REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

MISC. CIVIL APPLICATION NO. 44 OF 2021

ABDALLA ABDURAZAK.....1ST APPLICANT/INTENDED APPELLANT

MOHAMED BAKARIM JAHIB.....2ND APPLICANT/INTENDED APPELLANT

VERSUS

EVERLYNE ACHIENG OLUOCH.....RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Otieno Asewe Advocates for the Applicant

Kimondo Gachoka Advocates for the Respondent

R U L I N G

This application dated 26th May, 2021, is directed against the decision of the Magistrate Court at Kilifi by a session Senior Principal Magistrate (Hon Kituku dated 11.11.2020 in SPMCC No. 226 of 2018, in which he assessed general and special damages of Kshs.182,550/- in favor of the respondent.

This motion is concerned with whether the applicant should be granted leave for an extension of time to commence an appeal against the judgement. Further, to that, whether the Court should order for stay of execution of the decree pending the hearing and determination of the intended appeal.

In support of the application are antecedent facts and litigation history as disposed in the affidavit of one **Fredrick Nyabuti**, stepping as legal counsel for the applicant. By this affidavit the applicant explains that the judgement was delivered electronically though in absence of the parties, the legal advisors **Kimondo & Company Advocates** acknowledged receipt that the firm of **Kimondo Gachoka & Company Advocates** the legal advisors later received instructions from the applicants, to appeal on the said judgement, but at the time of making a move to lodge a Memorandum of Appeal the 30 days stipulated period in the statute had lapsed. That the delay was occasioned by the fact of miscommunication between the applicants and their legal counsel. That those blunders, inadvertence or omissions should not be visited upon the applicants who have an appeal with high chances of success. That the delay here is not inordinate as to be inexcusable. That the applicants stand to suffer prejudice and irreparable substantial loss, as the execution of the decree may render the appeal nugatory.

The Respondent Everlyne Achieng Oluoch vehemently opposed the application as demonstrated in her replying affidavit dated 21.6.2021.

That the issues before the trial court were demonstrated as follows; -

a) That the issue of liability was disposed of by a consent order recorded and adopted by the Court apportioned at 10%:90% as against the applicants.

b) That the trial court vide submissions and their documentary evidence filed by both parties determined the issue of damages as reflected in the judgement compromising of; -

i. General damages at Kshs.180,000/-

ii. Special damages Kshs.2,550/=

iii. Net award less 10% contributory negligence totaled Kshs.164,295/=.

c) That is the gist of the grievance.

The applicant intended to canvass to the High Court it is evidenced in the draft Memorandum of Appeal that the Learned Trial Magistrate erred in fact and law in applying wrong principles governing discretion to assess damages which were inordinately high and therefore an erroneous estimate of the award.

Discussion and Decision

In very lengthy submissions Learned Counsel for the applicants submitted that this is a case in which the Court ought to exercise discretion to guarantee the intended appellants a chance on appeal. Learned Counsel contended that the general principles regarding delay and the doctrine of laches which relate to this cause action should not be strictly construed to deny the applicants an opportunity to canvass the intended appeal. He hinged the explanation and reasons for the delay on the fact that the judgement was read in absence of the parties. Further, that the blunders and mistakes should not be visited upon the applicants or their legal counsel to shut the appeals door for the Court to hear the Memorandum of Appeal on the merits.

Reference to the conditions prevalent to be met by an applicant desirous of such equitable relief, Counsel contended that all of such have been met within the requirements of the law. Further, to that Learned Counsel also submitted on the need to grant stay of execution of the judgement as expressly set out under Order 42 Rule 6 (1) of the Civil Procedure Rules pending the hearing and determination of the intended appeal in support of his submissions, reliance was placed upon the following cases;- **Nicholas Kiptoo Salat V IEBC & 7 Others[2014]eKLR, Joseph Ouma Onditi V Jane Kisaka Mung'au[2018]eKLR, Trattoria Ltd V Joaninah Wanjiku Maina(Nairobi) Misc No.431 of [2013]eKLR, Utalii Transport Co. Ltd & 3 others V NIC Bank Ltd & another[2014]eKLR, Gahir Engineering Works Ltd V Rapid Kate Services & another [2015]eKLR.**

The respondent on her part relied entirely on the affidavit evidence and the facts as extracted from the record.

At the outset I must say that the Court has unfettered discretion to extend time as provided for under section 79 (G), 95 of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules whilst the above provisions give little or no guidance regarding factors to be taken into account in the exercise of discretion. There is now a considerable buoy of case law regarding the exercise of discretion to extend the 30 days' time limits imposed by section 79 (G) of the Act. Such plethora of cases include **Nicholas Kiptoo Arap Salat(supra), Utalii Transport Company Ltd (supra), Gahir Engineering Works Ltd(supra), Leo Sila Mutiso V Rose Hellen Wangari Mwangi [1999]2 EA 231, Edith Gichugu Koire V Stephen Njagi Thuita[2014]eKLR, Paul Wanjohi Mathenge V Duncan Gichane Mathenge[2013]eKLR.** It is trite that a Notice of Appeal shall be made promptly and in any event within 30 days from the date of ruling or judgement of an inferior Court. The proviso in the same section 79 (G) of the Act emphasizes that the Court may upon an application and if it so considers that there is sufficient good reason to do so by extending the period of 30 days for an appeal to be filed.

