Munene & another v Mulama (Miscellaneous Civil Case E053 of 2022)
[2022] KEHC 13545 (KLR) (26 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13545 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

MISCELLANEOUS CIVIL CASE E053 OF 2022

PJO OTIENO, J

SEPTEMBER 26, 2022

BETWEEN

PETER GITHENDU MUNENE ..... 1ST APPLICANT

FRESH JUICE LIMITED ..... 2ND APPLICANT

AND

CHRISTOPHER AKWEYWA MULAMA ..... RESPONDENT

RULING

1. By the notice of motion dated May 4, 2022 the applicant seeks, in the main, enlargement of time to file an appeal and for an order for stay of the judgement of the trial court delivered on March 16, 2021. The reasons advanced to support the application is that the judgement was delivered without notice to parties and that it aggrieved the applicant, as the decree holder herein, who now wish to challenge the same upon appeal to this court.

2. The grounds for dissatisfaction with the judgement are disclosed in the draft memorandum of appeal setting out such grounds. The gist of the four grounds sums up to be that there was no sufficient evidence to prove ownership of the motor vehicle and loss of the special damages awarded by the court. The application exhibits a letter demanding payment of the decretal sum and the judgement, the judgment itself and the draft memorandum of appeal.

3. The application was resisted by the respondent (a decree holder before the trial court), on the strength of the replying affidavit sworn by the respondent which faults the application, for being vague, seeking to introduce a third party to the proceedings, after judgement and that the application is defective for being supported by an affidavit by a person other than the person disclosed on the face of the application.

4. On compliance with section 79G *Civil Procedure Act*, it is contended that the proviso to the law anticipates situation where an appeal has been filed out of time and the leave is merely intended to deem the appeal duly file, which is not the case here.

5. On notice of the delivery of judgment, the respondent contends that a notice was issued on March 14, 2022 and judgement itself delivered on March 16, 2022, in Kakamega not Nakuru, by Hon Kassan, and further that the respondent graciously granted a stay of 28 days to the applicants in their absence and then communicated the terms of the judgment to the applicants by an email of the same day. It was stressed that it is that same email address the applicants employed to serve the current application.

6. Accordingly, the respondent contends that the fact of delivery of the judgment was relayed to and received by the applicants timeously hence there is no cogent or plausible explanation why the appeal was never filed within the statutory timelines. It was then highlighted that there is admission of having received the notice of judgment by April 12, 2022 when the defendants, the insurer alleges to have received instruction to appeal. The respondent considers the application as a ploy to mislead the court and therefore unfairly deprive a decree holder of his fruits of judgement.

7. After being served with the replying affidavit the applicant filed a supplementary affidavit in which it was repeated that instructions were received on April 12, 2021 and owing to easter holidays, the counsel only acted upon the issue on April 19, 2022 and thereafter more time was consumed by the need to send the application to Nairobi for signatures hence the current application was presented for filing on May 4, 2022. It is therefore asserted there was no undue delay but owing to challenges with technology the same was not assessed till May 9, 2022.

8. To the supplementary affidavit the respondent also filed a supplementary affidavit and contended that the fact of delivery of the judgement and its terms were made known to the applicant counsel on March 16, 2022 but it had not been disclosed when counsel notified the applicant and that by the time the information was received, there was still time to lodge the appeal hence no plausible reason has been adduced to justify the failure.

9. The indolence was attributed to the applicant including the fact that even with a reminder on the April 19, 2022 there was still no action by the applicant with the addition that with technology enabling soft exchange of documents, the exercise of sending documents to be signed in Nairobi and send back is not plausible. Lack of candour was alleged to be evidence when a look is given to the affidavit in support which has a printed signature, not an original and that no evidence of postage was availed to show that the application was indeed sent on hard copies. System downtime was denied as mere excuses it being underscored that no details were given when certain hearing steps were allegedly done.

