



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISCELLANEOUS CIVIL APPLICATION NUMBER 443 OF 2019

JAMES NJAI GITHUI.....APPLICANT

VERSUS

EQUITY BANK LIMITED.....RESPONDENT

RULING

1. On 11th June, 2019 the Hon. J. B. Kalo CM delivered his judgment in Chief Magistrate’s Civil Case Number 1321 of 2012 dismissing the plaintiff applicant’s suit against the defendant respondent.

2. On 30th July, 2019 the plaintiff applicant filed Notice of Motion under **Section 79G and 75 of the Civil Procedure Act and Order 51 rule 1** of the **Civil Procedure Rules 2010** seeking orders:

1. THAT the Honourable Court is pleased to certify this matter urgent and service be dispensed with in the first instance.

2. THAT the Honourable Court be pleased to enlarge time and grant the Plaintiff/Applicant leave to Appeal put of time against the judgment of the Honourable Chief Magistrate J. B. Kalo delivered on 11th June, 2019 in Chief Magistrate’s Court Case No. CMCC No. 1321 of 2012.

3. THAT costs be in the cause.

3. The application is supported by the grounds on its face and the affidavits of Lawrence Macharia Karanja Advocate sworn on 29th July, 2019 and James Njai Githui, the plaintiff applicant sworn on same date.

4. The grounds for this application are that;

i) The plaintiff/applicant was never informed of the date for judgment prior to its delivery.

ii) That he personally enquired from the trial magistrate who then informed him that the same had been delivered.

iii) That he proceeded to his advocate’s office and expressed his displeasure on the same and instructed them to file an appeal.

iv) That his advocates filed this application.

5. Counsel deponed that he was the advocate on record and was not aware of the date of the judgment. That even the copy of the judgment did not indicate that they were present. That upon learning of the judgment, reading it and explaining it to the applicant,

he brought this application with an undertaking to lodge the intended appeal within the time the court will set.

6. The application is opposed through the affidavit sworn by Joseph Wanyoike Mutonyi Advocate on 29th August, 2019. He avers that when the judgment was delivered the plaintiff applicant was indeed represented by counsel, a Mr. Njuguna held brief for Mr. Kibet for the plaintiff/applicant as is clearly evidence by the proceedings of that date.

Hence the applicant had no reason not to file his appeal on time.

7. His affidavit drew a swift rejoinder from Kibet Choswony Advocate, to the effect that the matter in question had been prosecuted by his colleague David Gatonye to its logical conclusion and there was no way he could have instructed Mr. Njuguna to hold his brief, and in any event, the said Mr. Njuguna never communicated to him of the judgment. More importantly this law firm never received any notice of the date of delivery of judgment.

8. Both counsel filed written submissions.

9. The applicant argued two (2) issues;-

1) Whether leave to appeal out of time ought to be granted.

2) Whether the application was meritorious.

The applicant relied on the provisions of the **Constitution, Article 50** on the right to be heard, **Article 50** on the right to be heard, **Article 159(2)** on the exercise of judicial authority, **Samuel Mwaura Muthumbi vs Josephine Wanjiru Ngugi & Another [2018] eKLR** on the factors to be considered in the extension of time to file an appeal. See also **Jennifer Njuguna & Another vs Robert Kamiti Gichuhi [2017] eKLR**, **Kinyunjuri Muguta vs Wotuku Muguta [2018] eKLR**.

10. On this issue the courts have been reluctant to stand in the way of a litigant and his appeal, as an appeal is the exercise of a constitutional right.

11. I will come back to the second issue.

12. The respondent argued;

1) Whether this court has jurisdiction to grant the order sought.

2) Whether the applicant has satisfied the court with good and sufficient cause for not filing the appeal in time.

13. On the first issue the respondent argues that the law only allows an appellant to file his/her appeal, and then seek to have it admitted out of time.

