



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**MISCELLANEOUS CIVIL APPLICATION NO. 32 OF 2020**

**MUYA CHIBANZA MUNGA**

**MOHAMED SAID ABUBAKAR.....APPELLANTS**

**VERSUS**

**ADNAN MOHAMMED OMAR**

**KHADIJA KADZO KAHINDI**

(Suing as legal representatives of the estate of the late **FAHIMA MOHAMMED ADNAN.....RESPONDENTS**

**CORAM: Hon. Justice R. Nyakundi**

**Kairu & Mc Court Advocates for the Appellants**

**Munyithya, Mutugi, Umara & Muzna Advocates for the Respondents**

**RULING**

This notice of motion filed in Court on 26.5.2020 by the applicant in terms of Section 1A, 3, 3A, 79(G) and 95 of the Civil Procedure Act and further under Order 42 Rule 6 and Order 50 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules seeking the following substantive orders:

- (1). That the Honourable Court be pleased to grant leave to file an appeal out of time against part of the Judgment delivered on 26.2.2020 by Hon. Kituku as per attached Memorandum of Appeal.**
- (2). This Honourable Court be pleased to order a stay of execution of the Judgment/Decree in Civil Suit No. 423 of 2015 – Kilifi entered against the intended appellant/applicant; on the aforesaid date.**
- (3). Costs of this application be in the cause.**

In support of the application is an affidavit sworn by **Isabella Nyambura** a legal officer with Direct line Assurance Company, the insurer of the motor vehicle registration number KAR 928 and at whose instance **Kilifi SPMCC No. 423 of 2015** was filed. The applicant main reason why an appeal was not filed within the stipulated thirty (30) days period was due to non-issuance of a copy of the impugned Judgment by the Court.

#### **Background**

On 14.7.2015 the respondent filed a claim in damages against the appellant arising out of a fatal accident which occurred on the 1.8.2014 involving motor vehicle registration number KAR 928, stated to be the vehicle the deceased victim **Fahima Mohammed Adnan** was travelling as a lawful passenger with that of the defendant/intended appellant registration number KBJ – 050D.

The claim by the legal representative to the estate of the deceased was based on particulars of negligence by the intended appellants as pleaded in paragraph 5 of the Plaintiff.

The Learned trial Magistrate having heard both parties on the merits entered Judgment in the following terms:

**Liability at 100%**

<b>Pain and suffering</b>	<b>Kshs. 150,000.00/=</b>
<b>Loss of expectation of life</b>	<b>Kshs. 100,000.00/=</b>
<b>Funeral expenses</b>	<b>Kshs. 40,000.00/=</b>
<b>Specials</b>	<b>Kshs. 460,056.64/=</b>
<b>Loss of dependency</b>	<b>Kshs.5,132,190.00/=</b>

In addition the respondent was awarded costs and interest. That Judgment forms the foundation applicant seeks to have leave for extension of time to challenge it in the Superior Court. The application was disposed of by way of written Submissions duly acknowledged from each counsel in support of the perspective for and against the orders premised in the notice of motion.

**Determination**

The principles for granting an extension of time to file an appeal or comply with certain case management directions are not in dispute. It is an equitable remedy in which Courts have unfettered discretion to intervene by extending time that could enable an applicant to process the proceedings to the next level. This is the power which is recognized by the Courts in a number of decisions. One of the leading cases was decided by the **Supreme Court in Salat v Independent Electoral & 7 others {2014} KLR – SCK**. The Court of Appeal Judgments in **Paul Wanjohi Mathenge v Duncan Gichane Mathenge {2013} eKLR** and **Leo Sila Mutiso v Rose Hellen Wangari Mwangi Civil Application No. Nairobi 255 of 1997 (UR)**.

That being the case, I would highlight the principles derived from the Supreme Court dictum in **Salat case (supra)** where the following guide was laid down to enable the exercise of discretion for leave or rejection of the application. Thus

- (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). Whether there will be any prejudice suffered by the respondents if the discretion is granted.**
- (6). Whether the application has been brought without undue delay and**
- (7). Whether in certain cases, like Election Petitions, public interest should be a consideration for extending time.**

This criterion inevitably will depend in the facts of each case on the true implication of the power to exercise discretion in favour of the applicant as against the respondent. In the **Paul Wanjohi and Leo Sila Mutiso cases (supra)**, the four factors are to be considered:

- (a). The length of the delay.**
- (b). The reasons for the delay.**
- (c). The chances of the appeal succeeding if the extension of time were to be granted and**
- (d). The prejudice caused to the would be respondent if an extension of time were granted.**

In another leading comparative case from the Supreme Court of the **Caribbean in Sayers v Clarke Walker {2002} EWCA CIV 645** where the Court observed:

**“It follows that when considering whether to grant an extension of time for an appeal against a final decision in a case of any complexity. The Courts should consider all the circumstances of the case, including**

- (a). The interests of the administration of justice.**

- (b). Whether the application for relief has been made promptly.
- (c). Whether the failure to comply was irrelevant.
- (d). Whether there is a good explanation for the failure.
- (e). The extent to which the party in default has complied with other rules, practice directions and Court orders.
- (f). Whether the failure to comply was caused by the party or his legal representative.
- (g). The effect which the failure to comply had on each party and
- (h). The effect which the granting of relief would have on each party.

**In the case of a procedural appeal, the Court would also have to consider item (g), whether the trial date or the likely trial date can still be met if relief is granted.”**

The decisions discussed in this Ruling show that in principle applying the interest of justice criterion a breach of statutory time limit can be remedied by extending time for the benefit of the applicant to pursue an impending claim in regard to a legal right.

With the above background, I now proceed to evaluate the factual matrix vis viz the settled principles:

**(a). The length of the delay.**

For the sake of this ground there is no dispute that the impugned Judgment was read and delivered on 26.2.2020. Typically, the aggrieved party pursuant to Section 79 (G) of the Civil Procedure Act had at his disposal a period of thirty (30) days to lodge an appeal. But in this occasion the express right contained in this provisions notably expired without a notice or memorandum of appeal being filed.

The application to seek leave to extend time under the proviso of Section 79 (G) of the Act was subsequently filed on 26.5.2020. It is clear that the applicant has surpassed the thirty (30) day period by a further two months after the expiry of the tariff period. This was for in excess of the thirty (30) day appeal window provided for in Section 79 (G) of the Civil Procedure Act.

Hearing both sides through their written Submissions the affidavit in support contains no detailed grounds underlying the reasons for the delay. The letter of the provisions under Section 79 (G) of the Act is for the aggrieved party to file an appeal promptly within thirty (30) days limit.

Cases of this nature are primarily based on personal injury claims, where a successful litigant to the claim would be occasioned substantial hardship or prejudice to his or her rights due to undue delay to access the fruits of the Judgment. It is also considered that long delays in challenging valid Judgments or orders of the Court would be detrimental to good administration of justice. In light of this, the delay of sixty (60) days in this case to bring an application for leave to extend time is very substantial and in breach of the relief sought under this limits.

Secondly, in preparing the motion for leave to extend time, the dichotomy which has been imposed, and which must now be explained are the reasons for the delay. The sole issue in this case was that the applicant filing of an appeal depended on a copy of the Judgment to internalize the reasons for the decision before taking the appeal option. It is undoubtedly clear that under Article 50 (5) (b) of the Constitution, the right to a copy of the record of the proceedings within a reasonable period is an entitlement which applies **Mutatis Mutandis** to civil proceedings in return for a reasonable fee as prescribed by Law. Despite the necessity of a certified copy of the decree or order of the trial Court from the point of delivery of Judgment onwards no mention is made of the applicant seeking certificate of delay for that matter.

Again and again the applicant failed to show sufficiently by way of evidence that there was delay in extracting the decree or order of the impugned Judgment. The fact that the applicant counsel had attended the open session for the delivery of Judgment on 26.2.2020 is a factor which does not safeguard permission to grant extension of time.

Taking a step further from the record its notable that the applicant never applied for a certified copy of the decree arising out of the Judgment read by the Learned trial Magistrate. The Court would have gone further still in the protection of the substantive statutory expectation. By similar reasoning the conclusion I reach is that in accordance with the general principles in favour of extension of time to that extent no sufficient and good cause has been demonstrated by the applicant.

