



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APPLICATION NO 325 OF 2019

DUNCAN OYOO

MULTIPLE HAULIERS (EA) AFRICA LIMITED.....APPLICANTS

VERSUS

PATRICK MWELE LASI AND ANGELINA

MWIKALI MWANIKI (Suing as the Legal

Representatives of the Estate of JULIUS

NZYOKI LASI).....RESPONDENTS

RULING

INTRODUCTION

1. The Applicants' Notice of Motion application dated 25th April 2019 and filed on 26th April 2019 was brought pursuant to the provisions of Order 50 Rule 6, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 1A, 1B, and 95 (sic) of the Civil Procedure Act, Cap 21, Laws of Kenya and all other enabling provisions of the Law. Prayer Nos (1) and (2) were spent. It sought the following remaining orders:-

1. Spent.

2. Spent.

3. THAT this Honourable court do extend the time within which the Applicants may file their Memorandum of Appeal from the Judgment in Milimani CMCC No 4974 of 2016 as per the annexed draft Memorandum of Appeal.

4. THAT costs of the application be in the cause.

2. Their Written Submissions were dated 17th June 2019 and filed on 18th June 2019 while those of the Respondents were dated 9th July 2019 and filed on 10th July 2019.

3. The parties requested the court to deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE APPLICANT'S CASE

4. The Applicants' present application was supported by the Affidavit of their advocate, Lilian Muthoni Njuguna (Mrs), that was sworn on 25th April 2019.

5. The said advocate contented that on 27th March 2019, she informed Martha Mutoro, the Legal Affairs & Compliance Manager of Multiple Hauliers (EA) Africa Limited of the judgment that was delivered against it on 14th March 2019. She stated that when she did not receive any response, she wrote to the said Martha Mutoro on 15th April 2019 when pointed out that the letter of 27th March 2019 was

inadvertently never brought to her attention.

6. It was her averment that the said Martha Mutoro instructed her to file an application seeking extension of time to lodge an appeal. She added that since the earlier order for stay of execution pending appeal had expired, an order for stay of execution ought to be granted pending the hearing and determination of the application herein.

7. The Applicants therefore urged this court to allow their application because it was only fair and in the interests of justice to so do.

THE RESPONDENTS' CASE

8. In response to the said application, the Respondents' advocate, Victor Odhiambo Ayieko, swore a Replying Affidavit on 13th May 2019. The same was filed on 15th May 2019.

9. The said advocate averred that the Applicants had been given enough grace period of thirty (30) days stay of execution and that the said Martha Mutoro had not sworn any affidavit to explain why she did not instruct their advocates to lodge an appeal within time.

10. He pointed out that the Applicants raised a preliminary objection on the issue of the suit in the lower court having been time barred and that they did not file an appeal when the same was dismissed. He was categorical that the issue could not therefore be raised at this juncture.

11. It was his contention that the reason given for the granting of leave to the Applicants to file an appeal out of time was an attempt to delay the conclusion of this matter and to further prevent the Respondents from enjoying their fruits of judgment.

12. He further stated that in the lower court, the Applicants had submitted that the Respondents were entitled to a sum of Kshs 851,384/= and consequently, the current application was an afterthought. He asserted that in the event this court were to be minded to allow the said application, then the Applicants ought to be ordered to release the aforesaid sum to the Respondents and the balance be deposited in a joint interest earning accounts in the names of the advocates. It was his averment that Article 50 (1) of the Constitution of Kenya guaranteed the Respondents a right of fair hearing without undue regard to procedural technicalities.

13. The Respondents thus urged this court to dismiss the Applicants' present application with costs to them.

LEGAL ANALYSIS

14. The Applicants admitted that an appeal from the subordinate court to the High Court ought to be filed within thirty (30) days from the date of the decision that is intended to be appealed from. They urged this court to extend time to enable them file their intended appeal so that their Appeal could be determined on merit.

