



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 164 OF 2009**

**BHAVEN HARJIVAN KURJI.....PLAINTIFF**

**-VERSUS -**

**TRIVEN SUSHIL LILADHAR.....RESPONDENT**

**RULING**

The application dated 14<sup>th</sup> December, 2020 seeks the following orders:-

- 1. THAT the Honourable court be pleased to extend time or lodging of a Notice of Appeal and Record of Appeal against the Judgment of the High Court of Kenya at Nairobi delivered by Lady Justice L. Njuguna on 29<sup>th</sup> October, 2020.**
- 2. THAT the costs of this Application be provided for.**

The application is supported by the applicant's advocate's affidavit sworn on 14<sup>th</sup> December, 2020 and the applicant's affidavit sworn on 25<sup>th</sup> January 2021 and Supplementary affidavit sworn on 19<sup>th</sup> March 2021. The respondent filed a replying affidavit sworn by John Maina Ngechu advocate on 18<sup>th</sup> January, 2021 and a supplementary affidavit sworn on 1<sup>st</sup> February, 2021. The application was determined by way of written submissions.

Counsel for the applicant submit that the High Court has jurisdiction to extend time for filing a notice of appeal to the Court of appeal as stated in Section 7 of the Appellate jurisdiction Act which states:-

**“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.”**

It is submitted for the applicant that he travelled to India for his own and his brother's medical treatment. The applicant's brother was to undergo an operation to treat cancer and medical documents to that effect were annexed to the affidavits in support of the application. According to the applicant, since he was out of the country, his advocate could not have acted without his instructions. The applicant maintain that he paid the sum of Kshs.3,616,795 out of the computed decretal sum of Kshs.4,204,371. The payment was acknowledged on account and on without prejudice basis. Further, the payment was made after the current application had been filed. Counsel for the applicant disputes the contention that the applicant has fully settled the decree. Reliance is made to the case of **MULTI MEDIA UNIVERSITY OF KENYA –VS- KENYA UNION OF ENTERTAINMENT AND MUSIC INDUSTRY EMPLOYEES (2019) eKLR** which cited the unreported case of **LEO SILA MUTISO –V- ROSE WANGARI MWANGI**, Court of Appeal, (Civil Appeal No. Nairobi 257/1997) where the court held:-

**"It is now settled that the decision whether or not to extend the time of 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 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.”**

On the issue of the period of delay counsel for the applicant relies on the case of **ANDREW KIPLAGAT CHEMARINGO –VS- PAUL KIPKORIR KIBET (2018) eKLR** where the court held:-

**The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour.**

**There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”**

Counsel for the applicant contend that the reason for the delay has been sufficiently and reasonably established. The plaintiff had travelled outside the court’s jurisdiction for medical purposes. The application was filed forty-six (46) days after the expiry of the required timeline and the delay has been explained.

The application is opposed. Counsel for the respondent submit that neither the applicant nor his advocate has disclosed why a notice of appeal which attracts minimal court fees and is a routine document was not filed. The applicant had an opportunity to instruct his advocate before travelling to India. Counsel for the applicant sent e-mail to his client on 4/11/2020 and was responded to on 11/12/2020. The medical records show that the applicant was only hospitalized for one day and was discharged on 17/11/2020. As at 7/12/2020 counsel for the applicant knew that time to lodge an appeal had lapsed.

It is further submitted that the power to enlarge time is a discretionary power that must be exercised judiciously, and upon reason rather than arbitrarily, capriciously on whim or sentiment. Counsel referred to the case of **JULIUS KAMAU KITHAKA –VS- WARUGURU KITHAKA NYAGA & 2 OTHERS (2013) eKLR** where it was held:-

**“The discretion under Rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in 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 and interested parties if the application is granted, and whether the matter raises issues of public importance.”**

It is the respondent’s position that the applicant was notified by his advocate about the court’s judgment on 4/11/2020 and the judgment was sent to him on 20/11/2020. The applicant did not respond to his advocate and has not offered any reason for the delay that would meet the required standard to warrant the court exercising its discretion in his favour.

