



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 46 OF 2018

MARIQUETA NKOYAI M'THIRINGI

(Suing as the Legal Representative of

the Late GEOFFREY MUTUMA THIRINGI).....APPELLANT

VERSUS

SHADRACK MWENDWA MWITL.....1ST RESPONDENT

BENJAMIN IBUA.....2ND RESPONDENT

RULING

Introduction

1. Before the Court is an application by the Appellant seeking extension of time within which to file a Notice of Appeal. The origin of this matter is a claim in Meru CMCC No. 22 of 2012 for general and special damages brought by the Deceased, Geoffrey Mutuma Thiringa following injuries sustained in a road traffic accident that occurred along Keeja-Mitunguu earth road on 5th December 2011.
2. The Deceased passed on during the pendency of the suit and the Appellant herein, took over, suing as the Legal Representative of the Deceased's Estate. The trial court's Judgment in the matter was delivered on 30th April 2018 apportioning liability at 50:50 and awarding damages of Ksh 557,301/= to the Appellant herein.
3. Being dissatisfied by the said decision, the Appellant appealed against the judgment on both liability and quantum. By Judgement delivered on 25th June 2020, this Court (Mabeya, J.) found that the appeal had no merit and dismissed the same with costs.
4. Being dissatisfied with the outcome, the Appellant herein intends to appeal against the same to the Court of Appeal but has been locked out of time, and has hereby filed an application dated 3rd September 2020 seeking extension of time for giving notice of intention to appeal.

The case for the Applicant

5. The Appellant argues that following delivery of the Judgement, it was difficult for her Advocates to reach her owing to the travel restrictions imposed by the Government to alleviate the spread of the COVID 19 pandemic. She argues that she could not communicate and get feedback on the outcome of the appeal. However, when she learned of the outcome, she has taken this earliest opportunity to seek for enlargement of time. She further argues that the Deceased had children who are minors and she is only seeking justice for them because he was the sole breadwinner.
6. She filed a further affidavit sworn on 1st December 2020 wherein she rebuts some of the arguments raised by the Respondents. She avers that the Judgment of the Court did not indicate that it was delivered in Court and it does not indicate any party who was present in Court during its delivery. She annexed copies of the draft Notice of Appeal. She avers that she only learnt of the outcome of the Judgement on 1st September 2020. With respect to the fact that the decretal amount had already been paid, she avers that the law allows for the Respondents to pay the decretal amount and it was within their right since they never disputed that they were involved in the accident.
7. In her submissions, the Appellant restates the facts as pleaded in the affidavits. She urges that pursuant to Section 7 of the Appellate Jurisdiction Act, the High Court indeed has powers to extend the time for giving notice of intention to appeal, notwithstanding that the time for giving such notice may have already expired. She relied on the case of ***Edward Njane Ng'ang' & Another v Damaris Wanjiku Kamau & Another Civil Appeal No. 8 of 2013 (2016) eKLR*** where the Court allowed for extension of time since the mistake was not attributable to the Applicant.

The Respondent's case

8. The application is opposed by the Respondents. By the replying affidavit sworn by the 1st Respondent on 11th November 2020, the Respondents argue that no sufficient cause and/or reasons have been advanced by the Applicant to warrant the extension. They contend that the excuse on travel restrictions does not hold water because at the time of delivery of the Judgment, the said travel restrictions had since been eased. They contend that the Judgment having been delivered in open court, this confirms that at the time, the lockdown/restriction measures had indeed been eased. They also contend that even with the restrictions to minimize the spread of COVID 19, court operations were still ongoing through technological platforms such as Microsoft Teams/Zoom including on-line filing and thus no excuse for failure to file the Notice of Appeal on time. They contend further that no draft Notice of Appeal has been annexed to the application and that the Appellant has not disclosed the exact time, day and month when she allegedly learnt of the outcome of the case and that the decretal sum has already been paid to the Applicant and as such, the orders sought have been overtaken by events.

9. In their submissions, the Respondents reiterate the contents of their replying affidavit. They further highlight that in this day and age of technological advancement, the Appellant could have well been reached way of phone call, text message, or other social media platform. They argue that the Applicant's counsel has not tendered any evidence on the number of attempts (if any) that were made to reach out to the Applicant and the mode used thereof. They contend that the Applicant's application is an afterthought. They submit that the Court should dismiss the Applicant's application dated 3rd September 2020 in its entirety with costs.

Issue for determination

10. The question for determination in this application is whether or not this Court should extend the time within which to file a Notice of Appeal.

Determination

11. The procedure with respect to filing an appeal from the High Court to the Court of Appeal is found in the Court of Appeal Rules, 2010. Rule 75 (2) provides that a Notice of Appeal shall be lodged within fourteen (14) days from the date of the decision against which it is desired to appeal. A Memorandum and Record of Appeal should thereafter be filed within sixty (60) days after filing the Notice of Appeal as per Rule 82 (1) (a).

12. In addition to Section 7 of the Appellate Jurisdiction Act which the Appellant has brought her application under, Order 51 Rule 6 of the Civil Procedure Rules provides for extension of time even where the application to extend is brought after the lapse of the time allowed for the doing the action or taking of the step relevant to the application as follows:

“Power to enlarge time [Order 50, rule 6.]

6. Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

13. Section 95 of the Civil Procedure Act, Cap 21 Laws of Kenya provides the statutory basis for extension of time, and there is power to extend time even where the application to extend is brought after the expiry of any such time, as follows: -

95. Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

14. In similar terms Section 59 of the Interpretation and General Provisions Act provides as follows: -

59. Where in a written law a time is prescribed for doing an act or taking proceeding, and power is given to a court or other authority to extend that time, then, unless a contrary intention appears, the power may be exercised by the court or other authority although the application for extension is not made until after the expiration of the time prescribed.

