



**REPUBLIC OF KENYA**

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

**MISC. APPLICATION NO. E447 OF 2020**

**JOHN MWITI JULIUS.....APPLICANT**

**= VERSUS =**

**DANIEL MUSYOKA KITEMBUI**

**(Suing as Legal Representative and**

**Administrators of the Estate of JOSEPH**

**KITEMBUI MUSYOKA.....RESPONDENT**

**RULING**

The Applicant filed a Notice of Motion dated 27th October, 2020 under the provisions of Sections 3A, 79 G and 95 of the Civil Procedure Act, Cap 21, Order 22 rule 22, Order 42 Rules 6, Order 51 Rules 1 and 3 of the Civil Procedure Rules, 2010 and all other enabling provisions of the Law. The prayers before this court for determination are;

**1. Spent**

**2. THAT this Honourable Court be pleased to grant leave to the Applicant to appeal out of time against the Judgment of the Honourable S.G. Gitonga (Mrs.) Resident Magistrate in Milimani Commercial Courts CMCC No. 931 of 2018 delivered on 1st November, 2019.**

**3. THAT this Honourable Court be pleased to stay execution of the judgment and decree in Milimani Commercial Courts CMCC No.931 of 2018 delivered on 1<sup>st</sup> November, 2019 pending the hearing and determination of the application herein.**

**4. THAT the costs of this Application abide the outcome of the intended Appeal.**

The application is premised on the grounds on the face of the application and the supporting affidavit of Pauline Waruhiu, Deputy Claims Manager at Directline Assurance Company Limited, sworn on 27th October, 2020. The Respondent opposed the application through her Replying Affidavit sworn on 27th November, 2020. On 2nd December, 2012, the parties agreed to have the application canvassed by way of written submissions. Subsequently, the Applicant and the Respondent filed their submissions dated 15th December, 2020 and 6th February, 2021 respectively. The Applicant being aggrieved with the judgement of Honourable S.G. Gitonga (Mrs.) Resident Magistrate in Milimani Commercial Courts CMCC No. 931 of 2018 delivered on 1st November, 2019 filed the present application together with a Memorandum of Appeal dated 27th October, 2020.

In the application before this court, the Applicant is seeking leave to appeal against the trial court's judgment out of time. The Applicant contends that this application has been brought without unnecessary delay and argues that the appeal has a high chance of success and if it succeeds then it would be rendered nugatory if the stay is not granted. It is the Applicant's averment that this application should be allowed in the interest of justice and that the Respondent will not suffer any prejudice or any damage that cannot be compensated by way of costs.

It is the Applicant's assertion that the delay in filing the Memorandum of Appeal is not so inordinate as to be inexcusable as the same was filed at the earliest opportune time. The Applicant cited the case of **Imperial Bank Limited (In Receivership) & Another v Alnashir Popat & 18 Others [2018]eKLR** where the Court held that a 10 days delay was not inordinate delay. The Applicant's aver that the delay was occasioned by the fact that the trial court did not issue a Judgment Notice and that they knew about the judgment only after receiving a demand letter from the Respondent dated 17th July, 2020. The Applicant submit that after receiving the Demand Letter they embarked on tracing the file and due to the effects of Covid, the file was finally traced on 23rd October, 2020 and subsequently on 27th October, 2020 after receiving instruction, the present application was filed. The Applicant submits that he has given satisfactory reasons for the delay and relied case of **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & Another [2018] eKLR** where the court found that delay

occasioned by the time taken requesting for proceedings as sufficient reason. Additionally, the court in the case of **Hellen Wanza Maeker V Bernard Njoroge Gathua & Another HCC Misc. Application No. 286 of 2009** held that delay contributed by the court registry to provide typed proceedings was excusable. That it was only until the end of September that the Applicant managed to get a copy of the judgement and immediately filed this application together with a draft Memorandum of Appeal. The Applicants made reference to the case of **Hellen Wanza Maeker, Bernard Njoroge Gathua & Another HCC Miscellaneous Application 286/2009** where the court held that delay is excusable where it is contributed to by delay by the court registry to provide typed proceedings.