Thirdly, other novel phenomena likely to impact the exercise of discretion is the prejudice test derived from the principles in **Salat Wanjohi and Sayers ( supra)** authorities cited elsewhere in this analysis. The persuasive authority with reference to these words discretionary stated as follows in **Sunjin Engineering Pte Ltd v Hwang Jaewoo {2011} 2 SLR 196**

**“In our view, what the aforesaid authorities show is that in each case, the Court, in deciding whether to extend the timeline for an act to be done, has to balance the compelling interests of the parties concerned ... The factual matrix of the case at hand will be paramount. In balancing the parties compelling interests, the Court inevitably needs to consider the question of prejudice. Copious citation of case Law will not be necessary and also will not be helpful. In determining how the balance of interests should be struck and in applying the principles and factors in exercise of discretion it is the overall**

**picture that emerges to the Court as to where the justice of the case lies which will ultimately be decisive.”**

In the instant case on the face of it, a Plaintiff seeking damages was filed on 14.7.2015 against the defendant/intended appellant. The trial Court expended about four years and seven months to determine the claim on the merits. The Court made an important survey of the subject of damages after establishing the causal connection on liability between the parties. The damages claimed and awarded being pecuniary are of a scale expected to be satisfied in favour of the respondents by the intended appellants.

Therefore, in this case further delay to enforce the decree militates in favour of dismissing the application for an additional extension of time. One case illustrates legal policy operational distinction in **Federal Housing Authority v Katejaiye {2010} 19NWLR PL 1226** where **Onnoguen JSC** articulated the following principles on the duty of the Court and the rights of parties in applications of this nature:

**“It must be pointed out that the role of the Court in adjudication is to maintain a level playing field for the parties by offering them equal opportunity to present their cases or grievances, if they so wish. Once the opportunity is offered, it is the duty of a party to litigation or his counsel to utilize the opportunity so offered; he cannot turn around and blame the Court for the loss of the opportunity as the Court will not allow a party to hold the opponent or the Court to ransom under the guise of the desert to protect the principles of fair hearing. To me the right to fair hearing remains the right to an opportunity to be heard on any matter affecting one’s rights. Once the opportunity is offered, the duty of the Court ends there.”**

All indications now are that the Courts will not exercise discretion to extend time merely because an unsuccessful litigant is aggrieved with the order made which turns out to be unacceptable to him or is of a nature which did not meet his expectations. The discretions can only be exercised on the well settled principles enunciated in the above cited cases. That list as a rule is not extensive and the burden rests with the applicant the reasons for the delay do not fall foul of the Law and the rules in the Civil Procedure Act and Rules 2010.

It is for the same reason, I find that the applicant has not shown good and substantial reasons in this context in consider sense to exercise discretion to extend time.

Finally, there is the potentiality of prima facie evidence to show that the applicants case has a prospect or chances of succeeding on appeal instructively, in **Athuman Nusura Juma v Afwa Mohamed Ramadhan CA No. 227 of 2015** the Court held inter alia that:

**“On application to extend time, the Court has to ensure that the intended appeal has merits or chances of success.”**

In confirming this last position, the Court in **Hing v Hing {1978} 25 WIR 391** the House of Lords held that:

**“The dominant consideration is the interest of justice, and it is for this Court to determine in every individual case as it arises, whether recourse to this rule is demanded. This Court’s sense of justice must be its guide. But it must be in the interests of justice according to Law. This consideration includes not only the interests of the dissatisfied litigant who wishes to pursue a right of appeal, but those of the successful one in the satisfaction of the Judgment in his favour without undue delay, as well as regard for the important administrative principle against the undue protraction of litigation. We have to balance the two competing interests bearing in mind the third.”**

When considering whether an applicant has satisfied the test on the prospect of success of the intended appeal, the Court at this stage is not engaged in a process of evaluation on the merits by on a probability of success in light of the relevant facts and draft memorandum of appeal. Each case must, in my view, be evaluated on its own individual facts. This ground on the chances of likely success of an appeal on quantum resets the discretion of the Court then allows meaningful access and its due process as a whole. Notwithstanding the failure by the applicant succeeding on the threshold of other conditions on delay and reasons for the length of delay, purpose interpretation of the Law as it stands gives effect to the criterion on the interest of justice and the right to be heard on appeal. In **Hoggard v Wordsbrough UDC {1962} 1 ALL ER 468** the Court held:

**“Where two parties are in dispute, and the obligation is on the Court or tribunal to decide equitably between the compelling claims each party must receive consideration and each claimant must be invited to put forward the material on account of that claim and the opportunity must be afforded to be heard on the rival claim: The claim here is on award of damages on loss of dependency on the face of it the legality of the award is questionable as being excessive and punitive.”**

On this account, I take the view there is good ground for discretion to be exercisable by the Court to grant leave for extension of time in favour of the applicant.

