



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CIVIL APPEAL NO. 41 OF 2017**

**MUNYAO MUSYOKA NGATI.....APPLICANT**

**VERSUS**

**MUTINDA RHODA MUENI.....RESPONDENT**

**RULING**

1. By way of Notice of Motion dated **9<sup>th</sup> April, 2018** the Applicant seeks leave to appeal out of time against the Judgment of **Hon. S. K. Ngii** delivered on the **11<sup>th</sup> October, 2017**.

2. The Application is premised on grounds that the delay in appealing against the Judgment within the time required by **Section 79G** of the **Civil Procedure Act** was occasioned by the fact that the Judgment was delivered in the absence of the Appellant on a date that was not within the knowledge of his Advocate; That the delay was in any event not inordinate; the Defendant will not suffer any injustice if the Court allowed the application; the intended Appeal raises valid triable issues and has a high chance of success.

3. The Application is supported by an affidavit deposed by the Applicant, where he reiterated what is stated in the grounds upon which the Application is founded.

4. The Respondent filed a Replying Affidavit opposing the Application. She deposed that per the advise she was seized of from her Advocate, the intended Appeal lacks merit and is incapable of succeeding and no good reason has been given why the Appeal was not filed within the stipulated time. That failure by the Applicant's Advocate's clerk to file the Appeal on time was professional negligence on their part. That the Applicant is a man of straw being a night watchman who may not be in a position to meet costs of the Appeal in event the Appeal is successful. In that regard she asked the Court to order him to deposit security in Court.

5. Pursuant to directions given the Appeal was to be canvassed by way of written submissions but only the Respondent filed submissions which I have duly taken into consideration.

6. The principles that guide the Court in extending time within which to file an Appeal out of time were laid down in the case of **Nicholas Kiptoo Arap Korir Salat vs. I.E.B.C. & 7 Others (2014) eKLR** thus:

*"It is clear that the discretion to extend time is indeed unfettered. 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 the discretion in favour of the applicant.*

*"... we derive the following as the underlying principle that a court should consider in exercising such discretion.*

- i) *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.*
- ii) *A party who seeks extension of time has the burden of laying to the satisfaction of the court;*
- iii) *Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;*
- iv) *Where there is a reasonable (cause) for the delay, (the same should be expressed) to the satisfaction of the court;*
- v) *Whether there will be any prejudice suffered by the Respondents, if extension is granted;*
- vi) *Whether the application has been brought without undue delay; and*
- vii) *Whether in certain cases, .....*”

7. In the case of **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi (Civil Application No. Nai 255 of 1997 (unreported))** the Court stated thus:

*“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.”*

8. Judgment in the Lower Court was delivered on the **11<sup>th</sup> October, 2017**. The application herein was filed on the **9<sup>th</sup> day of April, 2018**. This was after a Memorandum of Appeal had been drafted and filed in Court out of time in the month of **November, 2017**. It is further urged that the Judgment was delivered in the absence of Counsel for the Applicant. The Lower Court record shows that initially the Judgment was to be delivered on the **20<sup>th</sup> September, 2017**. However, the Judgment was delivered on the **11<sup>th</sup> day of October, 2017**. There is no indication if any notice was sent to respective Advocates, but there was representation for the Respondent.

9. It has been demonstrated that the Applicant’s Counsel moved at the first opportunity to comply with the law therefore there was no inordinate delay and the reason given was plausible.

10. For the reasons given, I find the application having merit, and I allow it by granting the prayer sought. The Appeal filed herein is therefore deemed to have been filed within time.

11. It is so ordered.

**Dated, Signed and Delivered at Kitui this 17<sup>th</sup> day of January, 2019.**

**L. N. MUTENDE**

**JUDGE**



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