



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC MISC APPLICATION NO. 13 OF 2015

DAVID MITHAMO GATITU.....APPLICANT

VERSUS

BONIFACE KARIMI NYAMU.....RESPONDENT

RULING

I have before me the applicant's Notice of Motion dated 4th March 2015 brought under **Section 79G of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules** seeking the following prayers:-

- 1. That this Honourable Court be pleased to grant the applicant leave to appeal out of time.***
- 2. Costs of the application be in the cause.***

The application which is supported by the applicant's affidavit is also based on the following grounds:-

- 1. That judgment in Civil Case No. 306 of 2013 Chief Magistrates' Court Kerugoya was delivered against the applicant on 16th September 2014 in his absence as he had not been served with summons to enter appearance.***
- 2. The applicant's application to have the said judgment set aside was dismissed on 16th December 2014.***
- 3. That the applicant was dissatisfied with the said judgment and applied for copies of proceedings and judgment on 29th December 2014 and the same were not supplied until 20th February 2015 when time to file appeal had expired.***
- 4. That initially he was acting in person and appointed an advocate who applied for certificate of delay which was issued on 23rd February 2015.***
- 5. That the delay was caused by not getting the copies of proceedings and judgment in time.***
- 6. That he has a good appeal and it is fair and just that the application is granted.***

The application is opposed and in his replying affidavit, the respondent has deponed that the appeal has no merit at all and is mere frivolous litigation. Further, the respondent has deponed that he stands to suffer irreparable injury since the applicant has custody of the suit premises. However, should the application be allowed, then the applicant be condemned to pay throw away costs.

I can see from the record that the respondent did also file a Notice of Motion seeking the dismissal of the application now before me. I do not think that that was necessary as the replying affidavit was sufficient.

I have considered the application which clearly seeks the exercise of my discretion and in exercising that power, I must bear in mind that the primary concern of a Court of law is to do justice to the parties.

On the issue of leave to appeal out of time. **Section 79G of the Civil Procedure Act** 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”. emphasis added.

In **BAGAJO VS CHRISTIAN’S CHILDREN FUND INC 2004 2 K.L.R 73** Ringera Ag. J.A (as he then was) gave the following guidelines with regard to the exercise of such discretion:-

- a. ***Length of the delay***
- b. ***The explanation for that delay***
- c. ***Whether the appeal is arguable***
- d. ***Any prejudice that may be caused to the respondent if the application is granted***
- e. ***Generally, the requirements of justice in the case***

also bearing in mind the importance of the case.

While **Ringera Ag. J.A** (as he then was) was considering an application under the Court of Appeal rules, similar guidelines would apply in an application such as this since both seek the exercise of the Court’s discretion.

In am also guided by the recent decision of the Supreme Court of Kenya in the case of **NICHOLAS KIPTOO Arap KORIR SALAT VS IEBC and 7 OTHERS 2014 e K.L.R** where the following principles for extension of time for filing appeal were laid down:-

- a. ***Such extension is not a right but only an equitable remedy available to a deserving party at the Court’s discretion.***
- b. ***A party seeking extension must lay a basis for the same to the satisfaction of the Court.***
- c. ***Where there is delay, the same must be explained to the satisfaction of the Court.***
- d. ***Whether any prejudice will be caused to the respondents if extension is allowed.***
- e. ***The circumstances of each case must be considered.***

See also **FAHIM TWAHA VS TIMAMU ABDALLA & TWO OTHERS, SUPREME COURT OF KENYA CIVIL APPLICATION NO. 35 of 2014.**

This application will therefore be determined bearing in mind those principles.

The starting point is when the judgment subject of this appeal sought to be filed was delivered. It is not in dispute the same was delivered on 16th September, 2014 and the applicant says he was not present when the judgment was delivered. That is not really rebutted by the respondent’s replying affidavit. The applicant states further that when he got to know about the judgment, he applied to have it set aside on 10th September 2014. That must be an error because he could not have applied on 10th September

2014 to set aside a judgment delivered on 16th September 2014! Nonetheless, what is clear is that on 16th December 2014, the trial magistrate delivered a ruling dismissing that application. On 29th December 2014, the applicant applied for copies of the proceedings

and judgment and even paid for them but it was not until 20th February 2015 that the same were supplied long after the time within which to file the appeal had expired. A certificate of delay was duly issued.

Bearing all the above in consideration, it is clear to me that the applicant has explained the reason for not filing the appeal in time to my satisfaction. Having obtained copies of proceedings and judgment on 20th February 2015, the applicant promptly filed this application on 9th March 2015.

I have also looked at the draft memorandum of appeal. The applicant says judgment was only entered against him yet there were other defendants. The judgment itself is not clear on that issue. Applicant also says he was not a party to the agreement subject of this dispute. That raises arguable issues in the appeal which this Court ought to consider.

In the circumstances, I find that the application herein is well merited and I allow it on the following conditions:-

- 1. The appeal be filed within (15) fifteen days of the delivery of this ruling.**
- 2. The applicant to meet the respondent's costs of this application.**

B.N. OLAO

JUDGE

27TH NOVEMBER, 2015

27/11/2015

Before

B.N. Olao – Judge

Mwangi – CC

Applicant – present

Respondent – absent

COURT: Ruling dated, delivered and signed this 27th day of November, 2015 in open Court.

B.N. OLAO

JUDGE

27TH NOVEMBER, 2015



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