



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. E336 OF 2021.**

**JOYCE MUGURE MAINA.....1<sup>ST</sup> APPELLANT**

**JAMES MBURU KIMANI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**JOHN NGUGI.....RESPONDENT**

**RULING**

The appellants filed a notice of motion dated 16<sup>th</sup> June 2021 brought pursuant to Section 59 of the interpretation of General Provisions Act, Section 1A, 3A, 79G and 95 of the Civil Procedure Act, Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules 2010 for orders;

- 1. Spent**
- 2. That the appellant be granted leave to lodge an appeal against the judgement delivered on 20<sup>th</sup> April 2021 out of time**
- 3. That upon been granted prayer number 2 herein, the already filed memorandum of appeal be deemed as properly on record**
- 4. That costs of this application be in the cause.**

The application was supported by the affidavit of James Mburu Kimani. According to the applicants, judgement was delivered by the trial court on 20<sup>th</sup> April 2021. They received a typed copy of the judgement on 21<sup>st</sup> May 2021 and thereafter instructed their previous firm of advocates to lodge an appeal but the instructions were never acted upon. Thereafter they instructed the current advocate but consent for representation was reached on 14<sup>th</sup> June 2021. The delay was therefore not intentional.

Counsel for the applicants submitted that the principles that guide the court in exercising discretion on whether to enlarge time were highlighted in **First American Bank of Kenya Ltd v Gulab P Shah & 2 Others Nairobi (Milimani) HCCC No. 2255 of 2000 [2002] 1 EA 65** where the court set out the following;

- i. Explanation if any for the delay**
- ii. The merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is**

**frivolous one which would only result in delay of the course of justice**

**iii. Whether or not the respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favorable exercise of discretion in favor of the applicant.**

The applicant explained that judgement in Milimani CMCC No. 7516 of 2016 was not immediately available after the judgement was delivered and a copy was availed on 21<sup>st</sup> may 2021 to the applicant's previous advocates. The applicants being dissatisfied by the judgement instructed their previous advocates to file an appeal but their instructions were never acted upon. On 27<sup>th</sup> May 2021 the applicants instructed the current law firm to come on record and the previous firm of advocates but there was need to regularize the issue of representation before filing the appeal. Consent was reached on 14<sup>th</sup> June 2021 and this application was filed soon thereafter. The applicant in support cited **Philip Keipto Chemwolo & another v. Augustine Kibende [1986] KLR 495** where the court stated

**“Blunders will continue to be made from time to time and it does not follow that because a mistake is made that a party should suffer the penalty of having his case determined on its merits”**

The applicants added that the intended appeal is arguable as it seeks to challenge the dismissal of the matter by the subordinate court despite availability of evidence to guide the court to a contrary decision. The applicant also argued that there will be no prejudice suffered by the respondent if the orders sought are granted.

The respondents opposed the application vide their grounds of opposition dated 29<sup>th</sup> July 2021 and submitted that during judgement both parties' advocates were present in court and were informed that the copies of the judgement were ready and the parties should apply and pay for the same to enable them get a copy of the judgement. That it was therefore improper for the applicants advocates to allude that judgment for this matter was not typed and hence the delay caused and if at all the same was not typed the applicants ought to have annexed the said communication. In support the respondents cited Section 107 of the Evidence Act that states

**“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist”**

Counsel for the respondent argued further that the intended appeal is untenable and only meant to delay the conclusion of the suit and also delay the course of justice. The application herein is therefore an afterthought meant to deceive the court and ought not to be allowed.

### **Analysis and determination**

I have considered the application, the supporting affidavit, the grounds of opposition and the submissions filed by the parties.

**Section 79G** of the Civil Procedure Act provides that:

**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.**

The Court's decision as to whether or not to extend time for filing an Appeal is an exercise of this Court's discretion. However, the court must act upon reason(s) not based on whims or caprice. In general, the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay; the reason for the delay; the arguability of the Appeal and the degree of prejudice to the Respondent if the application is granted.

The applicants have laid blame on the fact that a typed judgement was not readily available. That their former advocates did not act

on their instructions to file an appeal and the delays that were caused when regularizing representation. It was pointed out by the respondents that the applicants indicated that they received a copy of the judgement on 21<sup>st</sup> May 2021 which was a long time after an appeal needed to be lodged and that no evidence was provided to prove that they had requested for the same. It is this courts view that when litigants instruct advocates it is their duty to monitor the progress of their cases.

Section 79G of the Civil Procedure Act requires that before the Court enlarges the time for appealing, the Applicant must satisfy the court that he had good and sufficient cause for not filing the Appeal on time. The impugned judgment was delivered on 20<sup>th</sup> May, 2021. The appeal ought to have been filed by 19<sup>th</sup> of May, 2021. The Memorandum of Appeal was filed on 16<sup>th</sup> June, 2021 which is a period of almost a month after the expiry of the thirty (30) days appeal window period. I do find that the delay is not inordinate. There is also no indication that the applicant was made aware of the Judgment before the 21<sup>st</sup> of May, 2021. By then time to file appeal had already lapsed.

In this case, I see no prejudice that will befall the Respondent if the applicant is allowed to file the Appeal. I find the application is merited and is granted in the following terms:-

- 1. Time to file appeal is extended.**
- 2. The Memorandum of Appeal filed herein is deemed to be properly on record.**
- 3. Costs of the application to the Respondent.**

**DATED AND SIGNED AT NAIROBI THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2021**

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**S. CHITEMBWE**

**JUDGE**



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