



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

APPEAL NO. E123 OF 2021

(Before Hon. Justice Dr. Jacob Gakeri)

KAKIRI LIMITED.....APPELLANT

VERSUS

REUBEN MAUTI GISIAINA.....RESPONDENT

(Being an appeal from the whole of the Ruling of the Honourable E. Riany (Mrs.)

Senior Resident Magistrate delivered on the 29th day of July 2021

in CMCC No. 188 of 2018 at Thika – Reuben Mauti Gisiaina v Kakiri Limited)

RULING

1. By a notice of motion dated 26th October 2021, the Applicants/Appellants filed this application under a certificate of urgency of even date seeking orders that –

(i) Spent.

(ii) THAT the Honourable Court enlarge time for the Appellant/Applicant to file the Memorandum of Appeal herein.

(iii) THAT this Honourable Court be pleased to deem the

Memorandum of Appeal filed on the 21st day of October 2021 as properly on record.

(iv) THAT there be a stay of proceedings in the trial Court in Thika CMCC No. 188 of 2018; Reuben Mauui Gisiaina v Kakiri Limited pending the hearing and determination of the Appeal.

(v) THAT the costs of this Application be provided for.

2. The application is expressed under Order 42 Rule 6, 50 Rule 6 of the Civil Procedure Rules 2010, Sections 1A, 1B, 3A, 63(e), 79G and 95 of the Civil Procedure Act and all other enabling provisions of the Law

3. The application is grounded upon the following–

(a) The Applicant herein being dissatisfied with the said Ruling has instructed their advocates to lodge an Appeal against the whole Ruling of the Honourable Resident Magistrate E. Riany, Senior Resident Magistrate delivered on the 29th day of July 2021 in Kiambu CMCC No. 188 of 2018.

(b) The time frame for filing an Appeal lapsed on 29th August 2021 and there is need for the Honourable Court to enlarge time to allow the Defendant/Applicant to file an Appeal out of time and also for the court to order for stay of proceedings pending the hearing and determination of this Application as well as hearing of the Appeal.

(c) The reason for the delay in filing the Memorandum of Appeal was inadvertent.

(d) The Respondent will suffer no prejudice should the Court exercise its discretion to grant the Applicant leave to file the Memorandum of Appeal out of time which cannot be compensated for by costs.

(e) That unless leave of this Honourable court is granted to the Applicant to file the Appeal out of time and stay granted the applicant is apprehensive that the subordinate Court will proceed to hear the suit and pronounce Judgment rendering its intended Appeal nugatory.

(f) The mistake of the advocate should not be visited on the client.

(g) This Application has been made in pursuit of the interests of justice and without unreasonable delay.

(h) Further grounds to be adduced at the hearing hereof.

4. The application is supported by an affidavit deponed by MERCYLINE MORAA OBWORI who depones that on 7th May 2021 the defendant filed a preliminary objection challenging the jurisdiction of the Court to hear and determine the claim being a work injury related claim and the Court delivered its ruling via email on 29th July 2021 dismissing the preliminary objection.

5. It is deponed that the Defendant/Applicant instructed Counsel to lodge an appeal against the ruling and the memorandum of appeal was to be filed on 29th August 2021 but the appeal was not filed in time.

6. Counsel affirms that although she prepared the memorandum of appeal for approval by the Managing Partner, it was inadvertently filed away and the file returned to the cabinet until a mention notice was received on 12th September 2021 and the mistake came to light.

7. That the Managing Partner consulted the client and it was agreed that the instant application be filed for enlargement of time to file the appeal out of time. That the matter has already gone through pretrial directions.

8. It is further deponed that the memorandum of appeal was filed on 21st October 2021 and the same has been filed without unreasonable delay and the delay was inadvertent. That if the orders sought herein are not granted, the subordinate court will proceed to hear the suit and render judgment occasioning the insurer substantial loss.

9. That the Applicant is keen to file an appeal and the inadvertent mistake of its advocates should not be visited upon it.

10. Finally, it is deponed that it is in the interest of justice that application be granted for the Applicant to file a memorandum of appeal out of time and stay of proceedings of the suit in the subordinate court as the Applicant stands to suffer grave prejudice if the orders sought herein are not allowed as prayed.

11. That the insurer is ready to provide security on behalf of the Defendant/Applicant as the Court may direct.

12. The Plaintiff/Respondent responded to the application by a replying affidavit dated 2nd November 2021 and sworn by Jesse Kariuki, Counsel for the Plaintiff/Respondent.

13. Counsel depones that the lower court dismissed the preliminary objection on 29th July 2021 after which Counsel sought a mention date and the same was slated for 22nd September 2021 and served the notice upon the Applicant. Counsel for the Applicant Mr. Olunga attended court and intimated that they intended to file an appeal and requested the matter to be taken out of the cause list pending the filing of the appeal.

14. It is deponed that the Applicant's advocates were awakened by the notice of mention dated 12th October 2021 and their conduct manifest an intention to delay the conclusion of this matter.