15. In the case of *Omar Shurie v. Marian Rashe Yafar (Civil Application No. 107 of 2020)* Asikhe Makhandi JA, cited with approval the locus classicus of *Leo Sila Mutiso v. Hellen Wangari Mwangi* (1999) 2EA 231 which laid down the parameters of deciding an application for extension of time to file a Notice of Appeal as follows: -

“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.”

16. In the present case, there has been a delay of about 2 months between the end of the fourteen (14) day period when the Rules allowed for filing a Notice of Appeal and the filing of the instant application seeking extension of time.

17. The explanation given by the Appellant for this delay is that there had been some communication challenges posed by the COVID 19 pandemic and as such, she was not apprised on time of the outcome of the Judgment. She avers that she only came to learn of the Judgment on 1st September 2020. This Court is fully aware of the challenges that the COVID 19 pandemic posed to the administration of justice more so in the months shortly after the pandemic broke out in Kenya. It is a matter for judicial notice in terms of section 60 of the Evidence Act that the National Council for Administration of Justice NCAJ on 15th March 2020 under its ADMINISTRATIVE AND CONTINGENCY MANAGEMENT PLAN TO MITIGATE COVID-19 IN KENYA'S JUSTICE SECTOR resolved to inter alia to scale down the court operations and directed particularly directing that "4. All appeals, hearings and mentions in Criminal and Civil cases in all courts are suspended with immediate effect", and, subsequently, in-person services of the court were halted for a long period thereafter. In Meru Law Courts, business resumed in June, and to mitigate the spread of the pandemic, the e-filing system was introduced which involved Advocates emailing their pleadings and documents to the registry's email address. This being the first time this system was being used, it had its fair share of challenges.

18. It is, however, clear from the Appellant's affidavits, that she was yet to make any attempts to lodge the Notice of Appeal even amidst these troublesome avenue. What the Appellant argues is that there was difficulty in travelling owing to the travel restrictions imposed by the Government in this posed a challenge to filing the Notice of Appeal on time. While it is true that there were travel restrictions, as rightly pointed out by the Respondents, this was eased in July and even then, it was possible to communicate via phone either through calls or texts. This Court also takes cognizance of the fact that where a litigant is represented, it is the Advocate who ordinarily prepares and executes a Notice of Appeal and at the point of execution and filing the same, the physical presence of the Appellant would not be required. The reasons advanced by the Appellant as to the delay are not entirely convincing.

19. However, in exercising its discretion to extend time, this Court is of the view that the delay of 2 months, especially in a period heavily affected by the COVID 19 pandemic is excusable. This Court also takes note of the fact that the subject matter herein involved damages claimed as a result of personal injury where the initial Plaintiff is Deceased. The Appellant claims that the Deceased left behind children for whose benefit she is claiming. Bearing these circumstances in mind, this Court is inclined to allow the extension of time.

20. On the chances of the appeal succeeding if the application is allowed, it is the appellate court which would be competent to consider that limb of considerations, as otherwise it may appear as if the High Court Judge who hears the application for extension of time is sitting on appeal from the judge whose decision is intended to be appealed to the Court of Appeal. The Appellant has not annexed a draft Memorandum of Appeal to her application.

21. This Court however takes note of the fact that even at the Court of Appeal, the single judge exercising discretion to extend time to appeal does not at this stage go into the merits of the Appeal. The court only need be satisfied that there is a serious question to be put before the appellate court at the hearing of the intended appeal. In case of *Omar Shurie Vs Marian Rashe Yafar (Civil Application No. 107 of 2020)* it was pointed out in the case of the appeal court that:

"As regards the chances of success of the intended appeal, it is not my role to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal. In Athuman Nusura Juma v Afwa Mohamed Ramadhan, CA No. 227 of 2015 this Court stated as follows:

"This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word "possibly."

Less still by the High Court judge who is exercising the special powers under section 7 of the Appellate Jurisdiction Act.

22. The applicant is entitled to present to the Court of Appeal, as a second appeal, a question of law as provided under section 72 of the Civil Procedure Act, as follows:

"72. Second appeal from the High Court

(1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely—

(a) the decision being contrary to law or to some usage having the force of law;

(b) the decision having failed to determine some material issue of law or usage having the force of law;

(c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

From the affidavits in support of the application, this court is not able to say that the applicant has no such matter to present to the Court of Appeal and that the appeal is frivolous.

23. On the prejudice to be suffered by the Respondent, this Court finds that the Respondent has not demonstrated any such prejudice. It is argued by the Respondent and it is well admitted by the Appellant that the decretal sum awarded by the Court has already been transmitted to the Appellant. On whether this occurrence should hinder the progression of the intended Appeal, this Court finds otherwise. The deposit

made was merely a natural consequence of the outcome of the Judgement. This, in the respectful view of this court, cannot stand in the way of the applicant's pursuit of justice, access to which is a fundamental right under Article 48 of the Constitution, in the absence of any real prejudice to be suffered.

Orders

24. Accordingly, for the reasons set out above, this Court allows the application dated 3rd September 2020 and makes the following orders: -

i) The time within which the Applicant/Appellant is required to file its Notice of Appeal against the Judgement of this court (Hon. Mr. Justice A. Mabeya) of 25th June 2020 is hereby extended.

ii) The appellant is hereby ordered to file the Notice of Appeal within the next three (3) days.

iii) The costs of this application will abide the outcome of the appeal.

Order accordingly.

DATED AND DELIVERED THIS 25TH DAY OF FEBRUARY 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Norbert O. & Co. Advocates for the Appellant.

M/S Mithega & Kariuki Advocates for the Respondents.