



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 205 OF 2016**

**J J (a minor suing through JKG & JMJ**

**His father and mother as next friends).....1<sup>ST</sup> PLAINTIFF**

**F J (a minor suing through JKG and JMJ**

**her father and mother as Next friends)..... 2<sup>ND</sup> PLAINTIFF**

**-VERSUS-**

**GENERAL ACCIDENT INSURANCE CO. LTD.....DEFENDANT**

**RULING**

The application dated 16<sup>th</sup> July, 2020 seeks the following order: -

**2. THAT the Honourable Court be pleased to enlarge time for a further period of 14 days within which time the Plaintiff's shall have filed and served their Notice of Appeal against the Judgment of this Court;**

The application is supported by the affidavit of Mr. Steve Luseno advocate sworn on the same date. The respondent filed grounds of opposition dated 2<sup>nd</sup> August, 2020 Counsel for the applicant submit that Section 7 of the Appellate Jurisdiction Act allows the High Court to extend time for giving notice of an intended appeal from a Judgment of the High Court. Further, the overriding objective under Sections 1A and 1B of the Civil Procedure Act is to have a just determination of the proceedings. The applicant has effectively explained the delay. Counsels referred to the case of **EDITH GICHUGU KOINE -VS- STEPHEN NJAGI THOITHI [2014] eKLR** where the Court of Appeal (Odek J) stated: -

**I have anxiously considered the Application, the affidavits on record and the submissions of counsel. There can be no doubt that the discretion I have to exercise under rule 4 is unfettered and does not require establishment of "sufficient reasons". Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted and whether the matter raised issues of public importance, amongst others – See **FAKIR MOHAMED V JOSEPH MUGAMBI & 2 OTHERS**, Civil Application Nai. 332 of 2004 (unreported). There is also a duty now imposed on the Court under sections 3A and 3B of the Appellate Jurisdiction Act to ensure that the facts considered are consonant with the overriding objective of civil litigation, that is to say, the just expeditious, proportionate and affordable resolution of disputes before the court.**

**I have emphasized the fact that the respondent did not indicate the nature of prejudice, if any that he stands to suffer if the present application is granted. I have considered the overriding objective principles that bind this court and the 2010 Constitution of Kenya requires this court to administer justice without undue regard to technicalities. At this stage, I should not delve into the merits of the intended grounds of appeal and the issues to be raised in appeal. I find that the respondent shall not be prejudiced if the applicant gets her day in court to challenge the judgment. He respondent can be compensated by an order for costs in the event the intended appeal is not successful.**

Counsel further argue that the court delivered a ruling on 28<sup>th</sup> April, 2020 and granted the applicant leave to file a notice of Appeal out of time. The ruling was delivered in the absence of both counsels and their parties. The notice of Appeal was not filed. The applicant become aware of the ruling on 10<sup>th</sup> July, 2020. Pursuant to directions issued on 15<sup>th</sup> March, 2020, court activities were scaled down so as to control Covid-19. Counsel for the applicant engaged the court through e-mails trying to find out the fate of the ruling. By 10<sup>th</sup> July, 2020 when counsel got the ruling, the 14 days granted by the court to file the notice had lapsed. It is submitted that no prejudice will be suffered by the respondent who can be compensated by an award of costs. Counsel relies on the case of **OMN -V- JASPER NCHONGA MAGARI & ANOTHER [2020] eKLR** where the court (Nyakundi J) held: -

**In the present motion on computation of time basically from the date of delivery of Judgment on 22/10/2019 to the date of filing an application to extend time on 7/2/2020 there is an overreach of about three and a half months.**

**However, if the court was to believe the assertion that the impugned Judgment was read and delivered without notice to the parties, the applicants calculation of time commences from 22/01/2020 when the existence of the Judgment came to his knowledge. As a matter of fact, the record of the trial court supports this assertion by the applicant that none of the parties attended delivery of Judgment on the due date.**

**As I have stated earlier, elsewhere in another decision of this nature reserved judgments once written should be read and delivered in the presence of the parties in open court. However, the court acknowledges the unfortunate state of affairs that has been occasioned by the COVID-19 pandemic. To add to context it is important to underscore that whatever legal procedure adopted by the Court to bring to the attention of the parties any outcome of the case through a written Ruling/Judgment copy of the same ought to be supplied forthwith or within 24 hours from the date of delivery. It is not lost for this court to observed that an overturned schedule, nature of the case, due pressure of work to go through the handwritten judgment and have it prepared in an eligible format consumes additional time outside the prescribed statutory period for delayed judgments. Be that as it may be a court's failure to provide a copy of his or her judgment may serve as a ground in applying the law to extend time to file an appeal out of time.**

