



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**MISC. CIVIL APPLICATION NO. 104 OF 2020**

**GEOFFREY MWAURA KARANJA.....APPLICANT**

**VERSUS**

**RWAKEN INVESTMENT COMPANY LIMITED.....RESPONDENT**

**RULING**

1. The applicants filed the amended notice of motion dated 25<sup>th</sup> February 2020 seeking the following orders:

i. The honourable court be pleased to enlarge the time allowed for filing an Appeal and grant the appellant/applicant leave to file the draft memorandum of appeal annexed to his supporting affidavit.

ii. The cost of this application be in the cause

2. The application is premised on the grounds on its face and the supporting affidavit of the applicant. The main ground is that the applicant was never informed by his advocate on record of the delivery of the Judgement on 21<sup>st</sup> December 2018. That he only learnt of its delivery in July 2019, when his then advocates informed him of a cheque which he went to collect.

3. He depones that he was given the cheque by the advocate's secretary who informed him that he could file an appeal if he was dissatisfied. By that time his then advocate was not present and efforts to locate him were futile. On 12<sup>th</sup> October 2019 he sent his daughter to the civil registry Milimani Chief Magistrate's court to inquire about his matter. It is then that she met his current advocates who later took up the matter on his behalf and filed the appeal on 13<sup>th</sup> November 2019.

4. He explains that he suffered serious injuries which have left him crippled and without the full use of one of his arms. This he says is the reason he did not follow up on the timeous filing of the appeal.

5. The respondent filed a replying affidavit dated 2<sup>nd</sup> June 2020 by Edith Wambui an advocate. She avers that the applicant has not satisfactorily explained his delay in filing an appeal. She depones that the respondent paid out through its insurance company the compensation of Kshs. 1,210,670/= on 29<sup>th</sup> January 2019 and costs on 7<sup>th</sup> February 2019 (EW 2 (a) and (b)).

6. She further depones that the applicant has not demonstrated any mistake on the part of his former advocates. She adds that the applicant as the plaintiff had a duty to regularly follow up on his matter with his advocates. She wonders why he had not used the daughter to follow up the matter with the said advocates. She urged the court not to excuse the applicant for his indolence.

7. The application was disposed of by written submissions. The applicant's submissions are dated 7<sup>th</sup> June 2021. Mr. Mwangi for the applicant referred the court to Order 50 Rule 4 of the Civil Procedure Rules and submitted that after taking it into account the applicant in filing his application on 21<sup>st</sup> February 2020 was late by 368 days. He again referred to the case of **Shah Vs Mbogo [1967] E.A** as quoted with approval in **Python Waweru Maina V Thuka Mugira [1983] eKLR**. He then submitted that from the applicant's explanation the delay in filing the memorandum of appeal was beyond his control and as shown in his supporting affidavit he has been a diligent litigant.

8. On chances of success he has submitted that the award by the trial court was too low for the nature of injuries suffered. He referred the court to the cases of **Martin Kidaki V Wilson Simiyu Siambi [2014] eKLR** and **Zipporah Nangila V Eldoret Express Limited and 2 others [2016] eKLR** where bigger awards had been given. He therefore submits that the appeal is meritorious. He adds that the respondent will not be prejudiced since they will be allowed to defend the appeal.

9. The respondent's submissions are dated 18<sup>th</sup> June 2021. M/s Wainaina for the respondent submitted that time lines must be adhered to and

extension of time is not a right of a party. On this she referred to the case of **Salt V Independence Electoral Commission and 7 others [2014] KLR (SCK)** and section 79G of the Civil Procedure Act. She also submitted that Order 50 Rule 4 of the Civil Procedure Rules cannot contradict the provisions of Section 79 of the Civil Procedure Act as it is subsidiary to the Act. On this she referred to the case of **Wavinya Ndeti Vs Independent Electoral and boundaries Commission (IEBC) and 4 others [2014] eKLR**.

10. It is her submission that the applicant has not given good and sufficient reason for the delay in filing the appeal and application. She cites the contradictions in the dates of receipt of the cheque as a sign of dishonesty on the part of the applicant. Further that despite his averment that he instructed his present advocates to file the appeal in November 2020, the application was only filed in February 2021. Counsel gave a chronology of dates preceding the Judgment saying the applicant never followed up the matter to know its position and he can't blame his former counsel for this. She relied on the following cases:

**i) Simon Wanyiri and 5 others V Catholic Diocese of Nyeri and 4 others [2018] eKLR**

**ii) Reliance Bank Ltd (in liquidation) and Grandways Ventures Ltd & 2 others [2007] eKLR** and submitted that the applicant had not given sufficient explanation for the day.

11. It is counsel's submission that the present application was filed way after the delivery of Judgment and the alleged receipt of the cheque. The explained delay she contends is inordinate, unreasonable and inexcusable.

