REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

MISC. CIVIL APPLICATION NO 27 OF 2021

GUSII WATER SANITATION COMPANY LIMITED.....APPLICANT

VERSUS

VIOLET MORAA RATEMO t/a JAYKEEN GENERAL SUPPLIES.....RESPONDENT

RULING

1. By a Motion dated 29th April 2021, the applicant herein seeks a stay of execution of the judgment and decree in Kisii Chief Magistrate's Court Civil Suit No. 302 of 2016 and leave to appeal out of time against the judgment.

2. The said application is supported by the affidavit sworn by **Elvis Masiga,** on 29th April, 2021. According to the deponent, judgment was entered in the absence of the applicant as its previous advocate M/s Masese Advocate was not served with the notice of delivery of judgment. The applicant only received a letter on 30th September 2021 from its advocate forwarding an assessment notice.

3. The applicant's current advocate M/s Bosire Gichana & Co. Advocates upon perusal of the court file realized that a judgment was delivered on 30th September 2019 in the absence of the applicant. It is deposed that the applicant is aggrieved by the decision and wishes to appeal against the judgment which appeal can only be filed with the leave of the court. In the applicant's view the intended appeal is arguable.

In response, the Respondent relied on the replying affidavit sworn by Ouma Maurice Otieno. He averred that the application is unmeritorious as the applicant failed to give sufficient reason explaining why it had been indolent for close to 2 years since the judgment was delivered. He noted that during the pendency of the suit the applicant's representative attended court and testified and the suit was ultimately listed for final submissions. The respondent averred that it was the duty of the applicant to follow on the progress of its case. That the applicant's former advocate was aware of the judgment date but elected not to attend court.

4. The respondent averred that the applicant's counsel was duly served with the respondent's bill of costs dated 5th May 2020 together with the assessment notices consequent to which the advocate participated and filed his written submissions dated 2nd July 2020. The applicant's advocate having participated in the proceedings, that applicant cannot feign ignorance of knowledge that judgment had been delivered. In the respondent's view the applicant has not established good reason why it did not appeal in good time and the re-opening of the dispute will prejudice the respondent and expose her to an unnecessarily protracted court dispute.

Analysis and Determination

5. I have considered the application, affidavits, submissions and authorities cited.

6. The law that guides this court on enlargement of time for the filing of an appeal out of time is **section 79 G of the Civil Procedure Act**. **Section 79 G of the Civil Procedure Act** provides:

> *"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 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 has good and sufficient cause for not filing the appeal in time."*

7. In **Daphne Parry vs. Murray Alexander Carson [1963] EA 546** the interpretation given to '*good and sufficient cause*' used in the

context of section **79 G of the Civil Procedure Act** was as follows:

> *"Though the court should no 'doubt' give a liberal interpretation to the words* ***'sufficient cause,'*** *its interpretation must be in accordance with judicial principles. If the appellant has 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, ……."*

8. The decision of granting leave to appeal or not to appeal out of time is discretionary and must be exercised after considering the evidence adduced before the court and sound legal principles. **The Supreme Court in Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR** considered the principles for extension of time and stated as follows:

> *"Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it."*

9. In **Mutiso v Mwangi [1997] KLR 630** the court held as follows:

> *"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that 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 appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted."*

10. The application herein was filed on 29th April 2021 while the judgment of the subordinate court was entered on 30th September 2019 in the absence of the applicant.

11. The applicant submitted that it has given sufficient explanation for the delay to warrant the exercise of discretion in its favour. It implored this court to consider **Rule 4 of the Court of Appeal Rules**. It relied on the decisions in **Edith Gichugu Koine v Stephen Ngagi Thoithi [2014] eKLR; Nyaigwa Farmers' Co-operative Society Limited v Ibrahim Nyambare & 3 Others [2016] eKLR and Richard Nchapi Leiyagu v IEBC & 2 Others [2013] eKLR**.

12. The Respondent argued that it is not enough for a party to simply blame its advocate and approach the court one and half years after a judgment has been rendered in seeking orders to continue litigating the matter. The respondent cited the cases of **Charo Shuhuli Randu v Karisa Nzai & Another [2018] eKLR** in support of her position.

13. The undisputed facts are that the judgment before the lower court was rendered on 30th September 2019 after the applicant participated in the hearing by calling a defence witness and closing its case.

14. The applicant expected that that a judgment would soon be rendered after close of its case. Their advocate was served with an assessment notice on 5th May 2020 and proceeded to file written submissions on 2nd July 2021. The applicant's assertion that he was not aware of the process cannot therefore hold water.

15. The applicants is responsible for following up on its case and check its progress and in the event it feels aggrieved that its advocate failed to prosecute its case to its satisfaction and without its instructions then it has an option of suing such an advocate for professional negligence. This was the position taken by Kimaru J in the case of **Alice Mumbi Nganga vs Danson Chege Nganga & Another (2006) eKLR** where he stated:

> ***"In the first place, she cannot blame her counsel who was then on record for failing to attend court when the said application was listed for hearing. This court has ruled in several cases that a civil case once filed, is owned by a litigant not his advocate. It behoves the litigant to always follow up his case and check its progress. He cannot come to court and say that he was let down by his advocate when a decision adverse to him is made by the court due to lack of diligence on the part of his advocate. I think it has been ruled by the Court of Appeal that where an advocate fails to prosecute a case to the satisfaction of his client then such a litigant has an option of suing such an advocate for professional negligence. The mistake of counsel will not, per se, make this court to exercise its discretion in favour of an aggrieved litigant."***

16. There was no evidence led to show that the applicant had followed up with his advocate to show the status of his matter. It is not enough for the applicant to simply blame the advocate but it must show tangible steps taken by it in following up its matter (see ***Josephine Lunde Matheka v Gladys Muli [2018] eKLR***).

17. From the facts deponed by the applicant, it is not possible to know when the applicant knew that a judgment was entered against him as it alleged that it only received a letter from its advocate on 30th September 2021 while the suit was filed on 29th April 2021. Chronologically this flow of events is not possible. The alleged letter was also not annexed to the applicant's affidavit.

18. The application before this court has been filed 18 months after the decision by the trial magistrate was rendered in the subordinate court. In my view there was unreasonable delay in the filing of this instant application that would likely prejudice the respondent. In **Jaber Mohsen Ali & another v Priscillah Boit & another E & L NO. 200 of 2012 [2014] eKLR** the court stated that:

> *"…The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on*

the judgment of the court and any order given thereafter…"

19. In the end, I find that the applicant has not demonstrated good and sufficient reasons before this court to warrant admission of its appeal out of time. In the circumstances therefore, the issue of stay of execution raised is now moot.

20. In the end, I find the Notice of Motion dated 29th April 2021 lacking in merit and the same is hereby dismissed. The respondent shall have costs of this application.

DATED, SIGNED and DELIVERED at KISII this 18th day of November, 2021.

R. E. OUGO

JUDGE

In the Presence of;

Miss Nyandoro h/b Mr. Bosire For the Applicant

Respondent Absent

Ms. Rael Court Assistan