



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

Civil Suit No205 Of 2016

JJ (a minor suing through JKG And JMJ His father and mother as next friends)...1ST PLAINTIFF

FJ (a minor suing through JKG And JMJ her father and mother as Next friends)...2ND PLAINTIFF

VERSUS

GENERAL ACCIDENT INSURANCE COMPANY LTD.....DEFENDANT

RULING

1. On 14th March 2019, this court delivered its Judgment in which it dismissed the Plaintiff's' suit with costs to the Defendant herein. The said judgment was initially slated to be delivered on 19th February 2019 when the court did not sit, hence the deferment.
2. It was apparent that the Plaintiffs were not aware of the new date of delivery of the judgment hence their Notice of Motion application where they were seeking enlargement of time for a further fourteen (14) days to enable them file and serve a Notice of Appeal. They had also sought an order that the Deputy Registry do furnish them with the typed copy of the judgment, certified copy of the proceedings and certified copy of the decree upon payment of the requisite court fees.
3. Their said application was supported by the Affidavit of its advocate, Steve Luseno, which was sworn on 7th June 2019. They contended that the judgment was not delivered on notice as the court had indicated and that there having been no notice, they did not file their Notice of Appeal within the stipulated time. They averred that they were aggrieved by the said decision hence the need for their application to be allowed as prayed.
4. In opposition to the said application, on 6th July 2019, the Defendant filed Grounds of Opposition dated 2nd July 2019. The gist of its grounds of opposition was that the application was an abuse of the court process, incompetent and a mischievous attempt at circumventing the time lines for lodging an appeal. It contended that it was not clear why the Plaintiffs had not filed the present application immediately they became aware of delivery of the judgment herein.
5. Notably, only the Plaintiffs filed Written Submissions and a List and Bundle of Authorities. At the time of reserving the Ruling herein, the Defendant indicated that it would rely on the Grounds of Opposition only.
6. The Plaintiffs placed reliance on the provisions of Section 95 of the Civil Procedure Act Cap 21 (Laws of Kenya) and Section 7 of the Appellate Jurisdiction Act Cap 9 (Laws of Kenya) in urging this court to find and hold that it had jurisdiction to extend the time for giving the notice of intention to appeal its judgment to the Court of Appeal.
7. They relied on several cases amongst them **Edward Kamau & Another vs Hannah Mukui Gichuki & Another [2015] eKLR** where the common thread was that in exercising its discretion whether or not to extend time to file an appeal out of time, a court has to consider whether or not the application had been brought without undue delay, whether or not there were reasonable reasons for the delay and whether or not there would be any prejudice to be suffered by the respondent if such extension was granted.
8. They submitted that they filed their application without undue delay as the file could not be traced and further that they filed the same immediately they became aware of the judgment on 28th May 2019. It was their submission that a period of a month was not inordinate. In this regard, they referred this court to the case of **Sundowner Lodge Limited vs Kenya Tourist Development Corporation [2019] eKLR** where the court therein held that a period of four (4) months was not inordinate.
9. They further argued that notwithstanding that litigation had to come to an end, the Defendant would not suffer any prejudice if their application was granted for the reason that the right of appeal was a constitutional right and that denial of the same was denial of justice.

10. They relied on the cases of Edward Kamau & Another vs Hannah Mukui Gichuki & Another (Supra) and Edward Njane Nana vs Damaris Wanjiku Kamau & Another [2016] eKLR which dealt with the issue of extension of time to file an appeal out of time where a notice of delivery of judgment had not been issued.

11. Notably, 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.

12. Section 95 of the Civil Procedure Act Cap 21 (Laws of Kenya) provides that:-

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

13. 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...”

14. In addition, Section 7 of the Appellate Jurisdiction Act further empowers to the High Court to extend time to give notice of intention to appeal from a judgment delivered in the High Court. The said Section stipulates that:-

“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired...”

15. Having said so, such leave is not to be granted as a matter of course. The court is required to consider several factors before it can grant an applicant leave to file an appeal out of time.

16. In addition to cases the Plaintiffs relied upon, this court also 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 in which the factors to be considered before extension to file suit out of time could be 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.

17. This court took judicial notice that on 19th February 2019, a notice was placed in the Kenya Law Report website informing all litigants and advocates who had pending judgments and rulings on the said date before this court that as the court was not sitting on the said date, the same would be delivered on 14th March 2019. On the said date of 14th March 2019, having been satisfied that a notification had been made as aforesaid, this court proceeded to give its judgment herein along several other decisions that were to be delivered on the said date.

18. This court therefore took the firm view that the notice that was issued on 19th February 2019 in the Kenya Law Report website was for all purposes sufficient for notifying litigants and their advocates of the deferment of its decisions. There was no indication in that notice that the judgment would be delivered on notices had been alluded to by the Plaintiff herein. Hence, there was no requirement on the part of the court that any notice was to be issued to the parties herein. The notification in the cause list had a definite date for the delivery of its decisions and in particular the judgment herein.

19. Having said so, this court took cognisance of the fact that because the Plaintiffs' advocate may not have expected that the judgment herein would be deferred on 19th February 2019 and hence may not have checked the notices in the Kenya Law Report. This was a reasonable omission that this court was prepared to excuse.

20. Bearing in mind that the said advocate became aware of the delivery of the decision on 28th May 2019, it was the opinion of this court that a period of slightly more than a week before the present application was filed was not long. In any event, a delay of three (3) months between the date when the judgment was delivered and the date when the present application was filed could not be said to have been inordinate. This court was thus not satisfied by the Defendant's grounds of opposition that the Plaintiffs' application ought not to be granted on the ground that there was inordinate delay in filing the same.

21. Accordingly, 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 is to do substantive justice to both parties. This demanded that the Plaintiffs' present application be considered favourably as they would suffer more prejudice than the Defendant if they were not given an opportunity to have their appeal heard and determined on merit.

DISPOSITION

22. For the foregoing reasons, the upshot of this court's decision was that the Applicant's application that was dated 7th June 2019 and filed on 1st July 2019 was merited and the same is hereby allowed in terms of Prayer No (1) therein. The costs of the application will be in the cause.

23. This court did not find it necessary to grant Prayer No (2) of the said application as the Plaintiffs did not need a court order to obtain a certified copy of the judgment, certified copy of the decree and certified copies of the proceedings. The same could be obtained upon payment of the requisite court fees. This was an administrative issue that did not require assistance of the court. Courts must exercise restraint in granting orders merely because the same have been sought in an application. An order should only be issued if it is hinged on the law and/or has a legal basis.

24. It is so ordered.

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

J. KAMAU

JUDGE