It is now thoroughly well established that the Court upon grant of the equitable relief on extension of time its inescapable not to rule on stay of execution under Order 42 Rule 6 of the Civil Procedure Rules.

The rules of the applicants Submissions on this same application is to have the execution of the decree stayed pending the hearing and determination of the appeal. In relation to this pursuant to Order 42 Rule 6 a party is at liberty to pursue stay of execution. There has been guidance from a number of cases with respect to this relief on stay of money decrees and Judgments. The general rule in **Madupaper v Crescent Construction Civil Appeal No. 60 of 1990**

**“a successful litigant is entitled to the fruits of his Judgment without fetter or delay.”**

Therefore, there must be a special feature such as irregularity of the Judgment or substantial loss and the fact that the respondent would not

be able to repay back the decretal sum in the event the appeal succeeds.

The Court in **Stephen Wanjohi v Central Glass Industries Ltd Civil Case No. 6726 of 1991** stated that:

**“whether the Court will exercise its discretion to grant a stay will depend on all the circumstances of the case which includes:**

- (a). Sufficient cause**
- (b). Substantial loss**
- (c). No unreasonable delay**
- (d). security for due performance of the decree.”**

The Courts task is to preserve the subject matter so as not to render the appeal nugatory. The Court of Appeal in **Intra Africa Assurance Co. Ltd v Victoria Commercial Bank Ltd** laid down the principle illustrated therein that:

**“The jurisdiction on stay of execution is discretionary and it is trite Law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, or put another way, it is not frivolous, and secondly that unless he is granted a stay the appeal or intended appeal if successful will be rendered nugatory.”**

Similarly, in the case of **Funad Mahmoud Mohammed & Another v Kenya Oil Company Ltd CA No. 267 of 2003** the Court observed that:

**“an application for stay of execution may be granted where it would be shown that the applicant is likely to suffer hardship and financially ruined further as the respondents may not be in a position to repay back. The decretal sum were the results of the intended appeal to go against them.”**

Applying the above principles, this Court is required to look at all of the circumstances of the case in considering the application; to weigh whether there is a higher risk of injustice to any of the parties in the event stay is declined or granted. The applicant towards this end annexed a draft memorandum of appeal raising various grounds in reference to the impugned Judgment of the trial Court. He avers, inter alia that the general damages of Kshs.5,592,246 for loss of dependency was excessive and manifestly high and was unconscionable that the grounds of appeal are not frivolous and if the decretal sum is paid out to the estate of the deceased, he will suffer substantial loss for the respondent in effect will not be able to refund the quantum rendering the intended appeal nugatory.

The respondent in the affidavit has not provided adequate evidence to the contrary of the applicants' disposition. The duty of the Court is to safeguard the interest of both parties to the claim. See **National Bank of Kenya Ltd v Jirraj Raishi & Brothers Ltd Nairobi Civil Application No. 153 of 2002**.

In the **American Cynamide case {1975} AC 396, 408 Lord Diplock** held:

**“It would be unwise to attempt to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. Among the matters which the Court may take into account are prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is, the likelihood of such prejudice actually occurring, the extent to which it may be compensated by an award of damages or enforcement of the cross-cutting undertaking; the likelihood of either party being able to satisfy such an award, and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say the Courts opinion of the relative strength of the parties costs.”**

It is not contested that the applicants would suffer substantial loss if stay of execution is not granted. The effect of these submissions with regard to the application is to exercise discretion and grant the order for stay of execution. In a nutshell and in the light of the facts herein and the aforesaid apt principles of Law, the following final orders shall be granted:

- (1). Leave be and is hereby granted for extension of time to file an appeal out of time. The draft memorandum of appeal be deemed as duly filed within time under Section 79 (G) of the Civil Procedure Act.**
- (2). That correspondingly stay of execution is allowed on condition that the applicant do deposit the decretal sum of Kshs.5,132,190/= in a joint earning interest account of both counsels within thirty (30) days from the date herein and in default the intended appeal stand dismissed.**
- (3). The balance of damages constituting a total sum of Kshs.750,056/= be partially released to the respondents within the stated period of thirty (30) days as part settlement of the claim.**
- (4). Costs of the application to abide the outcome of the appeal.**

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 21<sup>ST</sup> DAY OF AUGUST, 2020**

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of**

1. Mr. Muniyitha present for the respondents