



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

MISCELLANEOUS APPLICATION NO. 42 OF 2020

GERALD ODHIAMBO LAMBA.....1ST APPLICANT

PATRICK VAATI MUTHOKA.....2ND APPLICANT

-VERSUS-

FREDRICK MUEMA KIVUVO.....RESPONDENT

RULING

1. By a Notice of Motion dated 23rd November, 2020, the applicants herein seek the following orders:

1) SPENT.

2) **THAT** this honourable court be pleased to extend time and grant leave to the Applicants to lodge a Memorandum of Appeal out of time against the judgement and/or decree entered against the Applicants by Hon. M. E. Analo Resident Magistrate in Machakos Chief Magistrate's Court Civil Suit No. 749 of 2018 delivered on 5th August, 2020.

3) SPENT.

4) **THAT** this honourable court be pleased to stay execution of the judgement and/or decree in Machakos Chief Magistrate's Court Civil Suit No. 749 of 2018 delivered on 5th August, 2020 pending the hearing and determination of the intended appeal.

5) SPENT.

6) This Honourable Court be pleased to issue any other orders that it may deem fit, just and expedient in the interest of justice.

7) **THAT** the costs of this Application be in the cause.

2. The application was supported by an affidavit sworn by **Njoroge Caroline**, an advocate practising in the firm of Kimondo Gachoka & Co. Advocates for the applicants.

3. According to the deponent, on 5th August, 2020 judgement was delivered against the Applicants herein where in the Applicant was found 100% liable and the Plaintiff was awarded General Damages of Kshs 100,000/- plus costs and interests. Though the Applicants were duly informed by their advocate of the said decision, by the time the Advocate received instructions to lodge an appeal against the same, after consultation, the time limited for the same had already lapsed.

4. The applicant was apprehensive that due to the threat of imminent execution, this application would be rendered nugatory yet according to them, they have proper grounds of appeal which are merited, arguable and raise pertinent points of law and fact. The applicant disclosed that it was ready, able and willing to furnish such reasonable security as this court may deem fit and undertook to provide a bank guarantee for the entire decretal amount pending the outcome of the intended appeal, which according to the applicant was based on quantum. It was the applicants' case that the Respondent stand to suffer no prejudice or damage that is incapable of being compensated by costs. On the other hand the applicants stand to suffer prejudice and irreparable substantial loss since there is a likelihood that they will not recover the decretal sum once the same is paid over to the Respondent.

5. In opposing the application, the Respondent averred that on 10th August, 2020, following the handing down of the judgement on 5th August, 2020, his advocate notify the Applicants' advocates of the same and demanded payment of the decretal sum. It was therefore averred that the application which was made 116 days after judgement, some 86 days after the prescribed period of appealing, was made in bad faith and is calculated to cause further delay in concluding the matter by denying him the fruits of his regularly obtained judgement. He deposed that there was an inordinate delay which was not properly explained.

6. It was the Respondent's contention that the amount in issue being Kshs 188,240/- cannot be considered so high as to justify the grant of the orders sought.

Determination

7. I have considered the application and the respective affidavits. Though directions were given on the filing of submissions, none of the parties filed any.

8. 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.

9. Under the proviso to section 79G of the *Civil Procedure Act*, an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so. This must be so since it was held in **Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633** that there is no difference between the words "sufficient cause" and "good cause". It was therefore held in **Daphne Parry vs. Murray Alexander Carson [1963] EA 546** that though the provision for extension of time requiring "sufficient reason" should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of *bona fides*, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.

10. As to the principles to be considered in exercising the discretion whether or not to enlarge time in **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65** the Court set out the factors to be considered in deciding whether or not to grant such an application and these are (i). the 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 a frivolous one which would only result in the 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 favourable exercise of discretion in favour of the applicant.

11. As regards the reason for the delay, there is no attempt to explain the reason why the appeal was not filed within time. It is deposed that the fact of the delivery of the judgment was brought to the attention of the applicant who after further consultation gave instructions to appeal. However, by then the time limited of appealing had lapsed. That is all that is stated in the affidavit. The affidavit in support of the application is itself sworn by counsel for the applicant who deposed that the instructions to lodge the appeal were given after further consultation. The deponent has not stated the source of this information at all. In the case of **Yussuf Abdulgani vs. Fazal Garage (1953) 28 LRK 17**, it was held that an advocate should not swear a belief affidavit on information supplied by his client if his client is unavailable to swear of his own. In the case of **Oyugi vs. Law Society of Kenya & Another [2005] 1 KLR 463, Ojwang, J** (as he then was) stated as follows:

"It is not competent for a party's advocate to depone (sic) to evidentiary facts at any stage of the suit and by deponing (sic) to such matters the advocate courts an adversarial invitation to step down from his privileged position at the Bar, into the witness box. He is liable to be cross-examined on his depositions and it is impossible and unseemly for an advocate to discharge his duty to the Court and to his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case. Besides that, the counsel's affidavit is defective for the reason that it offends the proviso to order 18, rule 3(1) by failing to disclose who the sources of his information are and the grounds of his beliefs."

12. In the case of **Small Enterprises Finance Co. Ltd. vs. George Gikubu Mbutia Nairobi HCCC No. 3088 of 1994** it was held that advocates should not depose to contested matters of facts.

13. In the premises, I agree that no sufficient reason has been given for the delay. As the applicant has failed in satisfying the conditions for extension or enlargement of time to file an appeal or admission of this appeal out of time, the said limb of the application must fail and without an order extending time the stay cannot be granted in vacuum and must similarly collapse.

14. Consequently, the Motion on Notice dated 23rd November, 2020 is dismissed with costs.

15. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS DAY OF 15TH DAY OF APRIL, 2021.

G V ODUNGA

JUDGE

Delivered in the absence of:

Miss Kabuteh for Miss Wanjiku for the Applicant

Miss Kamau for the Respondent

CA Geoffrey