The Applicants have further submitted that the Respondent has not shown how he will be adversely affected or prejudiced if the Applicants are allowed to appeal out of time and have cited the ruling of Ngugi J. in **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another (2018) eKLR**, the Applicants have also submitted that they are willing to furnish security in terms of a Bank Guarantee for the entire decretal amount. They have referred to the case of **Selestical Limited vs. Global Rock Development (2015) eKLR** where the Judge held that the court has unfettered discretion to issue any orders as to preserve the subject matter pending the hearing of the appeal. It is the Applicant's further submission that their appeal has high chances of succeeding owing to the fact that what is being challenged is the liability of the Applicant which was placed at 100% despite the fact that there was no eye witness and the Deceased earning of Ksh. 30,000 which was not proved.

The Applicant has cited the case of **Julius Kamau Kithaka v Waruguru Kithaka Nyaga & 2 Others, CA. No. 14 of 2013** where the court held that the full court as opposed to a single judge has the role of definitively determining the merits of an appeal once placed before it. Additionally, in the case of **Athuman Nusura huma v. Afrva Mohamed Ramadhan, CA No 227 of 2015**, the Court held that;

***"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".***

The Respondent on the other hand submits that the supporting affidavit of Pauline Waruhiu, is fatally defective and incompetent having been sworn by a stranger to the proceedings and as such should be struck out. It is the Respondent argument that the supporting affidavit of Pauline Waruhiu who claims to be a Deputy Claims Manager at Directline Assurance Company Limited has not shown the nexus between the said insurance company and the Applicant herein. The Respondent further submit that the presence of Kimondo Gachoka & Co. Advocates in this matter has not been explained since the letter annexed to the supporting affidavit was addressed to Kairu & McCourt, who were the plaintiff's advocate in the trial court.

It is the Respondent's submission that the Applicant has failed to prove that the delay herein was occasioned by failure by the court to notify him of the judgment date and the difficulty in tracing the court file. The Respondent avers that the Judgment date was given in court in the presence of the applicant and that the applicant has not put forth any evidence showing their effort in tracing the court file. The Respondent contends that the Applicant has not met the threshold as provided for under Order 42 Rule 6(2) of the Civil Procedure Rules. He asserts that the Applicant has not demonstrated what substantial loss he is likely to suffer and that a nine (9) months delay is inordinate and inexcusable. The Respondent has further highlighted that the parties via a consent recorded in court on 9th July, 2019 agreed on apportionment of liability in the ratio of 75%;25% in favour of the Respondent and that the same should not be an issue for determination in the suit. It is the Respondent's further submission that the court in balancing the interests of the parties should order the Applicant to pay Kshs. 2,000,000 to the Respondent and deposit the balance in an interest earning account in the name of both advocates as a condition for getting the order of stay.

#### **Analysis/Determination:**

On the first issue, the Respondent has argued that *Pauline Waruhiu* is a stranger to the proceedings and did not have capacity to swear the affidavit as the insurance company was not a party to the primary suit. The Applicant did not file a further affidavit to respond to the averments in the replying affidavit nor did they file any submissions in reply. Be that as it may, it is the court's duty to interrogate the issues raised by the respondent to establish whether or not they are factual and whether the said affidavit is incurably defective. In the supporting affidavit is sworn by Pauline Waruhiu, she describes herself as:

***"...the Deputy Claims Manager at Directline Assurance Company Limited who are the insurers of the motor vehicle registration number KAZ 748J and at whose instance this claim is being defended and i am conversant, authorized and competent to swear this affidavit by dint of our rights of subrogation and the right to defend, settle or prosecute claims filed against or in the insured's name as per the policy of insurance."***

It is not disputed that the deponent is indeed a Deputy Claims Manager working with the insurance company that had insured the motor vehicle that was involved in the fatal accident which was the subject matter of the primary suit. Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act, Cap 405 provides that an insurance company which has issued a motor vehicle policy against 3<sup>rd</sup> party risks is under a mandatory legal duty to satisfy any judgment entered in favour of a 3<sup>rd</sup> party against the owner of the motor vehicle in question who is its insured while Section 10 (2) of the same Act provides that the insurer will only be liable to satisfy the judgment entered against its insured if it was notified of the proceedings in which the judgment was delivered before or within 14 days of the commencement of the proceedings.

