



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

(Coram: Odunga, J)

MISC CIVIL APPLICATION NO. 17 OF 2020

HAJAR SERVICES LIMITED.....APPLICANT

VERSUS

PETER NYANGI MWITA.....RESPONDENT

RULING

1. By a Motion on Notice dated 8th May, 2020, the applicant herein substantially seeks that there be a stay of execution of the decree issued in Kajiado CMCC No. 35 of 2017 pending the hearing and determination of the application. It further seeks an order that the time for filing and serving of the Memorandum of Appeal and Record of Appeal against the said judgement be extended and the memorandum of Appeal be deemed as duly filed and served upon payment of the requisite fees.

2. It is clear that the prayer for stay is now moot since it was meant to preserve the substratum of the matter pending the disposal of the application which is being disposed of by this ruling.

3. The ground upon which the application is based is that though the judgement sought to be appealed against was meant to be delivered on notice it was not so delivered but was instead delivered in the absence of the Applicant and without notice. It was not until 25th February, 2020 that the Applicant became aware that the same had been delivered when the Respondent demanded for payment of the decretal sum. However due to the prevailing conditions caused by COVID 19 the Applicant was unable to access the court hence the failure to lodge its appeal within the prescribed time was not deliberate.

4. The application was not opposed by the Respondent.

Determination

5. I have considered the application, the supporting affidavit and the submissions filed as well as the authorities relied upon.

6. Section 79G of the *Civil Procedure Act* provides that:

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 of 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 had good and sufficient cause for not filing the appeal in time.

7. It is clear therefore that the decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion and just like any other exercise of discretion. This being an exercise of judicial discretion, like any other judicial discretion must be exercised on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the applicant for such orders. One of those judicial principles expressly provided for in the above provision is that the applicant must satisfy the Court that he has a good cause for doing so, since as was held in **Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633**, there is no difference between the words "sufficient cause" and "good cause". It was therefore held in **Daphne Parry vs. Murray Alexander Carson [1963] EA 546** that though the provision for extension of time requiring "sufficient reason" should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of *bona fides*, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had 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, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.

8. As to the principles to be considered in exercising the discretion whether or not to enlarge time in **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65** the Court set out the factors to be considered in deciding whether or not to grant such an application and these are (i). the explanation if any for the delay; (ii). the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; (iii). Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant. This was the position reiterated in **Edith Gichugu Koine vs. Stephen Njagi Thoithi [2014] eKLR**, where the Court of Appeal set out the principles undergirding an Application for leave to file an appeal out of as follows:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others...”

9. Similarly, in **Leo Sila Mutiso vs. Helen Wangari Mwangi Civil Application No. Nai. 255 of 1997 [1999] 2 EA 231** the Court of Appeal set out the factors to be considered in deciding whether or not to grant such an application and these are first, the length of the delay; secondly the reason for the explanation if any for the delay; thirdly, (possibly), the chances of the appeal succeeding if the application is granted i.e. the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; and fourthly, the degree of prejudice to the respondent if the application is granted and whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant. However, in the case of **Thuita Mwangi vs. Kenya Airways Ltd [2003] eKLR**, the Court explained that follows:

“The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered.”

10. However, as was held in **Kenya Commercial Bank Limited vs. Nicholas Ombija [2009] eKLR**:

“An “arguable” appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court.”

11. That was the position in **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR** where the court held that:

“...On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised...An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous...”

12. I also associate myself with the decision of the Supreme Court in **Civil Application No. 3 of 2016 - County Executive of Kisumu –vs- County Government of Kisumu & 7 Others** at page 5 where the said Court said:-

“... 23) It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the court. Further, this court has settled the principles that are to guide it in the exercise of its discretion to extend time in the NICHOLAS SALAT case to which all the parties herein have relied upon. The court delineated the following as:-

“the underlying principles that a court should consider in exercise of such discretion:

- 1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;**
- 2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
- 3) Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;**
- 4) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.**
- 5) ...”**

13. In this case the Applicant contended that the delay in filing the appeal was due to the fact the judgement was delivered in the absence of its counsel and without notice, a position which is not contested. Ordinarily, where a judgement is delivered in the absence of a party without notification and the party becomes aware of the same after the lapse of the time prescribed for taking action, that constitutes sufficient ground for extension or enlargement of time to take the necessary step. This is my understanding of the decision in **Edward Njane Nganga & Another vs. Damaris Wanjiku Kamau & Another [2016] eKLR**, where in allowing an application for leave to appeal out of time, the Court expressed itself as follows:

“The applicant has annexed to his supporting affidavit a letter dated 20th July, 2015 addressed to the Deputy Registrar of this Court requesting for a certified copy of the proceedings. Through a letter dated 22nd September, 2015 the applicant also applied for a certified copy of the order in the decision/judgment hereto. There is evidence of payment in respect of the documents requested. Counsel for the applicant informed the court that there was delay in obtaining the documents required to prepare the record of appeal and explained that the delay in obtaining those documents is not attributable to the applicant... I have considered the peculiar circumstances of this case. The judgment appealed from was delivered in the absence of the applicant/his counsel; there was no inordinate delay in bringing the application...”

14. It is therefore my view that the applicants had a sufficient reason for not appealing.

15. Accordingly, I grant leave to the applicants to file the appeal out of time. However, the prayer that the Memorandum of Appeal be deemed duly filed and served upon payment of filing fees cannot be granted for the simple reason that an appeal cannot be deemed to have been filed in a Miscellaneous Cause. Accordingly, let the Memorandum of Appeal be filed and served within 10 days from the date hereof. In default the application shall stand dismissed.

16. There will be no order as to the costs of this application.

17. It is so ordered.

Read, signed and delivered in open Court at Machakos this 30th day of June, 2020.

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Geoffrey