**In principle, court judgment remains to be the public face of the Judiciary and therefore the duty to timely delivery of judgment and allowing immediate access of such to the parties to the claim without any impediment appeals to the constitution that honors and promotes fairness, transparency, accountability, integrity and enforcing the rule of Law. With the introduction of the E-filing portal, Judgments, Rulings, Orders of the court should be electronically issue upon notice of the parties.**

**Coming back to the present application, my straight answer based on the submissions by counsel, the non-compliance with time in terms of Section 79 (9) of the Act has been explained in the affidavit.**

**Further the length of delay is not inordinate to provide a ground to satisfy the prejudice test where one expresses intention to file an appeal after a long period of time denying the respondents the fruits of his or her judgment.**

It is further submitted for the applicant that this court is not functus officio. The same court granted a similar application. The respondent has not established what prejudice it stands to suffer if the application is allowed.

Counsels for the respondent opposed the application. It is submitted that the applicant filed an application seeking to enlarge time to file a notice of appeal. A ruling was delivered on 28<sup>th</sup> April, 2020 granting the applicant 14 days to file the notice of Appeal. The applicants are now seeking the same orders they were granted instead of seeking a review of the earlier orders. This court is now functus officio in light of the previous ruling and cannot entertain the current application. The application is unsustainable in law, incompetent and incapable of being granted.

It is further submitted that the court had a chance to hear and determine a similar application dated 7<sup>th</sup> June, 2019 seeking extension of time. Granting the application would amount to a license to take a second, third or countless bites on matters which the court has made a determination on. The application ought to be made before the court of Appeal under Rule 75 of the court of Appeal Rules. The circumstances and facts of the case do not meet the requirements for extension of time.

The issue for determination is whether the court should extend time for the filing of the notice of appeal. Counsel for the respondent contend that this court is functus officio as it has already granted the prayers being sought and the applicants have themselves to blame after failing to file such notice.

Section 7 of the Appellate Jurisdiction Act, Chapter 9 laws of Kenya states as follows: -

**The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.**

**Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.**

The parameters to be considered by the court as to whether time for issuing a notice of intention to appeal or not have been explained in several past decisions. Although most of these decisions relate to the court of Appeal under Section 4 of the Court of Appeal Rules, the same are applicable to the High Court. Section 7 of the Appellate Jurisdiction Act empowers the High Court to enlarge time for filing a notice of intention to Appeal. It is true that the court granted the applicants their prayers for extension of time through a ruling delivered on 28<sup>th</sup> April, 2020. However, the applicant's advocate maintains that they managed to become aware of the ruling on 10h July, 2020 and by that time the 14 days period had already lapsed. In my view, it is permissible for the applicants to return to this court and offer an explanation as to why the earlier order was not complied with and to seek the court's permission to revisit the said orders.

In the case of **GITHIAKA –V- NDURIRI [2004] 2 KLR, 67**, Ringera Ag JA (as he then was) held inter alia: -

**3. In the exercise of its discretion, the court's primary concern should be to do justice to the parties. The court should, among other things, consider: -**

**The length of the delay in lodging the notice and record of appeal;**

- **Where applicable, the delay in lodging the application for extension of time, as well as the explanation thereof;**
- **Whether or not the intended appeal is arguable;**
- **The prejudice to the respondent if the application is granted;**
- **The public importance, if any, of the matter; and**
- **Generally, the requirements of the interest of justice in the case.**

Similarly, in the case of **WASIKE –V- KHISA & ANOTHER [2004] 1 KLR** Githinji J A (as he then was) held inter alia: -

**2. In exercising its discretion, the court is guided by such factors as the merits or otherwise of the intended appeal, whether the extension of time will cause undue prejudice to the respondent and the length of delay.**

**3. It would be a fetter on the wide discretion of the court to require a minute examination of every single act of delay and to require every such act to be satisfactorily explained.**

**4. It is not every delay in taking any appropriate step required that would disentitle a party to any relief. It is only the unreasonable delay which is culpable and whether or not delay is unreasonable will depend on the circumstances of the case.**

From the above decisions, it is established that the court's powers to extend time to lodge an appeal or notice of appeal out of time is unfettered. However, the court is called upon to consider the reasons and explanation of the delay so as to avoid litigants to abuse such an opportunity.