This court is of the view that the above sections of the law bestows upon the insurer an interest in the proceedings, judgment, appeal and any other application thereof because it is required by law to satisfy the judgment obtained against its insured. Therefore, as an officer of the insurer, it goes without saying that Pauline Waruhui had knowledge and was conversant with the proceedings in the trial court. In view of the foregoing, this court finds that the supporting affidavit is competent and properly before the court, the respondent's claim that the supporting affidavit is incompetent for want of capacity by the deponent is not well founded and cannot be sustained.

Section 79G of the Civil Procedure Act is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. The section provides as follows:

**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.**

Some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time were suggested by the Court of Appeal in *Mwangi v Kenya Airways Ltd [2003] KLR*. They include the following:

- i) The period of delay;**
- ii) The reason for the delay;**
- iii) The arguability of the appeal;**
- iv) The degree of prejudice which could be suffered by the Respondent if the extension is granted;**
- v) The importance of compliance with time limits to the particular litigation or issue; and**
- vi) The effect if any on the administration of justice or public interest if any is involved.**

The judgment was delivered on 1<sup>st</sup> November, 2019 while the present application was filed on 28<sup>th</sup> October, 2020, almost Nine (9) Months after the lapse of the 30 days stay of execution granted by the trial court. The Applicant has submitted that the delay was occasioned by the failure of the court to issue Judgment Notice and the delay in tracking the file at the registry. The Respondent however objected to the reason that the judgment notice was not issued as the judgment date was given in court in the presence of both parties. Without the benefit of the trial court proceedings and judgment, this court is left to interrogate the pleadings before it. It is evident that the judgment of 1<sup>st</sup> November, 2019 was delivered in the absence of the Applicant, with no contrary evidence on whether a Judgment Notice was issued, this court is persuaded by the Applicant's reason. Further, the fact that Counsel for the respondent called for the decretal sum through a letter dated 17<sup>th</sup> July 2020 gives credence to the applicant's contention that he was not aware of the judgment. It is most likely that counsel for the respondent also came to know about the judgment in July 2020.

It is not disputed that the Applicant became aware of the Judgment after the letter from the Respondent dated 17<sup>th</sup> July, 2020. However, he has not submitted any evidence before this court to show the steps he had taken to trace the file. The Applicant averments that the two (2) months delay was occasioned by the effects of Covid which restricted movement in the registry is denied as the first case of Covid in Kenya was confirmed on 12<sup>th</sup> March, 2020. I am of the view that there was indolence on the part of the Applicant in bringing the present application. However the same is not so inordinate as the delay was partly occasioned by the court.

A perusal of the draft Memorandum of Appeal reveals that the Applicant is dissatisfied with the quantum as awarded by the trial court but not the liability as the parties had entered into a consent on the 9<sup>th</sup> July, 2019. The decretal amount is Kshs. 3,174,337.50 which is quite substantial, the Applicant argues that the deceased's earning of Kshs. 30,000 (as awarded by court) was never proved and that the award of Kshs. 60,000 on account of pain and suffering was high considering the deceased died on the day of the accident. These are valid grounds of appeal and I am convinced that the appeal is arguable and should therefore be allowed to have its day in court.

The application is also seeking orders of stay of execution. The applicant is ready, able and willing to furnish reasonable security. The appeal involves assessment of damages. Although an order for payment of part of the decretal sum to the respondent is sometimes issued, the case involve a fatal accident claim and in my view the deceased's estate should benefit from a full and final payment instead of partial compensation.

In the circumstances, I do find the application dated 27<sup>th</sup> October, 2020 merited and the same is granted in the following terms:-

1. The Applicant to file and serve his Memorandum of Appeal within 14 days from the date of this ruling.
2. The applicant to either deposit the entire decretal sum in a joint interest earning account of Counsel for both parties or provide a bank guarantee for the entire decretal sum within sixty (60) days hereof.
3. The costs of the application shall abide the outcome of the appeal.

**DATED AND SIGNED AT NAIROBI THIS 30<sup>TH</sup> DAY OF JUNE, 2021.**

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**S. CHITEMBWE**

**JUDGE**