The issue for determination is whether the court should extend the time for filing a notice of Appeal to the Court of Appeal. This issue has been the subject of several litigation and the factors or principles to be considered by the court when dealing with such an application are well settled. In the case of **CHUMO –V- KOECH (1991) KLR II**, Justice Gachuhi (JA) (as he then was) held:-

**“Under rule 4 of the Court of Appeal Rules, the Court has unfettered discretion to enlarge time but it has to be exercised judicially.”**

The Court of Appeal once again in the case of **GITETU –V- KENYA COMMERCIAL BANK LIMITED (2009) KLR 545** held as follows:-

**“For an applicant to succeed in an application under Rule 4 of the Court of Appeal Rules, he has to satisfy to the Court that**

- a) the delay was not inordinate and has been sufficiently explained;**
- b) the intended appeal was arguable; and**
- c) prejudice would be caused to the respondent if the application to extend time was allowed.**

**The unfettered discretion granted under Rule 4 to extend the time for lodging an appeal is only subject to it being granted on such terms as the Court may think just. The Court could grant extension of time on the basis that an intended appeal was an arguable one and it would therefore be wrong to shut an applicant out of Court and deny him the right of appeal unless it could fairly be said that his action was, in the circumstances, inexcusable and that his opponent was prejudiced by it.”**

In the case of **SALAT –V- INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 7 OTHERS (2014) KLR – SCK (Digest -3) at 941**, the Supreme Court at paragraph 17 stated as follows:-

**“The Court ought to consider the following principles in exercising the**

**Discretion to extend time for filing an appeal: exercising the discretion to extend time for filing an appeal;-**

- 1.Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court.**
- 2.A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
- 3. Whether the court ought to exercise the discretion to extend time, is a consideration to be made on a case to case basis;**
- 4. Whether there is a reasonable reason for the delay, which ought to be explained to the satisfaction of the court;**
- 5. Whether there would be any prejudice suffered by the respondents if the extension was granted;**

**6. Whether the application had been brought without undue delay; and;**

**7. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.**

The background to the dispute is that the respondent who is the plaintiff was involved in a road traffic accident on 31<sup>st</sup> December, 2006. He sued the applicant seeking damages arising from the accident. In its judgment delivered on 29<sup>th</sup> October 2020 Justice L.N. Njuguna awarded the respondent a total of Kshs.3,616,738. The applicant was held 100% liable. The replying affidavit of John Maina Ngechu at Paragraph 4 confirms that the total sum of Kshs.3,616,798 has been paid and there is an acknowledgement receipt dated 28/12/2020 indicating that the said amount was received from **ICEA LION INSURANCE COMPANY LIMITED**.

The reason as to why a Notice of appeal was not filed on time is that the defendant had travelled to India with his brother for medical purposes. They traveled before the delivery of the Judgment. Time to file the notice of appeal lapsed on 11<sup>th</sup> November, 2020. The first affidavit in support of the application was sworn by Christine Adhiambo Oraro advocate who averred at paragraph 11 that her client was at the time of swearing the affidavit on 14<sup>th</sup> December, 2020 still hospitalized in India.

Counsel for the respondent is of the considered view that although the applicant was out of the country, he was notified about the entry of judgment via email and it would have taken little effort to simply instruct his advocate to lodge the notice of appeal. In his further affidavit that was sworn on 25<sup>th</sup> January, 2021 after the applicant had returned to Kenya from India, it is averred that the applicant travelled back on 28<sup>th</sup> December, 2020 and that while in India he was able to communicate with his advocate on 1<sup>st</sup> December, 2020. The application was filed on 14<sup>th</sup> December, 2020.

From the rival submissions and affidavits, it is not disputed that the plaintiff travelled to India and was not in the country when the Judgment was delivered. The applicant did not travel as a tourist. He travelled for purposes of seeking medical attention for himself and was also a guardian to his brother who equally required medical treatment. I am satisfied that although the applicant could access his e-mail and give instructions on the filing of a notice of appeal, he required to discuss the issue with his advocate either physically or through other mode of communication. The application was filed while he was out of the country and this must have been done after instructions were given to the advocate. The mere fact that a notice of appeal can be filed at minimal cost and soon after the delivery of a judgment cannot be a reason to stop parties from synthesizing the decision and decide to appeal against it after the expiry of the fourteen (14) days period. That is why the law anticipated the possibility of a litigant failing to lodge a notice of appeal within the permitted period of 14 days.

I do find that the reason for the delay is sufficient to draw the attention of the court's discretion. The plaintiff will not suffer any prejudice as most of the decretal sum has already been settled.

The upshot is that the application dated 14/12/2020 is merited and is granted as prayed. The applicant to file his notice of appeal within 14days hereof. Parties shall meet their respective costs of the application.

**DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF JUNE, 2021**

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**S. CHITEMBWE**

**JUDGE**