15. Finally, it is deponed that as they are basing their arguments on falsehoods, they are not entitled to a discretionary remedy for they have unclean hands.

16. At the hearing on 18th November 2021, Counsel for parties agreed to canvass the same through written submissions 14 days a piece. On 24th January 2022, the Plaintiff/Respondent submissions were not on record but a ruling date was fixed.

17. It is submitted that the law on the factors to be considered in an application for enlargement of time to file a memorandum of appeal is now settled. The Court should be guided by the following parameters: -

i) Length of the delay;

ii) Reason for the delay;

iii) Chances of the appeal succeeding

iv) Degree of prejudice to the Respondent

18. As regards length of the delay, it is submitted that the memorandum of appeal was filed on 21st October 2021, 2½ months after the prescribed duration, that the delay is inordinate and explainable.

19. Reliance is made on the decisions in **Allen v Alfred McAlphine & Sons [1968] 1 All ER 543** where a delay of 14 years was deemed inordinate and inexcusable as well as in **Agip (Kenya) Ltd v Highlands Tyre Ltd [2001] (1990) KLR** where a delay of 8 months was deemed excusable.

20. With regard to reason for the delay, Counsel submits that the internal systems of the law firm are to blame for the delay and the mistake was excusable. That the Respondent has not shown that the delay was inexcusable and damages could adequately compensate the Respondent.

21. As regards, chances of success of the appeal, it is submitted that the memorandum of appeal annexed raises triable issues with high chances of success and not frivolous.

22. As to the degree of prejudice the Respondent stands to suffer it is submitted that there is none. It is also submitted that the Court has unfettered discretionary powers to grant the extension of time and should exercise the same in favour of the Applicant as doing otherwise would unjustly shut out the Applicant and deny it the right of appeal.

23. Further, it is submitted that the Respondent has not explained the falsehoods it alleges the application is founded.

24. That the Applicant has already filed a memorandum of appeal and seeks the court's leave for the same to be considered as properly on record.

25. Finally, it is submitted that the Appellant is ready to compile the record of appeal and list the same for directions and set the appeal for hearing within a reasonable time.

26. The Respondent on the other hand identifies three issues for determination namely whether:

(i) The application made under Order 50 Rule 6 is competent and justifiable?

(ii) There is good and sufficient reason given to invoke the

discretionary power under Section 63(e), 79G, 95 of the Civil Procedure Rules;

(iii) Who should bear the costs of this application?

27. As regard the competence and justiciability of the application, it is submitted that Order 50 Rule 6 of the Civil Procedure Rules can only be relied upon when the fixed limited time for doing something has lapsed. That under Order 43, Rule 1 sub rule 1 provides for appeals which lie as of right while sub rule 2 provides that any other order shall lie with leave of the Court.

28. It is the Respondent's submission the order made by the Court on 29th July 2021 falls under Order 43 Rule 2 where appeals lie with leave of the Court.

29. The Respondent submits that Appellant did not seek leave either orally or within 14 days as ordained by Order 43 Rule 1 of the Civil Procedure Rules and the appeal is therefore irregular and bad in law.

30. On whether there is good and sufficient occasion for the discretionary power to be exercised in favour of the Appellant reliance is made on Section 63(e), 79G and 95 of the Civil Procedure Act.

31. It is submitted that the Appellant has no good and sufficient reason to file the appeal out of time. That being an equitable remedy, the Court should examine the Appellant's interest which is to delay the matter.

32. Finally, it is submitted that the Appellant's actions may be construed to mean that the decision to appeal was only contemplated after the period to apply for leave to appeal under Order 43 had lapsed. Specifically, when the matter came up for mention before the lower Court.

33. The Respondent prays for the application to be dismissed with costs.

Analysis and Determination

34. I have considered the application, replying affidavit and submissions by the parties. The issues for determination are whether;

(1) The Court should enlarge time for the Appellant/Applicant to file the memorandum of appeal;

(2) The Court should stay proceedings in the Trial Court in **Thika CMCC No. 188 of 2018 Reuben Mauti Gisiaina v Kakiri Limited** pending the hearing and determination of the appeal.

Whether the Court should enlarge time

35. The issue of enlargement of time was explained by the Supreme Court in **County Executive of Kisumu v County Government of Kisumu & others [2017] eKLR** as follows

“It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The Court delineated the following as:

“The under-lying principles that a Court should consider in exercise of such discretion:

- 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;*
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;*
- 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;*
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;*
- 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;*
- 6. Whether the application has been brought without undue delay; and*
- 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”*

36. In **Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No. Nairobi 255 of 1997) (unreported)**, expressed itself as follows: -

“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”.

37. The Court is bound by these principles.

38. It is equally important to note that as expressed by Onyango J. in **P. J Dave Flowers Limited v Linet Namunda Soita [2021] eKLR**

“The right to appeal is a right that is enshrined in the Bill of Rights under the right to fair hearing. Having already recognised the fact that judgement was delivered without notice to parties.”