15. In arguing that this court had unfettered discretion to extend the time, they relied on the case of **Samuel Mwaura Muthumbi vs Josephine Wanjiru Ngugi & Another [2018] eKLR** where the court therein cited the case of **Mwangi vs Kenya Airways Limited [2003] KLR** where the factors to be considered before extension to file suit out of time was granted were considered. These included:-

- a. the period of delay;
- b. the reason for the delay;
- c. the arguability of the appeal;
- d. the degree of prejudice which could be suffered by the respondent if the extension was granted;
- e. the importance of compliance with time to the particular litigation or issue; and
- f. the effect if any on the administration of justice or public interest if any is involved.

16. They submitted that there was no inordinate delay in filing the present application because the same was filed thirteen (13) days after the date the appeal ought to have been filed. It was also their further averment that their advocate's affidavit was adequate to explain the cause of the delay and that it was therefore not necessary for the said Martha Mutoro to have sworn any affidavit to explain what transpired.

17. They further asserted that their appeal was arguable because the Learned Trial Magistrate ought to have found the deceased, who was a pedestrian, to have contributed to the accident to some degree. In this regard, they relied on the case of **Samuel Mwaura Muthumbi vs Josephine Wanjiru Ngugi & Another**(Supra) where, in allowing an application for extension of time that had been filed thirty one (31) days after the lapse of the time for lodging an appeal, Joel Ngugi J rendered himself as follows:-

“...all the Applicants have to show at this stage is arguability- not high probability of success...”

18. They further placed reliance on the case of **John Kahiro & 2 Others vs Virginia Wanjiru Kiboro [2019] eKLR** where in allowing an application that had been filed after a delay of about five (5) months, Meoli C J stated as follows:-

“The main interest at this stage is to do justice between the parties and notwithstanding the delay herein, it is my considered view that justice can still be done between the parties.”

19. On their part, the Respondents relied on the case of Dilpack Kenya Limited vs William Muthama Kitonyi [2018] eKLR where Odunga J held that:-

“an applicant seeking enlargement of time to file an appeal must show that he has a good cause for doing so since it was held in Feroz Begum Qureshi & Another vs Maganbhai Patel & Others [1964] EA 633, there is no difference between the words “sufficient cause” and “good cause”...”

20. They also placed reliance on the case of Daphne Parry vs Murray Alexander Carson [1963] EA 546 where it was held that the provision for extension of time requiring “sufficient cause” should receive a liberal construction so as to advance justice. It was their argument that even if an appellant had a good cause but had no valid reason for the delay, then the appeal should be dismissed for having been time-barred, even at the risk of hardship and injustice to the appellant.

21. They were categorical that the reason that had been advanced by the Applicants for not having filed an appeal within the stipulated period was not sufficient reason and that they were simply indolent. They added that the letter advising the Appellant of the entry of judgment was not annexed to the present application.

22. They pointed out that the Applicants had in their submissions submitted that they were entitled to a sum of Kshs 851,384/= and since judgment was entered in against them for a sum of Kshs 1,068,660/=, the award could not be said to have been inordinately high to have warranted any interference by this court. They were emphatic that they were entitled to their fruits of judgment and that being awarded costs was not adequate

23. There was evidently a communication breakdown between the Applicants herein and their advocates. There was obviously negligence on the Applicants’ part. Failure to bring the letter of 27th March 2019 was an internal problem that could not be attributed to their advocates.

24. Having said so, the advocates were also expected to have exercised due care and diligence to ensure that the time within which to file the appeal did not lapse. In other words, they ought to have followed up with the Applicants before the said time lapsed because there was possibility that their letter may not have reached the officer who was to give instructions on the filing of the appeal, as did happen in this case.

25. Evidently, both the Applicants and their advocates could not escape the blame for not having filed the appeal within the stipulated time. However, no party should be penalised just because there was a blunder more. Indeed, in the case of Republic vs Speaker Nairobi City County Assembly & Another Ex Parte [2017] eKLR, it has been held that blunders will continue being made and that just because a party has made a mistake does not mean that he should not have his case heard on merit.

