



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO 336 OF 2019

LASERTECH (K) LIMITED.....1ST APPLICANT

AMIN SHERALI MAWANI.....2ND APPLICANT

VERSUS

JIMCAB SERVICES LIMITED.....RESPONDENT

RULING

INTRODUCTION

1. The Applicants' Notice of Motion application dated 25th April 2019 and filed on 2nd May 2019 was seeking extension of time to file a Memorandum of Appeal.
2. The said application was supported by the Affidavit of their advocate, Pramod Patel, which was sworn on 25th April 2019. He stated that he was not aware of the delivery of the judgment in the lower court and only learnt of delivery of the same on 15th January 2019. It was his contention that having read the said judgment, there was no option but to appeal against the same. The Applicants thus urged this court to allow their application as prayed as it was in the interests of justice that the same be allowed.
3. In opposition to the said application, on 21st June 2019, a Legal Officer at APA Insurance Limited, Rina Welemba swore a Replying Affidavit on behalf of the Respondent herein. The same was filed on 24th June 2019.
4. She contended that on 18th December 2018, judgment was reserved upon the Respondent filing its Written Submissions. The Applicants did not file theirs despite having been given an opportunity to do so. However, on 18th December 2018, the judgment was not ready and the court put a notice on the door of the chambers indicating that the said judgment would be delivered on 15th January 2019. It stated that Judgment was delivered on the said date wherein the Applicants' counter-claim and its case were both dismissed.
5. It averred that in addition to the Applicants having failed to file their Written Submissions or attend court on 18th December 2018 when the Judgment Notice was placed on the door advising of the delivery of the judgment on 15th January 2019, the Trial Court was justified in having dismissed the Applicants' Counter-claim as the same had not been brought under the subrogation rights.
6. It was therefore its contention that the Applicants' appeal had no chances of success and that it would continue suffering prejudice as it would defend a matter that had been determined and incur further costs which was a detriment to its financial position. It therefore urged this court to dismiss the present application with costs to it.
7. Right at the outset, it is important to point out that 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.
8. While Section 75 G of the Civil Procedure Code provides for the period of thirty (30) days for an aggrieved party to lodge an appeal, it does provide that an appeal can be admitted out of time if the appellant satisfied the court that he had good and sufficient cause for not having filed his appeal within the prescribed time. A similar conclusion was arrived at by Odunga J in **Dilpack Kenya Limited vs William Muthama Kitonyi [2018] eKLR**.
9. Further, Order 50 Rule 6 of Civil Procedure Rules empowers the court to enlarge the time to do a particular act. It 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...”

10. Having said so, the court has to consider several factors before it can grant an applicant leave to file an appeal out of time. The parties herein were in agreement on the circumstances under which such extension could be granted. In this respect, this court had due regard to 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. It was held that the factors to be considered before extension to file suit out of time was granted 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.

11. It did appear to this court that the Applicants herein filed their present application immediately they became aware of the entry of judgment against them. The Respondent admitted that the Notice was pinned on the door of the chambers of the Trial Court that was to deliver its judgment. It was the considered opinion of this court that that was not sufficient notice. The same ought to have been served upon the advocates in view of the fact that the same was not delivered on the day it was scheduled to be delivered.

12. This court was satisfied that the reason for not filing the appeal within the stipulated time was excusable. Further, a period of three (3) months from the date the judgment was delivered and the date of filing the present application could not be said to have been inordinate.

13. The Applicants submitted that the Learned Trial Magistrate erred in holding that there was no claim as the insurance company had paid. In addition it argued that such a matter need not have been pleaded because an insurance company could sue in the name of its insured under its subrogation rights. They added that the Learned Trial Magistrate did not correctly decide on the apportionment of liability.

14. On its part, the Respondent argued that the principle of subrogation was never pleaded in the pleadings and that the same never arose during trial. It was its submission that the Applicants were raising new issues on appeal, issues which were never pleaded during trial.

15. The question of whether the Learned Trial Magistrate arrived at a correct conclusion was arguable and it was important that the same be heard and determined by the appellate court to establish whether or not she arrived at the correct conclusion. It was not a frivolous ground of appeal.

16. This court fully associated itself with the holding of Joel Ngugi J in the case of Samuel Mwaura Muthumbi vs Josephine Wanjiru Ngugi & Another [2018] eKLR 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, he rendered himself as follows:-

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

17. There was evidently lack of diligence on the part of the Applicants’ advocates as they did not explain why they never attended court on 18th December 2018 when the judgment was scheduled to be delivered. They ought to have exercised due care and diligence to follow up the matter as failure to do so greatly prejudiced the Applicants herein.

18. However, it is trite law that no party should be penalised just because there was a blunder particularly by his or her advocate. 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.

19. 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 as they would suffer more prejudice than the Respondent in them not been given an opportunity to have their appeal heard and determined on merit.

DISPOSITION

20. 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 2nd May 2019 was merited and the same is hereby allowed in terms of Prayer No (1) therein in the following terms:-

- 1. The Applicants are hereby directed to file and serve their Memorandum of Appeal within fourteen (14) days from the date**

of this Ruling.

2. The Applicants are hereby directed to file and serve their Record of Appeal within forty five (45) days from the date of this Ruling.

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 Applicants comply with the timelines within which to file their Record of Appeal as aforesaid.

4. Either party is at liberty to apply.

5. Costs of the application will be in the cause.

21. It is so ordered.

DATED and DELIVERED at NAIROBI this 12th day of March 2020

J. KAMAU

JUDGE