



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISC. CIVIL APPLICATION NO. 17 OF 2020

FM (minors suing through mother & next friend MWM.....)APPLICANT

VERSUS

JASPER NCHONGA MAGARI.....1ST RESPONDENT

JACKLINE DAMA KARANI.....2ND RESPONDENT

Coram: Hon. Justice R. Nyakundi

Wambua Kilonzo advocates for the applicant

Respondents in person

RULING

This is a notice of motion dated 7.2.2020 brought in terms of Section 3A, 95, 79(G) of the Civil Procedure Act and Order 51 Rule 6 (1) of the Civil Procedure Rules seeking an extension of time to file an appeal intended to be preferred against the decision of the trial Court in **CMCC No. 29 of 2019** delivered on 22.10.2019.

Background

The applicant herein sued the respondents before Malindi Chief Magistrate Court vide Plaintiff dated 25.5.2019 seeking general and special damages arising out of a road traffic accident which occurred on 14.7.2018 at Malindi – Gongoni Lamu Road. The applicant who was travelling as a passenger in motor vehicle registration number KTWB532K which lost control suffered personal bodily injuries to the head, neck, thorax and abdomen. In a judgment delivered on 22.10.2019 the applicant was awarded general damages of Kshs.60,000/= and specials of Kshs.2,550/= plus costs and interest. Being aggrieved with the outcome of the suit he intends to appeal as supported by the grounds in the draft Memorandum of Appeal. The respondent was duly served with the suit papers and reasons why extension of time is being sought by the applicant. The affidavit of service indicates that the respondents were duly served with the notice of motion but as the time of preparing this ruling no appearance had been made in answer to it. The applicant counsel filed brief written submissions as a protocol to dispose of the application.

Determination

The Court has taken into account the notice of motion, grounds on the face of it, affidavit in support and brief written submissions to persuade the Court to exercise discretion in his favour. Further, I have also perused the record of the proceedings in the Court below.

Relevant Law and Legal Analysis

First and foremost where one intends to appeal a decision from an inferior tribunal or subordinate Court pursuant to Section 79 (G) of the Civil Procedure Act he or she has 30 (thirty) days within which to file the aforesaid appeal. Indeed under the proviso of the same Section, the High Court could extend time. However, it is only mandated to do so where an applicant demonstrates good and sufficient cause for an extension of time to file an appeal. The established principles to guide in the Courts exercise of its discretion are to be found in the decision of the Supreme Court in **Salat v Independent Electoral & Boundaries Commission & 7 others {2014} eKLR – SCK**. The Court held as follows:

“That in exercising the discretion to extend time for filing an appeal the question involved should bear in mind 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 ought to 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, which ought to be explained to the satisfaction of the Court.*
- (5). *Whether there would be any prejudice suffered by the respondents if the extension was granted.*

Whether the application has been brought without undue delay and whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.

In turn, the Court of appeal in **Paul Wanjohi Mathenge v Duncan Gichane Mathenge {2013} eKLR** guided by other similar authorities provided some useful guidelines on what constitutes sufficient and good cause in dealing with enlargement of time.

“The discretion under rule 4 which can be looked within the context of Section 79 (G) of the Civil Procedure Act is unfettered, but it has to be exercised fiducially, not on whim, sympathy or caprice. I take note that in exercising my discretion, I ought to be guided by consideration of the factors stated in previous decisions of this Court including but not limited to, the period of delay, the reasons for the delay, the degree prejudice to the respondent and interested parties if the application is granted and whether the matter raises issues of public importance.” (See also **Leo Sila Mutiso v Rose Hellen Wangare Mwangi CA NO 255 OF 1997**).

In the instant application, I am guided by the approach of the Supreme Court in **Salat case (supra)** and the Court of Appeal in **Wanjohi case (supra)** in deciding whether the notice of motion has merits. I have considered the affidavit in support of the motion anxiously and with utmost care. The applicant averments in paragraph (v) & (vi) makes reference to the grounds for the delay being that the impugned Judgment was read without notice and in absence of the parties. There is also an averment that the applicant came to learn of its existence on 22.1.2020 and promptly on the 7.2.2020 an application for leave to extend time was filed in this Court. It is noteworthy that the applicants motion stands unchallenged by the respondents. Though served elected not to file any opposition to the matter.

Be that as it may, I am satisfied that there is cogent material drawn from the affidavit on which I can exercise my discretion for leave to extend time for the applicant to file an appeal out of time. In this case as illustrated through the affidavit of the applicant and as corroborated by the record simply by virtue of its mode of delivery of the Judgment in absence of the parties a timely copy ought to have been dispatched to bring the decision to their notice.

What transpired in the Court on 22.10.2019 was never brought to the attention of the plaintiff nor the defendants. In light of the guidance contained in the cited authorities, I am of the view that the applicant has demonstrated the reasons for the delay and that the intended appeal raises arguable grounds with reasonable chances of success. It is therefore abundantly clear that the applicant has satisfied the elements for this Court to exercise discretion.

In a case as this one the exercise of discretion is also underpinned by the principles in **Sayers v Clarke Walker {2002} EWCA Civil 645** the Court held that:

“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 interest of the administration of justice*
- (b). whether the application for relief has been made promptly*
- (c). whether the failure to comply was intentional*
- (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 of which the failure to comply had on each party and 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 whether the trial date or the likely trial date can still be met if relief granted.”

In all these fronts starting from the point that the Judgment was read without notice to the parties and thereafter lack of evidence of it being supplied to the aggrieved party within a reasonable time is a good and sufficient reasons for the delay to file an appeal. Secondly, the

applicant is not guilty of dilatory conduct. Thirdly, it would be in the interest of justice to extend time to file an appeal for an appeal Court to determine the issues on the merits.

As a result the notice of motion dated 3.2.2020 succeeds by granting the reliefs sought. By this application, the draft memorandum of appeal be deemed as duly filed within time.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 5TH DAY OF AUGUST 2020

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R. NYAKUNDI

JUDGE

This ruling has been delivered in terms of Article 48 and 159 (D) of the Constitution and practice directions on the general risks associated with COVID – 19 pandemic. (*See Gazette Notice No. 3137 of 17.4.2020*)