



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 28 OF 2018

HOLIDAY CARS TRAVEL & TOURS LTD.....APPELLANT

VERSUS

BLASIO ESHITEMI LUBANGA.....1ST RESPONDENT

G4S SECURITY SERVICES.....2ND RESPONDENT

ISAAC WANJALA WANYONYI.....3RD RESPONDENT

(Being an appeal against the judgment of Hon. MI Shimenga, Senior Resident Magistrate, delivered on the 1st March 2018 in Butere PMCCC No. 34 of 2016)

RULING

1. The application for determination is the Motion dated 14th September 2020, filed at the instance of the 1st respondent, seeking, principally, that leave be granted to cross appeal out of time. The factual basis is set out in the affidavit of Blasio Eshitemi Lubanga, sworn, on the 14th September 2020, in support of the Motion. There is a reply to the application, by the appellant, vide an affidavit sworn by Lydia Luyali on the 22nd day of October 2020.
2. Directions were given on 15th October 2020, for disposal of the said application by way of written submissions. Both sides complied with those directions by filing their respective written submissions, which I have read through, and noted the arguments made.
3. The 1st respondent submits that the delay in filing the cross appeal was occasioned by his inability to instruct his advocate in good time owing to the Covid-19 pandemic, and the need for him to recover from the amputation of his limb, which was as a result of the injuries he sustained from the road accident, the subject of these proceedings. He wishes to file a cross-appeal to have damages assessed by the trial court reviewed upwards in light of the amputation of his left limb.
4. The appellant, on the other hand, contends the application for expansion of time to file a cross appeal was an afterthought. It is further submitted that the application fails the test of time since the Memorandum of Appeal was lodged herein on 3rd April 2018, and the record of appeal was served by the appellant on the 1st respondent on 13th December 2018.
5. The issue for determination, as arises from the filings, is whether this court should be inclined to grant leave to the 1st respondent to cross appeal out of time.
6. Before I delve into determining the application on its merits, it would be proper to first consider the principles upon which leave to file a cross appeal out of time could be allowed. In *Thuita Mwangi vs. Kenya Airways Limited* (2003) eKLR, the guiding principles for determining whether or not a party ought to be allowed to cross appeal out of time were said to comprise of consideration of the reason for the delay, the length of the delay, the arguability of the appeal, and the prejudice likely to befall the respondent should the applicant be granted leave to cross appeal.
7. On the reason and length of delay, the court in *Stanley Kahoro Mwangi & 2 others vs. Kanyamwi Trading Company Ltd* (2015) eKLR, said: -

“The principles guiding the court on an application for extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour.”

8. The 1st respondent has indicated that the delay in filing a cross appeal was occasioned by the amputation of his leg, and it took time for the wound to heal hence delay in giving instructions to his advocate to lodge a cross appeal. The appellant on the other hand has contended that the delay of two and half years is inexcusable and inordinate. The 1st Respondent's leg was amputated sometime after the 26th day of November, 2018, and I am inclined to believe that was possible that it took time to heal resulting in a delay on his part in instructing his advocate to file a cross appeal.

9. It is the duty of this court, as espoused under section 1B of the Civil Procedure Act, to ensure that justice is administered. In the instant case, it is my view that justice should be at the forefront. I have perused the draft memorandum of cross appeal attached to the affidavit sworn by the 1st respondent in support of the Motion. I am persuaded that it raises arguable grounds of appeal, which he ought to be given an opportunity to ventilate.

10. The law is silent on what amounts to unreasonable delay. Consequently, discretion vests with the court, bearing in mind the prejudice likely to be occasioned on the other party. It was said, in *Njoki Gachugu & 3 others vs. Francis Githi & 3 others* (1977) eKLR, that:

“The question of delays in bringing civil actions to speedy conclusion was exhaustively considered by the Court of Appeal in England in Allen vs Sir Alfred McAlpine & Sons [1968] 1 All ER 543 where it was held that when the delay is prolonged and inexcusable, and is such as to do grave injustice to the one side or the other or to both, the Court may in its discretion dismiss the action straightway. On the other hand this power should be exercised unless the Court is satisfied: (1) that the default has been intentional and contumelious e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party”.

11. I am persuaded that the 1st Respondent's Motion dated 14th September, 2020 has merit. The appellant has not demonstrated the prejudice that would befall it if the application is allowed, I shall accordingly exercise discretion and allow the 1st Respondent to file and serve a cross appeal in the next twenty-eight (28) days.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 19th DAY OF March 2021

W MUSYOKA

JUDGE