



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

MISC. CIVIL APL. NO. 11 OF 2020

PHILLIES TWILI MUTISYA & PATRICK MUTISYA

(suing as the legal representatives of

Estate of Mutisya Kitongu Ngali (deceased)).....APPLICANTS

VERSUS

SIMON MAINA *alias* SIMON MUCHEMI MAINARESPONDENT

RULING

1. This is the Notice of Motion application dated 12th June 2020 and filed on 19th June 2020 under certificate of urgency. It seeks among others orders that:

a) **That**, this Honourable court be pleased to extend time and grant leave to the Applicant to lodge an appeal against the judgment of Honourable M.K Mutegi, Senior Resident Magistrate in Tawa SRMCCC No. 36 of 2018 delivered on 20/2/2020 and the Memorandum of Appeal annexed hereto be deemed as duly filed with leave of the court.

b) **That**, upon granting the prayers above, this Honourable court be pleased to stay the execution of the judgment/decree obtained in Tawa SRMCC No. 36 of 2018 pending the full hearing and final determination of the appeal subject to this application.

c) **That**, the costs of this application abide the outcome of the appeal.

2. The application is supported by the grounds on its face plus the affidavit of the 1st Applicant. The main ground is that the Applicants suit was dismissed by the trial court on 20th February 2020 with costs to the Respondent. The Applicants are desirous of filing an appeal but the time for filing such appeal has lapsed. They cite the reasons for delay to be: -

i. Delay in getting a copy of the judgment.

ii. Covid – 19 pandemic having interfered with the court processes, hence their inability to give their advocates instructions on the intended appeal.

3. The Applicant in her affidavit has annexed a copy of an email dated 18th May 2020 “PTMI” to the court seeking certified copies of proceedings and judgment. A copy of the draft Memorandum of Appeal “PTM2” is also annexed.

4. She is convinced that the intended appeal has high chances of success. They are apprehensive that unless stay of execution is granted the Respondent may levy execution for the awarded costs.

5. Mr. Mulyungi for the Applicants in his submissions blames the countrywide lockdown as a result of the Covid-19 pandemic. He submits that there was an imposed curfew and transport lockdown making it impossible for the Applicants to visit their offices. Furthermore, their offices were closed barely two weeks of delivery of the judgment yet they had not notified the Applicants of the outcome.

6. He also adds that law courts and registries also scaled down their operations as a result of the pandemic. He referred to section 79G of the Civil Procedure Act as the basis of the application. It provides:

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. Heavily relying on the case of **Samuel Mwaura Muthumbi –vs- Josephine Wanjiru Ngugi & Another Kiambu High Court Miscellaneous Civil Appeal No. 108 of 2017** he submits that the delay has been explained and further the period of delay is not inordinate

8. Thirdly he argues that the draft Memorandum of Appeal is arguable enough to warrant the prayers sought. Finally, he states that the Applicant may not be able to offer any security for costs owing to her status as a widow.

9. The Respondent filed a replying affidavit sworn on 1st July 2020. He avers that the application is made in bad faith and the delay of four months is inordinate. He dismisses the claim of hardship in securing a copy of the judgment due to the Covid-19 pandemic. He depones that the first time the Applicant requested for a copy of the judgment was on 18th May 2020 which was three months after delivery of judgment.

10. Finally, that he is entitled to the fruits of the delivered judgment and the Applicants have not demonstrated what prejudice they will suffer if he proceeds with execution.

11. M/s Makau & Mulei for the Respondent in their submissions argue that there is no sufficient cause shown by the Applicants for failing to file their appeal in time. They rely on the following cases to support their argument:

i. Daphne Parry –vs- Murray Alexander Carson (1963 (E.A 556.

ii. Mugo & Others –vs- Wanjiru & Anor (1970) E.A 482.

iii. First American Bank of Kenya Ltd –vs- Gulab P. Shah & 2 Others Nairobi (Milimani) HCCC No. 2255 of 2000 (2002) I E.A 65.

iv. HCC Misc Appl. No. 401 of 2018 (Mks0 Nginyanga Kavole –vs- Mailu Gideon, where the court stated:

“Five months’ delay is clearly an afterthought and the Applicant is under duty to satisfactorily explain such delay ... In my view the Applicant cannot escape blame for the obviously inordinate delay in bringing this application. Accordingly, I find this application unmerited and the same is dismissed.”

Analysis and determination

12. Having considered the application, affidavits, annexures, submissions and caselaw, I find the issue falling for determination to be whether the application for leave to file appeal out of time is merited or not.

13. Leave to file appeal out of time is provided for under section 79G of the Civil Procedure Act. The condition is for the Applicant to show a good and sufficient reason for not filing the appeal in time.

14. As set out in the case of **Mwangi –vs- Kenya Airways Ltd (2003) KLR**, some of the factors for consideration in a matter of this nature are:

- a) Period of delay.
- b) The reason for the delay.
- c) The arguability of the appeal.
- d) Degree of prejudice which could be suffered by the Respondent if the extension is granted.
- e) The importance of compliance with time limits to the particular litigation or issue.
- f) The effect if any on the administration of justice or public interest if any is involved.

15. From the record, it's clear that judgment was delivered on 20th February 2020 which was about 21 days before the countrywide lockdown following the declaration of the covid-19 pandemic as a national disaster.

16. Prior to the lockdown the disease was already with us. From the 16th March 2020 the courts completely downscaled their operations and there were no staff to type proceedings or even judgments save for matters under certificate of urgency.

17. The 30 days for filing appeal in this matter lapsed on 20th March 2020 when the courts were not operating normally. Upscaling for the courts started on 15th June 2020. The Applicants had by then sent an email to the court requesting for copies of the proceedings and judgment on 18th May 2020. Given the special circumstances prevailing I find that the delay is not inordinate and it has been explained.

18. On arguability of the appeal I have read through the draft Memorandum of Appeal. The claim before the lower court arose from a fatal road accident and the same was dismissed. The Applicants in the intended appeal are saying they availed, evidence including that of a police officer. They want to have this court's second consideration of the said evidence to understand the negative outcome of their claim. This cannot be said to be frivolous.

19. I do find that the Applicants have made out a case for issuance of the order granting them leave to file appeal out of time. The Respondent will not suffer any prejudice by grant of this order. The favourable order they got before the lower court which may be executed is only the award of costs.

20. I therefore allow the application in terms of prayer **No. 3** of the application. The appeal to be filed within 14 days from the date of delivery of this ruling.

(b) There shall be stay of execution of the judgment/decreed in Tawa SRMCC No. 36 of 2018, dated 20th February 2020 pending filing and hearing of the intended appeal.

21. Costs of this application to the Respondents.

Orders accordingly.

Delivered, signed & dated this 29th day of July 2020, in open court at Makueni.

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H. I. Ong'udi

Judge