26. Further, in the case of Andrew Kiplagat Chemaringo vs Paul Kipkorir Kibet [2018] eKLR, it was held that the law does not set aside the maximum and minimum period of delay and all that was required was for the delay to be satisfactorily explained.

27. In exercising its discretion to allow an application seeking extension to file an appeal out of time, a court has to be satisfied that the omission or commission was excusable. In other words, there must be a plausible explanation for the delay in doing an act. It must also consider the length of the delay, the reason for the delay, the injustice that will be caused to the party applying for extension and the prejudice the respondent would suffer if the said application was allowed.

28. Although this court found that the Applicants and their advocates did not conduct themselves diligently, failure to bring the letter of 27th March 2019 to the attention of the said Martha Mutoro was not an entirely unexpected omission. It was normal occurrence. This was a plausible, good and satisfactory explanation for the delay in filing the appeal on time. It was not necessary for the said Martha Mutoro to have sworn an affidavit to explain the omission as the same was ably explained by the Applicants’ advocate.

29. It was evident that the present application was filed without undue delay. Judgment was delivered on 14th March 2019. The appeal ought to have been filed on or before 13th April 2019. This court therefore agreed with the Applicants that there was no inordinate delay in the filing of the present application.

30. Indeed, every party has a right to access any court or tribunal to have its dispute heard and determined in accordance with Article 50(1) of the Constitution of Kenya, 2010. Even where a party delays in doing an act, there is always a provision that would give it reprieve to seek justice. Notably, while Section 75 A of the Civil Procedure Code provides for the period of thirty (30) days for an aggrieved party to lodge an appeal, Order 50 Rule 6 of Civil Procedure Rules empowers the court to enlarge the time to do a particular act.

31. Order 50 Rule 6 of Civil Procedure Rules stipulates as follows:-

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise”.

32. Taking into consideration all the factors hereinabove, it was the considered view of this court that the Applicants ought to be given an opportunity to have their Appeal heard on merit as they would suffer great prejudice if it was denied an opportunity to fully present its Appeal to be heard on merit.

33. On the other hand, the Respondents did not suffer any prejudice. There was nothing in the application that seemed to suggest that the Applicants wished to have a stay of execution pending appeal. Their application was clear that the order for stay of execution had only been sought pending the hearing and determination of the application herein.

34. Whereas the Respondents had sought that the Applicants release the sum of Kshs 851,384/= that they had submitted in the lower court was sufficient compensation to the Respondents and the balance be deposited in a joint interest earning account in the names of their respective advocates, this court could not grant orders that had not been sought by the Applicants. Notably, a court should only grant what has been sought by an applicant otherwise it risks descending into the arena of the dispute to the detriment of the opposing party.

35. Having considered the affidavit evidence, the Written Submissions and the case law that were relied upon by the parties herein, this court found and held that the duty of the court to do substantive justice demanded that the Applicants' present application be considered favourably.

DISPOSITION

36. For the foregoing reasons, the upshot of this court's decision was that the Applicants' application that was dated 25th April 2019 and filed on 26th April 2019 is hereby allowed in terms of Prayer Nos (3) therein in the following terms:-

- 1. The Applicant is hereby directed to file and serve its Memorandum of Appeal within fourteen (14) days from the date of this Ruling i.e. by 11th February 2020.**
- 2. The Applicant is hereby directed to file and serve its Record of Appeal within forty five (45) days from the date of this Ruling i.e. by 16th March 2020.**
- 3. The Deputy Registrar High Court of Kenya Milimani Law Courts Civil Division is hereby directed to facilitate the expeditious typing of the proceedings in the lower court to enable the Applicant comply with the timelines within which to file its Record of Appeal as aforesaid.**
- 4. Either party is at liberty to apply.**
- 5. Costs of the application will be in the cause.**

37. It is so ordered.

DATED and DELIVERED at NAIROBI this 28th day of January 2020

J. KAMAU

JUDGE