12. On whether the respondent will be prejudiced if the application is allowed. Counsel relied on the case of **Ruth Shikanda (suing as Legal representative on behalf of the Estate of Agnes Ayori Ashiemi (DCD) V Sibed Transport Company Ltd [2020] eKLR** where it was stated;

*".....It is clear to this court that the applicant, after receiving and utilizing the decretal sum plus costs as assessed by the court is when she now purports to challenge quantum of damages awarded to her. That in my humble view is an afterthought and an act of bad faith. Litigation must come to an end and especially where decree has been settled without any protest or contestation from the decree holder..... The fact that the period for appeal ended during the covid-19 pandemic on 27/3/2020 is in itself no excuse for the applicant to wait until she has been paid all the decretal sum and eight months after the judgment and settlement of decree to seek to challenge the judgment of the trial court..... I find that the application for leave to appeal out of time is made with inordinate delay and the delay is not satisfactory explained (sic) to the court. I also find no good or sufficient reason to grant the orders sought which will set a very bad precedent to the extent that parties whose decrees are settled will keep returning to court long after settlement to ask for more by way of an appeal"*

She submits that it would be a great prejudice to the respondent who has settled the decretal sum to be dragged into further litigation.

13. On arguability of the appeal she contends that the award by the trial court was arrived at after scrutiny of the evidence before it and was commensurate to the injuries sustained.

### **Analysis and determination**

14. I have duly considered the application, grounds, affidavits, annexures, both submissions, cited authorities and the Law. The issue for determination is whether the applicant has met the threshold for grant of leave to file appeal out of time.

15. The principles that guide a court in considering an application for leave to file an appeal out of time have been stated in several decisions. See **Mwangi V Kenya Airways Ltd [2003] KLR**. In the case of **Stanley Kahoro Mwangi & 2 others v Kanyamwi Trading Company Ltd [2005] eKLR** the Court of Appeal stated thus:

*"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..... 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 exercised. There have been numerous Judicial pronouncements on this precise point. Aganyanya, JA (as he then was) in **Monica Malel & another v R- Elodoret Cicil Appl. No NA 246 OF 2008**, stated:*

*"When a person is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show.... the applicants are not quite sure of why the delay in filing the notice of appeal within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay."*

16. It is not disputed that the Judgment, the subject of this application was delivered on 21<sup>st</sup> December 2018, and the applicant filed this application on 21<sup>st</sup> February 2020. He blames his former advocates for not updating him on the delivery of the Judgment. He claims to have learnt of the delivery of the Judgment in July 2019 and that is when a cheque was handed over to him. The respondent has provided before this court two documents (Annexures EW 2(a) & (b) ) confirming that Njoroge O. Kimani & Company advocates for the applicant were paid Kshs. 1,210,670/= & Kshs. 131,440/= on 29<sup>th</sup> January 2019 & 7<sup>th</sup> February 2019 respectively.

17. It was incumbent upon the applicant to prove before this court when he indeed received the cheque. The cheque must have been accompanied by a forwarding letter. He could even have availed a copy of his bank statement to show when the money was paid. This was

all necessary because he had deponed that he only learnt of the delivery of the Judgment when he received the cheque in July 2019.

18. The applicant even after giving himself a further 30 days under Order 50 Rule 4 of the Civil Procedure Rules had a duty to explain why no appeal was filed from 21<sup>st</sup> December 2018 – 21<sup>st</sup> February 2020 when this application was filed. This delay of over one year is indeed inordinate.

19. There is no indication that the Judgment was to be delivered on notice. It follows that the court gave a date for delivery of Judgment and the applicant had a duty to follow up on his matter through his advocates on record. On arguability of the appeal, what the applicant is not happy with is the award. Both parties have cited authorities in support and against the award.

20. Award of damages is a discretionary power of the trial court. I will therefore not use the cited figures to make a determination on the unexplained delay. In the case of **Reliance Bank Ltd (in liquidation)** (supra) **Omolo JA** (as he then was) held:

*“ . . . . even good appeals must be filed within the prescribed periods and when that is not done, some explanations must be given. . . . for the delay.”*

21. I have perused the Judgment by the trial court delivered on 21<sup>st</sup> December 2018 (annexture EW1). On the face of it the learned trial magistrate did what she ought to have done. Even if the applicant was not happy it is clear that he only raised this issue long after having been paid the decretal amount by the respondent.

22. Another issue though not raised by the respondent is that the applicant was represented by the firm of Njoroge O. Kimani & Company advocates up to the finalization of the case in the lower court. The current advocates by virtue of Order 9 Rules 9 & 10 of Civil Procedure Rules should have filed a consent signed by both the former advocates and themselves OR filed an application for leave to come on record. I have not seen any such consent filed nor any prayer seeking leave in the notice of motion dated 25<sup>th</sup> February 2020 for them to come on record.

23. Having considered all the above, I find no merit in the amended notice of motion dated 25<sup>th</sup> February 2020 which I dismiss with costs.

**DELIVERED ONLINE, SIGNED AND DATED THIS 23<sup>RD</sup> DAY OF SEPTEMBER, 2021 IN OPEN COURT AT MILIMANI NAIROBI.**

**H. I. ONG’UDI**

**JUDGE**