



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. APPLN. CASE NO. 305 OF 2019

CAPTAIN MOTOR CYCLE

MANUFACTURING COMPANY LIMITED.....APPLICANT

VERSUS

SK (minors suing thro' next of kin & grandfather) KM.....RESPONDENT

RULING

1. In its Notice of Motion dated 4th April 2019 and filed in court on 8th April 2019, the applicant, *Captain Motor Cycle Manufacturing Company Limited* approached this court principally seeking leave to file its intended appeal out of time and stay of execution of the trial court's judgment delivered on 21st September 2018 in CMCC No. 6733 of 2013.
2. The application is premised on the grounds stated on its face and the averments made in the supporting affidavit sworn on 4th April 2019 by *Mr. Peter Wanjohi Gichuki*.
3. The application is opposed by the respondent vide a replying affidavit sworn on 16th August 2019 by her learned counsel, *Ms Salome Beacco*.
4. The application was argued orally before me on 15th June 2020. Learned counsel *Mr. Ngaira* appeared for the applicant while learned counsel *Ms Beacco* appeared for the respondent.
5. Briefly, the applicant contends that it is aggrieved by the judgment of the trial court and intends to challenge it on appeal but it requires leave of the court to do so since the statutory period for filing of appeals to this court has expired; that the delay in filing the appeal was not deliberate but was caused by circumstances beyond its control. The applicant explained that when judgment was delivered, it filed an application for review which was determined on 28th February 2019 when the time to file an appeal had already expired; that the delay was caused by the time the trial court took to hear and determine its application for review. In addition, the applicant asserted that its intended appeal is arguable and if stay was not granted, it will be rendered nugatory. Lastly, the applicant pledged to abide by any terms the court may impose with regard to deposit of security for the due performance of the decree.
6. In opposing the motion, the respondent narrated the history of the parties' litigation in the lower court and while admitting that the applicant had filed an application for review, learned counsel for the respondent denied the applicant's claim that the trial court's delay in determining the application for review prevented the applicant from filing its intended appeal on time. In the replying affidavit, *Ms Beacco* averred that the application was heard "promptly" but she did not indicate the date on which the application was determined.
7. It is the respondents' case that the applicant has not given cogent reasons for the delay. In the respondent's view, the application is frivolous and amounts to an abuse of the court process as it was filed with the aim of denying the respondent's enjoyment of the fruits of her judgment. It is the respondent's further claim that the application should fail since the applicant had not annexed a draft memorandum of appeal and has not shown that it was likely to suffer substantial loss if the stay sought was not granted. The respondent urged the court to find that if the application was allowed, she would suffer great prejudice.
8. I have given due consideration to the application, the affidavits on record and the oral submissions made by learned counsel on record for the parties. I wish to start by appreciating that the law governing the filing of appeals to the High Court is enshrined in *Section 79G* of the *Civil Procedure Act* (the Act) which states as follows:

“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.”

9. From the foregoing, it is clear that this court is clothed with wide and unfettered discretion in deciding whether or not to grant leave for filing of an intended appeal out of time provided that sufficient reason is given for the failure to file the appeal within the prescribed time.

10. In *Thuita Mwangi V Kenya Airways Limited, [2003] eKLR*, the Court of Appeal gave guidance on the factors a court should consider when exercising its discretion under the proviso to *Section 79G* of the Act. Such factors would include but are not limited to; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application was allowed and the degree of prejudice the respondent was likely to suffer if the application was allowed.

11. In this case, the applicant has claimed that it was unable to file its intended appeal on time since after judgment was delivered, it filed an application for review which was not determined until 28th February 2019. Though the applicant did not substantiate this claim by annexing a copy of the said application or the court’s ruling, the respondent through her learned counsel admitted that the applicant indeed filed an application for review in the lower court but denied that its pendency caused the delay in filing the intended appeal arguing that the application was determined promptly. As noted earlier, the respondent did not inform the court when exactly the application was determined. In the premises, I am inclined to give the applicant the benefit of doubt and accept its explanation for the delay.

12. Having said that, I agree with Ms Beacco’s submissions that allowing this application will translate to a further delay in having the respondent access fruits of her judgment but in my view, the right of a respondent to enjoy fruits of a judgment must be weighed against the other party’s right to access appellate courts if dissatisfied with the trial court’s decision provided that where an appeal is not filed on time like in the present case, sufficient cause is demonstrated why the intended appeal was not filed within the stipulated time.

13. In applications of this nature, the court is called upon to undertake a delicate balance of the rights and interests of both parties by considering the prejudice each party is likely to suffer if the application was determined one way or the other. In this case, if the application is dismissed, the applicant will be removed from the seat of justice before exhausting due process whereas if the application was allowed, the respondent is not likely to suffer any prejudice that cannot be ameliorated by an award of costs.

14. In view of the foregoing, I am persuaded to exercise my discretion in favour of the applicant. The application is consequently allowed as prayed on terms that the applicant shall file and serve its intended appeal within the next 14 days during which time there shall be stay of execution of the trial court’s judgment delivered on 21st September 2018.

15. The respondent is awarded thrown away costs in the sum of KShs.20,000 which shall be paid by the applicant within the next 14 days.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of June 2020.

C. W. GITHUA

JUDGE

In the presence of:

Ms Ngaira for the applicant

Ms Nzioka holding brief for Ms Beacco for the respondent

Ms Mwinzi: Court Assistant