



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

MISC. CIVIL APPLICATION NO. 20 OF 2015

DAVID NGUGI APPLICANT

-VERSUS-

THE BOARD OF GOVERNORS

KAMAHUHA GIRLS HIGH SCHOOL RESPONDENT

RULING

1. The Notice of Motion dated **21st August, 2015** brought under **Sections 3A, 79G, and 95** of the Civil Procedure Act and **Order 51** of the Civil Procedure Rules seeks leave to lodge appeal out of time.
2. The application is premised on the grounds that the intended appeal is arguable; that the delay in lodging the appeal has been explained; that the application has been brought without unreasonable delay and that the respondent will suffer no prejudice if the application is allowed.
3. The application is opposed on the grounds that it is belated, misplaced, incompetent and lacking in merit (not arguable).
4. When the matter came up for hearing, counsel for the applicant, **Mr. Nyamu**, relied on the grounds on the face of the application and the affidavit sworn in support of the application. He reiterated the applicant's explanation that the delay in filing the appeal was caused by the passing on of the applicant's previous counsel and delay in obtaining typed proceedings from the lower court.
5. In opposing the application, counsel for the respondent, **Mr. Macharia**, contended that no material has been placed before the court for consideration. In this regard, he argued that no evidence of when the proceedings were applied for, if at all they were applied for, no evidence of payment in respect of the proceedings or evidence of when the proceedings were received has been adduced.
6. Terming the delay of six months in bringing the application inordinate, he submitted that the explanation offered for the delay is unsupported by the evidence on record. In that regard, he contended that the evidence on record shows that there was someone in the previous firm who could have proceeded with the matter.
7. Concerning the certificate of delay annexed to the applicant's supporting affidavit showing that there was delay in obtaining typed proceedings and judgment, terming the certificate self serving, he submitted that it is incapable of forming a ground for issuance of the orders sought. Nevertheless, he conceded that this court has discretion to allow the application but maintained that in the circumstances of this case, no

material has been placed before court to exercise the discretion vested in it in favour of the applicant.

8. In a rejoinder, counsel for the applicant urged the court to use the power donated to it under **Section 3A** of the Civil Procedure Act to grant the orders sought.

Analysis and determination

9. I have read and considered the rival arguments of the parties to this application. The sole issue for determination is whether the applicant has made up a case for being granted leave to file the intended appeal out of time.

10. With regard to this question, it is not in dispute that this court has power to grant the orders sought.

11. The principles which guide the court in exercise of the power vested in it are those cited in the cases hereunder:

1. Leo Sila Mutiso v. Rose Hellen Wangari Mwangi-Civil Appeal No. Nai 255 of 1997 (unreported) where the Court of Appeal stated:-

“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 extension of time are first the length of delay. Secondly, the reason of delay, third (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”

2. CFC Financial Services Ltd v. Juja Road Fancy Store Limited (2009) eKLR where the Court of appeal stated:

“The court in considering the application exercises unfettered discretion. But like all such discretions, the court must exercise the discretion judiciously and not upon its own whims or capriciously. In order to ensure that the discretion is exercised judicially, there are certain well settled principles that through many decided cases, have been accepted as guidelines to be followed by the courts....These guidelines are that the court has to consider the period of delay, the explanation or reason for that delay, whether appeal or intended appeal as the case may be is arguable, but without considering the merits of the appeal or intended appeal at this stage and whether the granting of the application would prejudice the respondent.”

12. With regard to delay in bringing an application for leave to file appeal of time, the Court of Appeal in the case of **Stanley kahoro mwangi and 2 others v. kanyamwi trading company limited (2015) eKLR** held:-

“It is upon the applicant 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 applicant with those of the respondent...a plausible and satisfactory explanation for delay is the key which unlocks the court’s flow of the discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercised...”

In **Gedion Mwando Ujiji v. Justius Amunga Ambaka (2007)eKLR**, it was observed:-

“...The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained...”

13. In applying the above cited principles to the current application, there was a delay of 5 months in bringing the application for leave to file appeal out of time (the judgment sought to be appealed from was

delivered on 27th February, 2015 and the application for leave to file appeal out of time filed on 25th August, 2015.

14. The delay in filing the intended appeal is attributed to passing on of the applicant's previous counsel and delay in obtaining typed proceedings. It is not in dispute that the applicant's previous counsel passed on barely a month after the judgment sought to be appealed from was delivered (on 27th March, 2015).

15. Although the delay of 5 months is inordinate, being of the view that the passing on of the applicant's previous counsel must have affected the operations of the deceased's advocate's firm, I find the delay in lodging the application to have been properly explained.

16. On whether the appeal is arguable, upon reading and considering the Memorandum of Appeal annexed to the affidavit sworn in support of the application, I am satisfied that the issues raised therein are arguable hence the intended appeal is not frivolous.

17. On whether the respondent will suffer prejudice if the application is allowed, since the respondent will have its day in court, I hold the view that the prejudice if any to be occasioned to it if the application is allowed is compensable by way of costs.

18. The upshot of the foregoing is that the application has merit and is allowed in terms of prayer 1. The costs of the application shall abide the outcome of the appeal.

Dated, signed and delivered at Nyeri this 12th day of October, 2016.

L N WAITHAKA

JUDGE

In the presence of:

N/A for the applicant

N/A for the respondent

Court assistant - Lydia