That is why in the precedent section of cases Courts have accepted that their power to extend time should be exercised within the bounds of well settled principles that articulate the criteria applicable on a case-to-case basis. In my view the reading of the law is that the prima facie rule on appeal outside the prescribed period will not be entertained and it is a pre-condition to the exercise of discretion for the applicant to show good and sufficient reasons for the delay. The count down and operative time for an appeal begins to run immediately the date that impugned decision got communicated to the parties.

In this instant appeal in my view, when the trial magistrate emailed the judgment through their last known email address deposited with the registry. Literally the issue as to whether the judgement was read in absence of the parties properly scrutinized holds little weight as a valid explanation for the delay proffered by the applicant.

Apart from relying on this ground, no credible evidence was ever presented that the judgement was sent to the wrong email address or legal counsel not on record for the applicants. There is no material whatsoever that has been placed before this Court to explain why the applicants in any event sought to file the Appeal out of time. In our jurisdiction it has become the norm for litigants and or their Counsels to routinely file motions for extension of time outside the stipulated statutory limits to perform a particular judicial process and procedure.

It is thus seen from various dicta that Courts are more flexible and lenient in approaching the issue under the aspect of overriding objective in section 1A and 1B of the Civil Procedure Act and in furtherance of the interest of justice many a times the principle that a litigant should not be denied leave to prosecute his case as a result of procedural bar or on the other hand that the fault, mistake or omission of Counsel should not be visited upon a bona fide litigant, ought to be re-examined afresh. As I look at these principles Courts have ignored the fact that litigants have a duty to the Court and their Counsel to perform their part of the bargain necessary for the administration of justice to thrive. Something must be firmly said that litigants are also bound by the Constitution and other Laws of the land by taking steps required by those laws and rules of procedure for a fair, effective and proportionate resolution of disputes.

Indeed, I am of the opinion that the phrase "***The sins of Counsel will not be visited on a litigating party***" in granting application for extension of time is a matter against the letter of the Constitution under Article 50 on reasonable and expeditious trials and Article 159 (2) (c) justice delayed is justice denied. I agree with the persuasive authority in **Ahmed V Trade Bank PLC [1996] 3 NWLR Pl 437, 445** in which the Court stated;

> ***"That the sins of Counsel should not be visited on the litigant is without a doubt a judicial expedience and although conveyance, must not be jeopardized by Indiscriminating applications hence, to be able to sustain the concept, the applicable needs to show that he acted promptly in giving instructions to his solicitor to file the appeal, but that the inadvertence or negligence of the solicitor caused the delay. It is also the law that even when the applicant acted promptly, instructing his Counsel he is still expected to ensure that the Counsel carried out the instructions. This is so because the litigant who fails to ascertain if his counsel has taken the necessary steps to bring his appeal is as well negligent."***

Ali Alaba International Ltd & another Sterling Bank PLC [2018] 14 NWLR (Pt 1639) Eko J.S.C stated; -

> ***"I should think that a time has come for defaulting litigants, relying on error or blunders of their Counsel, to be told, and I hereby tell the appellants herein, that it is not enough for them to rely on the error or blunder of the Counsel of their own choice, when they are in default of statutory prescribed time table for taking steps in litigation, they must show what efforts they made themselves to follow up on the Counsel in order that their Counsel carried out their instructions within the time prescribed."***

I am bound to say that in the interpretation of the proviso of section 79(G), Section 95 and Order 50 Rule 6 of the Civil Procedure Act and Rules, Courts should strive; - for an interpretation that could provide the purpose or object overriding that written law.

As stated correctly in the context the provision in section 79 (G) the power to grant extension of time is purely discretionary and that the burden is on the applicant for such extension to ensue to raise grounds sufficient enough to persuade the court to extend sympathy to him or her. There is no room for the Court to allow an extension of time where the evidence of the applicant is wholly inexcusable and nothing short of a blatant and cautious disregard of the rules.

In the instant case, the extension of non-compliance is egregious because of the lengthy of delay of over 6 (six) months and the reason for such inordinate delay are in consistent with the principles in the cited authorities which guide the Court to exercise such a discretion. This is a delay which is not excusable for no good explanation for the delay has been convincingly and persuasively laid before this Court. The rules and case law provide a framework within which the interest of both parties must not be inevitably disturbed to entitle a greater indulgence to a defaulting party which may significantly prejudice the opponent taking all the considerations together, there is no good reason for this Court to exercise discretion to grant the applicants an extension of time to file an intended appeal.

