THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 165 OF 2018

PIETRO CANOBBIO.....................................PLAINTIFF

-VERSUS-

MAURIZIO DALPIAZ...............................DEFENDANT

R U L I N G

1. Before the court for determination is an application for extension of time to file and serve a memorandum of appeal out of time from the decision of Hon J Nangea (CM) dated 27.3.2018 by which allowed the respondents suit against the applicant and dismissed the counter-claim filed by the applicant. Over and above the invocation of section 79G of the Act and various Rules, the applicant also invoked the provisions of articles 48 and 159(2) of the constitution.

2. The grounds put forth to premise the application is that owing to an unfortunate oversight on the part of the advocate, a letter drawn to be sent to the applicant advising on the outcome was never dispatched in time and the applicant was thus not informed of the outcome till the 9.5.2018 by which time the period allowed for appeal had lapsed. The additional delay from 9.5.2018 till 21.6.2018 when the matter was file was explained to have been necessary for applicant to peruse the judgment before setting a meeting with the counsel. It was added that the court has the power to enlarge time as a way of furthering access to justice and that the court ought not to feel shackled by the procedural Rules limiting the time within which to file an appeal. It was finally urged that the appeal has good chances of success and should not be driven away from the seat of justice by refusal to extend time.

3. The same grounds were reiterated in the Affidavit sworn by D Muyaa Advocate and filed in support of the application with a detailed explanation that the oversight was occasioned by the coincidence of a secretary proceeding on leave at a time the firm was engrossed in certain matters which had spiraled from orders of several courts in Mombasa and had generated a lot of tension including claims against advocate, hence a draft of advice to client was overlooked and not typed for dispatch in time. The affidavit gives the explanation that it was not until the 9.5.2018 when the secretary who had proceeded on leave resumed duties. On the same date she resumed, the default was picked up, letter typed and an advance copy dispatched by email on 11.5.2018. On receipt of the advice the client is said to have asked for a copy of the judgment which was obtained and relayed to him on the 18.5.2018 and an appointment was fixed with counsel for the 31.5.2018 before the current application was filed twenty days later.

4. On those facts the applicant says there are good reasons for the delay and urges that the court should strive to do justice rather than punish the applicant for an unfortunate mistake not of his own making.

5. The application was resisted by the respondent on the basis of Fredrick Oduol Oduor, advocate whose gist was that the matter had been in court for one decade, the judgment was delivered in the presence of all the parties and that the letters written to court on 11th and 14th June 2018 were done well after time had lapsed and show lack of diligence on the part of counsel for the applicant. 0n the reasons for delay pressure of work and secretary being away on leave, it was contended that it was the duty of an advocate to arrange and prioritise his work and cannot delegated such to a secretary. In any event the deponent contended that it was upon an advocate to take work commensurate with his staff establishment. The alleged unavailability of the court file was not true and the arguiability of the intended appeal was said to be moot given the evidence led and the prayers in the counterclaim having been overtaken by events.

6. Parties did filled submissions which I have benefitted from reading. In their submissions the applicant stress the point and urges the court not to hold the delay as inordinate as against them it being stressed that good cause for delay has been shown in line with the proviso to section 79G Civil Procedure Act. The provisions of order 50 Rule 6 giving the court the power to enlarge time even after time prescribed has lapsed was emphasised together with overriding objectives of the court.

7. For the respondent submissions were made that the applicant had failed to satisfy the principles to be observed and applied in an application for extension of time. The decision in **Richard Muthusi vs Patrick Ngomo (2017)eKLR** which relied on the decision by the supreme court in **Nicholas salat vs IEBC (2014) eKLR** was cited for the applicable principle. The respondent further relied on the decision in **Caren Buaron vs Sony Holdings ltd (2017) eKLR** and **Zacharia Okoth Obado vs Edward Akongo (2014) eKLR** were cited for the

proposition of the law that the provisions of Article 159(2) and the overriding objective of the court should not be applied with unfettered abandon but only invoked in deserving cases so that the oxygen principle is saved from turning into an unruly horse. The court emphasised the fact that article 159(2) was never intended to oust the obligations of litigants to comply with procedural imperatives as they seek justice from the court.

Analysis and determination

8. This court proceeds from the position that extension of time to lodge an appeal is not a right of the applicant having squandered the right given by statute but remains a discretion vested in the court to facilitate the right to access the court unhindered especially where the default was by some inadvertence, error or excusable mistake. The court while exercising a judicial discretion proceeds with all the value systems expected of a robust justice system in mind. It must give regard to the dictate that justice shall not be delayed; that litigation ought to come to an end and that it is the duty of all citizen to submit to the law and observe timelines where a statute imposes such timelines. This is what I understand the principle now well laid by the Kenyan superior court in many other words.

9. Before a court confronted with an application to enlarge time decides which way to decide, the reason for delay must be explained to the satisfaction of the court and the duration for delay must not pass as inordinate or unreasonable.

10. Applying those principles to the facts disclosed before me, i am mandated to determine whether the explanation given for delay is satisfactory and if the length of delay is reasonable. The crux of the explanation by counsel is that there was pressure of work in an unrelated file which he say had a lot of tension and at a time a secretary was due to proceed on leave effective the 3.4.2018. To assess how plausible this reason is, I note that the judgment was delivered on 27.3.2018 which was a Tuesday and no step was taken to communicate with the applicant till the following Tuesday. That was seven day to just draft a letter exhibited as DM2. That letter is made up of three sentences. I pose the question whether it was the kind of letter that needed a wholly week to draft!

11. The response from the applicant also tells what could have been the real issue. He demanded to know what happened in court because he was '*never updated'*. I get the impression that the applicant had not been kept abreast of his case. The tone of the letter says he may not have been aware of the date set for judgment. I find that failure to inform the applicant was not an isolated default but a recurrent one. I also find that the fact that the advocate was engaged in a tenacious matter on the 3.4.2018 did not justify a delay for more than 30 days. In any event it is not said that the advocate and entire office dedicated the whole period between 3.4.2018 and 9.5.2018 to that one troublesome file. All these together with the unexplained delay between 321.5.2018 and 20.6.2018 make me be dissatisfied with the explanation offered. I do not find it plausible and the delay unexplained therefore. Instead I do find that there was failure to discharge counsel's duty to court and his profession. That cannot be the basis to exercise judicial discretion in his favour.

12. Does that by itself mean that the applicant is wholly without a remedy? I hold not. Our legal profession has now grown to maturity and safeguards have been provided for both counsel and the client by way of mandatory indemnity cover before one takes out a practicing certificate. Such developments dictate that at times a mistake or error of an advocate must be left to be shouldered by the client who then has recompense.

13. In **Julius Odhiambo Oduor v Chairman, Secretary, Auditor & Organisers of Nyikwa Ramogi Welfare [2019] eKLR** the court had a chance to consider this point and it did hold

> 'An error of counsel must not always be seen as incapable of being left to rest on the shoulder of his client. There are situations that asking a litigant to bear the brunt of his counsel's mistake may be the just way to proceed. I have in mind the law that advocates are by law mandated to take out professional indemnity covers. That to me is an appreciation that advocates do make mistake and that when such does happen, the client should not be left remediless. Others court have had the chance to consider this point and it is acceptable that at times blunders by counsel must rest on the client.

14. Having found that there has not been an explanation for delay to my satisfaction, that the delay was unreasonable and that the applicant is not left with no a remedy, I do find the application to lack merit and I direct that it be dismissed with costs.

Dated, **signed** and **delivered** at Mombasa

this **30th** day of **April 2020.**

P J O Otieno

Judge