10. Based on the summary of facts above, the court views the considerations for an application for enlargement of time to be now well settled that the applicant has to demonstrate that:-

    i. There is a plausible reason for failure to act within the time specified.

    ii. The delay is not inordinate

    iii. The proposed appeal presents arguable point and not merely a frivolity and

    iv. No prospects of prejudice to the decree holder.

    See *Thuita Mwangi Vs Kenya Airways Ltd* [2022] eKLR the court cited with approval its decision in *Feo Sila Mutiso v Rose Hellen Wambavi Muhegi*.

11. In this matter, the judgement having been delivered on March 16, 2022, the applicant had a period of 30 days, by dint of section 79G, to file the appeal. That period when computed in accordance with

order 50 rule 8 was to lapse on the April 15, 2022 which turned out to be a Good Friday, a day the court registry was not operational, and therefore by dint of *rule 3* the last day to take the action of filing the appeal was April 19, 2022.

12. The applicant asserts in both affidavits that the instructions to appeal were received on April 12, 2022. If that is accepted as the truth, then counsel had, over and above the period from 16th March when the outcome of the judgement was communicated, a period of 7 days to draw and file the memorandum of appeal.

13. It is therefore not in dispute that the judgement was with the counsel while drawing the application and the draft memorandum of appeal. The logical thing was to draw their memorandum of appeal, even a holding one, and file it rather than struggling with the application when time had not lapsed. I do consider that the delay between 12th April and April 19, 2002 was occasioned by misapprehension of the law, on computation of time rather than need to have the application signed by client in Nairobi.

14. Moreover, the application as conceived was intended to be supported by the affidavit of R R Mwetich, a counsel for the applicant. Such counsel after drawing the paper needed not send the documents to himself in Nairobi. On this point, I find the application be based for lack of candour.

15. Thirdly there being an assertion of knowledge of the outcome on the March 16, 2022 which assertion has not been denied, the court finds that an email sent on the March 16, 2022, at 4.38 p.m. was delivered the same day before 5.00 p.m. and therefore the applicant was made aware the same day of the judgement. Having been made so aware, by the time he filed the application on the May 9, 2022 he had had a period of 56 days. That period even if not itself of inordinate, but where there is no explanation for delay or where the application is evasive as is here, there would be no legal and just basis to exercise a discretion in favour of the applicant.

16. The court finds further that the allegation that the e-filing system was down and not operational on the May 4, 2022 is not plausible. Not plausible because no attempt was made to show that indeed an attempt at electronic filing was made but met with failure of or any difficult.

17. The court therefore finds that in the absence of plausible explanation but paucity of candour, it has no basis to exercise its unfettered discretion in favour of the applicant. A judicial discretion must be exercised upon reason and where one is exercised in the absence of reason, it ceased to be a judicial discretion but rather caprice, whim or sympathy. See *Paul Wanjoi Mathenge v Dancun Gichane Mathenge* [2013] eKLR.

18. As observed by the Supreme Court in *Nicholas Kiptui Arap Korir Salat v IEBC* [2014] eKLR, extension of time is not a right of a party but an equitable remedy that is only available to a deserving party and at the discretion of the court after that party applying discharges its burden of offering plausible reasons for delay to the satisfaction of the court.

19. Here, for reasons advanced above, the court has not been satisfied that there was valid or indeed plausible reasons for delay that would enable it to exercise its discretion in favour of the granting extension of time.

20. Having found that there is no explanation for delay, the question of whether any prejudice would be occasioned to the respondent becomes secondary, moot and not a basis to grant enlargement of time.

21. In the opinion of this court, that question only comes into play where the court is inclined to grant extension of time but notices that doing so would occasion a prejudice to the respondent.

22. The upshot, is that the application for extension of time lacks merit and the same is dismissed. Having been so dismissed, there is no prospect of an appeal being filed upon which to grant stay of execution. The entire application therefore fails and is thus dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 26TH DAY OF SEPTEMBER 2022.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Mr. Mugaru for the Applicants

No appearance for Mulama for the Respondents

Court Assistant: Kulubi