



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

MISCELLANEOUS APPLICATION NO. 66 OF 2018

EMBU FARMERS SACCO SOCIETY.....APPLICANT

VERSUS

MARTIN NJIRU MUNYI.....RESPONDENT

RULING

1. The Motion seeks the extension of time to file an appeal against the Judgment and Ruling of Hon. S. K. Mutai (PM) in Civil Case No. 229 of 1998 delivered on 3rd July 2017 and 17th July 2018 respectively. In the motion expressed to be under Section 79G of the Civil Procedure Act and Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules 2010, the applicant seeks to stay the execution of the judgment of the Learned Principal Magistrate pending the hearing and determination of the application and the intended appeal. The grounds for the motion are expressed on the face of the motion and are to the effect that the preparation of the typed proceedings took long. The Applicant argues that the proceedings and certified copies of judgment were applied for on 31st July 2018 and the same were availed on 6th December 2018.
2. The Respondent is opposed and filed grounds in opposition stating that there has been inordinate, unreasonable and unexplained delay in obtaining the court proceedings. The Respondent asserts that the application is incompetent and bad in law and lacks in merit.
3. The application was canvassed by way of written submissions. The Applicant submits that the Court in the case of **Richard Muthusi v Patrick Gituma Ngomo & Another [2017] eKLR** the court held that:-

It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant.

“We derive the following as the underlying principles that a court should consider in exercising such discretion:-

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; A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court; Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court; Whether there would be any prejudice suffered by the respondent, if extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

The Applicant submitted that under Order 42 of the Civil Procedure Rules, the applicant has to satisfy certain requirements and that it had done so and met the criteria for the grant of the relief sought. The Applicant submitted that the delay was not inordinate and the court should find in its favour. The Respondent did not file any submissions. The court has considered the submissions by the Applicant, the law and the facts of this case to determine the matter.

4. The factors to consider whether to grant an application such as this is premised on the following considerations. It is now well settled that the decision whether or not to extend time for filing an appeal is discretionary. In general, the matters which a court should take into account in deciding whether or not to grant an extension of time are firstly, the length of the delay; secondly, the reason for the delay; thirdly, 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. In addition, Section 79G of the Civil Procedure Act which was called in aid by the Applicant provides as follows:

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.

5. The judgment was made on 3rd July 2017. There was no notice of appeal filed within 30 days of the judgment. None was in fact filed as the attempt to file a memorandum of appeal is what has precipitated the Applicant's motion. Proceedings and copy of the judgment were not sought until 31st July 2018 one year 28 days after the decision. The Judgment of 3rd July 2017 and the Ruling of 17th July 2018 are not exhibited either. In my view, the intended appeal that is sought to be filed cannot be merited. There are no grounds to hold otherwise as all there is before me are 5 grounds that attack the impugned decision on facts and law as well as quantum. In my view, the length of the delay is inordinate. Secondly, the reason for the delay is one that cannot find traction as the delay that was apparently cited was over one year later. Had the Applicant sought proceedings timeously there would have been no delay so to speak. Regarding the chances of the appeal succeeding if the application is granted, there is no basis for me to find in favour of the Applicant as no copy of the judgment or ruling are annexed. One cannot discern the possibility of success in a vacuum. As regards the final limb for my consideration, the degree of prejudice the Respondent would suffer if the application is granted is unfathomable. As there are no grounds to grant the motion sought I dismiss it with costs.

It is so ordered.

Dated and delivered at Nyeri this 8th day of April 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar