



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CIVIL APPEAL NO. 6 OF 2017

(Being an appeal from Judgment of the SRM's Court at Engineer Civil Case No. 83 of 2016, M. Mutegi - SRM)

MARY WANJA MUGWA and WILSON MUCHIRI WAHOME

(Suing as the Legal Administrator of the Estate of FRANCIS WAHOME

MUCHIRI (DECEASED).....1ST APPELLANT/RESPONDENT

-VERSUS-

TOM MBUTHIA GITOGO.....RESPONDENT/APPLICANT

RULING

1. Before me is the Respondent's Notice of Motion filed on 9th March, 2017 that seeks the following orders:-

"1. THAT this Honourable Court do extend the time for filing and serving a Memorandum of Cross Appeal and the Applicant be allowed to file and serve the said Cross Appeal within such extended time.

2. THAT the draft Memorandum of Cross Appeal annexed hereto be deemed filed and served within time."

2. It is expressed to be brought under Section 65, 79G and 95 of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules interalia. The grounds on the face of the Motion state that:

"1. THAT judgment on the lower court matter was delivered on 17th January 2017 for a sum of Kshs 830,000/= before apportionment of liability and both parties held equally liable

2. THAT subsequently, the decretal sum was settled by the Applicant on the 14th February, 2017.

3. THAT the Appellant/Respondent has filed a Memorandum of Appeal on the 13th February, 2017.

4. THAT we were served with the Memorandum of Appeal on 21st February, 2017.

5. THAT the Applicant only became aware of this Appeal after the period of thirty days allowed for filing of an appeal from a subordinate Court to the High Court expired.

6. THAT the Applicant is desirous of filing a Memorandum of Cross Appeal in response to the Appellant's Memorandum of Appeal as against the lower court's judgment.

7. THAT the Applicant is desirous of pursuing the intended Memorandum of Cross appeal.

8. THAT the Applicant has a meritorious Cross Appeal on liability and quantum with high chances of success.”

3. The gist of the supporting affidavit sworn by the Applicant’s counsel is that, that Memorandum of Appeal filed herein on 13th February, 2017 was served on the Applicant after the expiry of the time provided for filing appeal, and that the Applicant had already settled the decretal sum awarded in the lower court on 14th February, 2017 but in any event is now desirous of lodging a cross-appeal out of time.

4. For her part the Appellant sees the present application as a tit-for-tat afterthought motion and by her affidavit opposes it. The parties agreed dispose of the motion by way of written submissions.

5. In their respective affidavits and written submissions the parties accuse each other of bad faith. For the Respondent, based on the fact that the Appellant accepted payment of the decretal sum on 14th February, 2017 while having filed an appeal on 13th February, 2017, but only serving the same on the Respondent after a lapse of seven days. By which time, the period of filing appeal had closed on the Respondent/Applicant.

6. For her part, the Appellant/Respondent views the application as an afterthought and an attempt to intimidate her, the Respondent not having earlier evinced any intention to appeal as evidenced by settlement of the decretal sum.

7. I have considered all the matters canvassed in respect of the subject motion. In my view, none of the parties stands to gain from this blame game. It is mischievous of the Respondent in my view, to have accepted the decretal sum and then delaying to serve the already filed Memorandum of Appeal on the Respondent. The fact that the Appellant had accepted the payment in itself was not the problem, the mischief lay in the apparent suppression of the fact that the Appellant had already preferred an appeal against the decision giving rise to the decree.

8. Having so acted, the Appellant cannot be seen to attempt to remove the log in the Respondent’s eye. Besides, having preferred an appeal the Appellant, ought not to dictate the manner in which the Respondent chooses to counter the appeal. That choice lies with the Respondent. No explanation has been given by the Respondent over the proven delay in serving the Memorandum of Appeal on the Respondent. The Applicant seems to have been content with the first decision, but now intends to cross appeal. The change of heart has not been explained.

9. Having considered the substantive material canvassed in respect of the Motion, it is my view that the provisions of Section 79G of the Civil Procedure Act are apposite:-

“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 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.”

10. The court’s discretion under the provision though unfettered must be exercised judicially considering the length of delay, the explanation for it; and possibly, the chances of the appeal succeeding; and the degree of prejudice to the Respondent. (See **Niazsons (K) Ltd -Vs-China Road and Bridge Corporation (Kenya) [2000] eKLR**. See also **Mwangi -Vs- Kenya Airways Ltd [2003] KLR 486**).

11. The above principles were reiterated in **Mwangi -Vs- Kenya Airways Ltd [2003] KLR 486** where the Court of Appeal held:-

“Matters which the Court takes into account in deciding whether or not to grant extension of time are:-

(a) the length of delay

(b) the reason for the delay

(c) possibly, the chances of the appeal succeeding if the application is granted; and

(d) the degree of prejudice to the respondent if the application is granted.”

With regard to (c) the Court qualified that this is not a mandatory requirement but merely “something for a “possible” consideration.”

12. Recently in the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2015] eKLR** the Supreme Court outlined principles to be applied where extension of time is sought. The court stated:

“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive 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.”*

13. The delay herein is about one month. The short delay has been on the blamed Appellant’s late appeal. While the Applicant may have been content with the lower court decision as it was, the appeal herein, if successful may mean further payment to the Appellant. I am conscious that the right of appeal ought to be allowed without too many impediments so as to facilitate the Applicant to ventilate issues raised in the appeal. In **Bagajo –Vs- Christian’s Children Fund Inc. [2004] 2 KLR 73** the court emphasized that in exercising its discretion relating to extension of time, *“the court’s primary concern should be to do justice to the parties”*.

14. Looking at the draft cross-appeal, I cannot say it is frivolous as it seems to raise some serious issues. Besides, the Appellant has already received the entire sum comprising the decretal sum and will therefore not be prejudiced unduly. While I am minded to allow the application, prayer 2 cannot be granted as it stands, the subject thereof being a draft pleading. I will therefore grant leave to the Applicant to file a cross-appeal within 14 days of today’s date. The parties will bear own costs.

Delivered and Signed at Naivasha this 7th day of December, 2017.

In the presence of:

Mr. Waigwa holding brief for Mr. Karanja for the Appellants

Mr. Achieng Owuor for the Respondent

Court clerk - Barasa

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C. MEOLI

JUDGE



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