The respondents argument is based on the provisions of **Section 79 B** of the **Civil Procedure Act** as interpreted by *Emukule J* in **Gerald M Limbine vs Joseph Kangangi [2008] eKLR**. Section **79B** provides for;

i) the admission of an appeal or

ii) Its summary dismissal.

It is the respondents argument that since no appeal has been filed there is no basis for the application to “file the appeal” out of time. Secondly that **Section 95** of the **Civil Procedure Act** only relates to time lines set by the court.

14. On the second ground, it is the same as that of the applicant :whether the application has merit. For it to have merit the application would have to demonstrate sufficient cause. It is noteworthy that the fact of whether the applicant was present and /or

represented by counsel during the delivery of the judgment is a contested one and it is the applicant who needed to demonstrate this fact, to the satisfaction of the court.

15. The court proceedings filed by the counsel for respondent show that the applicant was represented by counsel who held brief for his counsel. Now, Mr. Lawrence Karanja deposed that he was the one seized of the matter, while on his part, Mr. Kibet, deposed that one Mr. Gatonye was the one who was seized of the matter. Who within the law firm, was seized of this matter specifically" I can only conclude it could have been any of the three counsel and that it was in that fashion that Mr. Njuguna was holding brief for Mr. Kibet when judgment was read. Note that neither Mr. Njuguna nor Mr. Gatonye has said anything about the said scenario. The hence the court record speaks for itself.

16. The ground for the application that the plaintiff was not aware of the date of judgment, tumbles upon the court record.

17. Coming back to the law, it is clear that no appeal has been filed. The applicant intends to file an appeal. That scenario is not foreseen by **Section 79G** of the **Civil Procedure Act**. The proviso foresees a situation where an appellant has filed an appeal, then seeks to have it admitted out of time by an application seeking extension of time and explaining the reasons for delay. Hence I find the words of *Emukule J* in the **Gerald Limbine** case above necessary.

“My understanding of the proviso to section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal, and at the same time seek the court’s leave to have such an appeal admitted out of the statutory period of time. The proviso does not mean that an intending appellant first seeks the court’s permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the court’s process under section 79B which says:

‘Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree part of a decree or order appealed against he may notwithstanding section 79C, reject the appeal summarily’

It seems to me therefore that it is not open to the court to exercise its discretion under the proviso to section 79G of the Civil Procedure Act except upon the existence and perusal of the appeal to be “admitted” not to be “filed out of time.” Admission presupposes that the appeal has been filed and will be “admitted” for hearing after a judge has established under Section 79B that there is “sufficient” ground for interfering with the decree part of a decree or order appealed against.”

18. I need not belabor the point as this decision is in line with numerous other decisions of this court on the requisite process when filing an appeal out of time. See **Apa Insurance Limited v Michael Kinyanjui Muturi [2016] eKLR** where the judge observed

*This court as correctly submitted by Mr Ochieng, has had on many occasions to decide on the same issue and has plainly, overtly and authoritatively pronounced itself that an appeal which is filed out of time can be validated by an application for leave to validate the appeal and that is what the proviso to Section 79G of the Civil Procedure Act stipulates. The decisions by Honourable H.M. Okwengu J (as she then was) in **HCC 322/2008 Michael Kinyanjui Mbuthia V John Kamau Nganga**; Honourable R.V.P. Wendoh J in **Richard Ngetich & another V Francis Vozena Kidiga HCCA 75/2012** ; and Honourable Mary Kasango J in **Asma Ali Mohamed V Fatime Mwinyi Juma HCCA 75/2014 (Mombasa)** among others all positive attestations to that pronouncement and so far there is no contrary decision from the Court of Appeal on that line of interpretation of Section 79G of the Civil Procedure Act Proviso*

Hence clearly the application;

1. Has no merit.

2. The orders sought cannot be granted as there is no appeal filed as required by Section 79 G of the Civil Procedure Act.

3. Application is dismissed with costs.

Dated, delivered and signed at Nakuru this 16th day of January, 2020.

Mumbua Matheka


Judge

In the presence of

Court Assistants.....

Applicant

Tanga for mbiyu for respondent Respondent

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