39. It is not in dispute that the ruling which is the subject matter of the proposed appeal was rendered on 29th July 2021 dismissing the Applicant’s preliminary objection that the Court had no jurisdiction to entertain the case before it. It is also not in contest that the memorandum of appeal was filed on 21st October 2021 and out of time and the application for enlargement of time for the Appellant/Applicant was filed on 28th October 2021, a delay of about 2½ months.

40. The question for determination in the first instance is whether the Appellant/Applicant has demonstrated good and sufficient reason to invoke the discretionary power of the Court for the grant of extension of time to file the intended appeal.

41. As observed by the Court of Appeal in **Abdul Aziz Ngoma v Mungai Mathayo & another [1976] eKLR** *“other considerations such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered”* after sufficient cause is demonstrated.

42. On the reason for the delay in filing the appeal, the Appellant/Applicant intimates that the law firms mode of operation is that all correspondence must be brought to the attention of Ms Zehrabanu Janmohamed, the Managing Partner who issues instructions. In this case, instructions were issued to Mercyline Moraa Obwori to lodge the appeal and the draft memorandum of appeal was prepared and forwarded to the managing partner for approval before filing but inadvertently the document was filed away and the file returned to the cabinet until a notice of mention of the matter was served. It was only then that the mistake was detected. That the client was informed accordingly and further instructions sought but were not forthcoming until after the matter had come up for pretrial on 22nd September 2021 for the appeal to be filed and seek enlargement of time.

43. The Respondent argues that the Appellant lacks good and sufficient cause to be allowed to file the appeal out of time since their intent is to delay the suit. However, no evidence in support is provided.

44. In **Aviation Cargo Support Ltd v St. Mark Freight Services Ltd [2014] eKLR**, the Court of Appeal observed as follows –

“The order whether or not to grant extension of time or leave to file and serve record of appeal out of time is discretionary. Such discretion is exercised judicially with a view to doing justice. Each case depends on its own merit. For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the Court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the applicant took to ensure that it came to Court as soon as was practicable. In the normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The Courts are not blind to this fact.”

45. The Court is guided by these sentiments. Similar sentiments were expressed by Koome JA in **Karny Zaharya & another v Shalom Levi [2018] eKLR**.

46. For the above reasons, the Court is persuaded that the Appellant/Applicant has on a balance of probabilities shown that the delay in filing of the appeal is not undue or ordinate and has been explained satisfactorily. Noteworthy, Counsel has taken responsibility for the inadvertence which occasioned the delay.

47. In addition, it is now settled that mistakes of Counsel should not be visited upon the client.

48. As regards prejudice to the Respondent if the extension is granted, the Respondent tendered no submission. The Appellant/Appellant submitted that any prejudice the Respondent stands to suffer can be compensated by costs.

49. The Court is satisfied that other than the delay in having the cause concluded, the Respondent stands to suffer no other prejudice which cannot be compensated money wise.

50. It is not in contest that the Appellant/Applicant filed a memorandum of claim on 21st October 2021 out of time and without leave of the Court as required. A copy of the memorandum of appeal is also annexed to the notice of motion application. The annexed memorandum of appeal raises the issue of jurisdiction of the Trial Court to hear and determine the case before it which is undoubtedly a triable issue with chances of success as submitted.

51. Finally, prayer no. 3 of the notice of motion application dated 26th October 2021 is puzzling. The Court is being requested to deem the memorandum of appeal filed on 21st October 2021 as properly on record for purposes of the appeal. However, as luck would have it, this specific issue was addressed by the Supreme Court of Kenya in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** and settled. The Court expressed itself as follows:

“In his submissions, counsel for the applicant acknowledged having already filed his appeal. He now prays for extension of time and urges that once so granted, the Petition of appeal already filed be deemed to have been duly filed.

What we hear the applicant telling the Court is that he is acknowledging having filed a ‘document’ he calls ‘an appeal’ out of time without leave of the Court. Pursuant to rule 33(1) of the Court’s Rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the Court’s Rules, this Court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires.

By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.

To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court.”

52. The Court is bound by these sentiments and holds that the memorandum of appeal filed on 21st October 2021 is a nullity. In the circumstances prayer no. 3 of the notice of motion application dated 6th October 2021 falls by the way side.

53. In conclusion, on a preponderance of the materials before the Court, the Court is satisfied that the notice of motion application dated 26th October 2021 is merited and following orders commend themselves for issuance: -

(i) The Appellant/Applicant to file and serve its appeal within 30 days from the date of this ruling.

(ii) The Appellant/Applicant to take reasonable and proactive steps to have the appeal listed for hearing at the earliest convenience.

(iii) Proceedings in Trial Court in Thika CMCC No. 188 of 2018; Reuben Matui Gisiana v Kakiri Limited stayed pending the hearing and determination of the appeal.

54. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 14TH DAY OF MARCH 2022

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE