provided that in computing time within which the appeal is to be instituted, there shall be excluded such time that the subordinate court or tribunal may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

(2) An appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.

9. It follows therefore that any appeal against judgment in SPMCC No. 56 of 2014 (Molo) had to be filed within thirty days from the date of delivery of the judgement. Going by the date of delivery according to the parties, the Memorandum of appeal had to be filed by 16th October 2015. If, however we go by the date of delivery on the record of appeal, the Memorandum of Appeal ought to have been filed by 16th December 2015. Either way, the appeal herein having been filed on 12th April 2016 was about four months late.

10. A reading of both the affidavit in support of the application before the court as well as the applicant's submissions reveal that the applicant was confusing an application for enlargement of time with an application for stay pending appeal. This explains why the applicant has made some references to the risk of the appeal being rendered nugatory if stay is not granted.

11. The applicant also appears to have been mixed up as to an application for leave to appeal out of time filed before the memorandum of appeal is filed as opposed to an application for enlargement of time filed after the appeal had been filed. In an apparent attempt to cure the mix up, the applicant filed an amended notice of motion on 15th August 2017 in which the substantive prayer was that the applicant be granted leave to admit appeal out of time. The amended notice of motion was filed without leave and after the order for written submissions had been made. It remains unheard.

12. Since both parties were clear that what is before the court is an application for admission of an appeal filed out of time, I will proceed to consider the application as such. Such an approach is pragmatic and will save judicial time. Indeed, Article 159 of the constitution enjoins the court to administer justice without delay and without undue regard to procedural technicalities.

13. Both Section 79G of the Civil Procedure Act and Section 16A of the Environment and Land Court Act require an applicant in an application for admission of an appeal out of time to satisfy the court that he had good and sufficient cause for not filing the appeal on time.

14. In *Mwangi –v- Kenya Airways Limited*, [2003] KLR 486 at page 487, the Court of Appeal laid down guidelines to be considered when dealing with an application for extension of time as follows:

“Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance, in, Leo Sila Mutiso –v- Rose Hellen Wangari Mwangi, Civil Application No. Nai. 255 of 1997 (unreported), the court expressed itself thus: -

'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'.

These in general, are the things a Judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive; it was not meant to be exhaustive and that is clear from the use of the words “in general”. Rule 4 gives the single Judge an unfettered discretion and so long as the discretion is exercised judicially, a Judge would be perfectly entitled to consider any other factor outside those listed in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single Judge and as we have pointed out, the rule itself gives a discretion which is not fettered in any way”.

15. Thus some of the factors the court is supposed to consider are the length of delay, the reason for the delay and the degree of prejudice to the respondent if the application is allowed.

16. Regarding the length of delay, the delay herein as regards filing of the appeal is about four months. This amounts to four times the statutory period provided for filing an appeal from the subordinate court to this court. Further, the application for admission of the appeal out of time was filed some eight months after the appeal had been filed. Such a delay is certainly not a short delay. It is inordinate and the applicant ought therefore to provide an acceptable explanation for it.

17. Reasons for delay ought to be put before the court in the form of evidence. A perusal of the supporting affidavit herein shows that no explanation is given for the delay. There is some attempt to introduce the reasons in the submissions but that is not acceptable. Submissions do not constitute evidence. Evidence must be on oath and can only be introduced through oral testimony or in a written form in an affidavit. I therefore find that no good and sufficient cause has been shown for not filing the appeal in time and for not applying for admission within a reasonable period.

18. Finally, as regards possible prejudice to the respondent herein, the respondent has stated on oath that he will be kept from enjoying the fruits of his litigation. In the absence of any explanation from the applicant as to what caused the delay, I consider that keeping the respondent from enjoying the fruit of his litigation is prejudice which the court cannot ignore.

19. In the end, all factors considered, I am not persuaded that the applicant has made out a case for granting of the orders sought. Notice of Motion dated 20th January 2017 is dismissed with costs.

Dated, signed and delivered in open court at Nakuru this 19th day of October 2017.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Simiyu holding brief for Mr. Rioba for the appellant/applicant

No appearance for the respondent

Court Assistant: Gichaba