The record of this court shows that the previous application for extension of time was heard by way of written submissions. On 29/1/2020, Justice Kamau fixed the ruling of the said application for 28/4/2020 at 9.00 a.m. The record of the court for 28/4/2020 reads as follows: -

**28/4/2020 (In chambers)**

**Before: Hon. Kamau, J**

**Court Assistant: Kevin**

**No appearance for plaintiffs**

**No appearance for defendants**

**Court**

**Parties herein have not given their consent for the court to deliver the Ruling of the plaintiff's notice of motion application dated 7/6/2019 and filed on 1/7/2019 electronically. Parties are hereby directed to give the aforesaid consent by 6/5/2020 to enable the court deliver the said application electronically. Orders accordingly.**

**KAMAU J**

**28/4/2020**

**Court – Further Orders**

**It has come to my attention that advocates practicing in the Civil Division are not giving consents to have the decisions transmitted electronically. In view of the fact that the courts have a legitimate expectation to deliver judgments and they cannot hold ready judgments indefinitely, I hereby deliver the Ruling of the plaintiff's notice of motion application dated 7/6/2019 and filed on 17/6/2019 and direct that the Senior Deputy Registrar High Court of Kenya Milimani Law Courts Civil Division transmit the decision to the parties herein electronically. I therefore set aside the previous orders that I had given earlier. Orders accordingly.**

**KAMAU, J**

**28/4/2020**

Justice Kamau directed the Deputy Registrar to transmit the ruling electronically. It is not established as to whether the said ruling was

transmitted as ordered and if so, when was it transmitted. The supporting affidavit has an e-mail from the applicant's advocates of 22<sup>nd</sup> April, 2020 sent to the court indicating that they had no objection in having the ruling transmitted electronically via e-mail. The Deputy Registrar responded by an e-mail of 27<sup>th</sup> April, 2020 indicating whether counsels had complied by filing a consent. Equally, counsels for the respondent on 23/4/2020 gave their permission to have the ruling transmitted electronically. There is an e-mail from the Deputy Registrar of 26<sup>th</sup> April, 2020 which reads as follows: -

**“Kindly note that the deadline of submitting consents was 9<sup>th</sup> April, 2020.”**

**We have already analyzed those that were filed and directions given.**

**Kindly wait for directions on the delivery of the same in due course.**

Counsel for the applicant's sent an e-mail on 25<sup>th</sup> June, 2020 which reads as follows:

**May it please your Honour,**

**We refer to the above matter and our application dated 7<sup>th</sup> June 2019 whose ruling was scheduled to be delivered on 28<sup>th</sup> April 2020.**

**It has just come to our attention that the same was delivered in our absence. Kindly furnish us with a copy of the ruling to enable us to deal further.**

**We undertake to meet the requisite fees.**

From the court record, it is established that the ruling was delivered in the absence of the parties and their counsels. It is also established that the order to transmit the ruling electronically was not complied with within the fourteen (14) days period granted to the applicants to lodge their notice of Appeal. By the time the applicants got the ruling which had allowed them to file the notice, time had already lapsed. According to counsels, they got the ruling on 10<sup>th</sup> July, 2020 and the current application was filed on 16<sup>th</sup> July, 2020, that is a period of about six (6) days. I am satisfied that the delay is not unreasonable and the explanation is understandable. The applicants cannot be blamed for having failed to comply with the earlier orders.

The nature of the dispute is that the applicants filed civil suit number 256 of 2010 before the High Court against Akamba Public Road Services Ltd claiming damages arising from a road traffic accident which occurred at Longido near Namanga in Tanzania. The plaintiffs were awarded damages. They later filed the current suit against General Accident Insurance Company Ltd seeking orders that the defendant is under duty to satisfy the earlier judgment. The second suit was dismissed on 14<sup>th</sup> March, 2019.

The applicants are desirable to approach the court of Appeal and ventilate their appeal. There will be no prejudice against the respondent apart from the fact that the appeal has to be defended. In my view, I find that there is need to have the issues escalated to the Court of Appeal as the matter relates to an accident which occurred outside Kenya. The interest of Justice will be served if the applicants are allowed to pursue their claim before the court of Appeal. The decision of the court of Appeal will also be beneficial to the respondent as the likelihood of facing similar disputes in future is highly possible.

For the above reasons, I do find that the application dated 16<sup>th</sup> July, 2020 is merited and the same is granted as prayed. The applicants to file and serve their notice of Appeal within fourteen (14) days from the date of delivery of this ruling. Parties shall meet their respective costs of the application.

**Dated and Signed at Nairobi this 25<sup>th</sup> day of January, 2021**

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**S. CHITEMBWE**

**JUDGE**