Finally, in the same motion, the applicant sought stay of execution pending the hearing and determination of the intended appeal. For completeness I mention that both parties rely on the respective affidavits to canvass this relief on stay of execution under order 42 Rule (6) of the Civil Procedure Rules. In addition, the applicant counsel buttressed affidavit in support with skeleton written submissions. The principles applicable to an application for a stay of execution are as stated in **Housing Finance Company of Kenya V Sharok Kher Mohammed Ali Hinji [2015] eKLR, Canter & Sons Ltd V Deposit Protection Fund Board CA No. 291 of 1977, Edward Kamau & another V Hannah Mukiri Gichuki [2015] eKLR, Kenya Tea Growers Association & another V Kenya Planters & Agricultural Workers Union CA No. 72 of 2001**, in which the highlights are that; -

> ***1. While the Court has unfettered discretion to grant a stay and this is entirely clothed within its jurisdiction, the discretion must be exercised judicially and in accordance with well established principles.***
>
> > ***Ø The first principle is as framed that the Court should strive not to deprive a successful litigant of the fruits of his or her judgement by locking up funds by a continuous litigation which prima facie is his or her entitlement following a valid judgement of the Court.***
> >
> > ***Ø The second principle stay of execution can only be granted where the applicant shows sufficient cause.***
> >
> > ***Ø The third principle must be satisfied that substantial loss may result unless the order is made.***
> >
> > ***Ø The fourth principle, the application has been brought without unreasonable delay.***
> >
> > ***Ø Fifth, is a balanced principle, that the Court in exercising discretion ought to see to it that the appeal if successful is not nugatory and if damages are paid out there is no reasonable probability of getting a refund back from the judgement creditor.***
> >
> > ***Ø Sixth the applicant must show any special circumstances that exist for the Court to stop an execution of the judgement.***
> >
> > ***Ø Seventh, that in respect of the decree, proposed security for due performance of the decree.***

In the instant application too much weight has been placed on the appeal being rendered nugatory and the fact of the intended appeal being of high probability of success. In my judgement and my appraisal of the record of the trial Court the representations made by the applicants remain to be bare assertions. Constituting principles governing stay of execution have the effect of considering the carrier jurisdiction of unfettered discretion and the caution required not to prejudice the rights of the respondent on the sole basis of a party obvious of exercising his right of appeal. Moreover, even assessing for the sake of argument the applicant's position is that they ought to be given a chance to canvass the appeal on the merits that the petition must stand an arguable appeal with a high probability of success. It is also not worthy that the representation on substantial loss be made in the context of the well settled principles within this condition.

At the heart of the intended appeal is a concern of an assessment of damages being in ordinately high and excessive. Having decided the issue of liability by consent it is a non-suited issue on appeal. Central to the issue on damages is what the law sets out as the appellate jurisdiction in **Butt V The Rule Restriction Tribunal CA No.6 of 1979 Simon Taveta V Mercy Mutitu Njeru[2014]eKLR.** As evidential from the record and wording of the trial court judgment these are at least three key jurisprudence requirements must be well satisfied; -

> ***1) The question that the assessment of damages is discretionary.***
>
> ***2) The appraisal of the evidence adduced by the Court as presented by the parties.***

3) An obligation by the trial magistrate to apply the facts of the case in relation with similar awards bearing a resemblance with the specifics to the case at bar.

These elements must be interpreted in the light of the objects and purpose of the Memorandum of Appeal for an appeal to qualify as being of high chances of success, it must fall within the definition envisaged in **Butt case, Kemfro Africa V Lubia**. That there is a prima facie case of misdirection or error apparent in the impugned judgement. That in coming to that conclusion in damages the context surrounding it was erroneous and wrong to call for an interference form the appeals Court.

Whether this Court exercises discretion to grant stay, upon over all considerations of the appeal case is likely to be canvassed, there would be a sense of injustice to the Respondent if the impugned judgement is stayed. For, though not sitting on appeal the applicant's prospect of success in the intended appeal are in the realm of remoteness. Given the consent judgement on liability the functional hardship to be suffered by the applicant if the judgement is enforced is a matter of conjecture. It is true, the appeal is on damages but in respect of futuristic evaluation, in respect of facts or point of law, none has been raised in the submissions which may as well persuade this Court to grant stay of execution. My considered view is that the justice of the case requires that none of the orders prayed for should be granted. Accordingly, the Notice of Motion dated 26th May, 2021 be and is hereby dismissed with cots to the Respondent.

DATED, SIGNED AND DELIVERED via EMAIL AT MALINDI THIS 29TH DAY OF OCTOBER, 2021

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R. NYAKUNDI

JUDGE