



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

MISC. CIVIL CASE NO. 34 OF 2020

RUTH SHIKANDA (Suing as Legal Repr. on behalf of the Estate

of AGNES AYORI ASHIEMBI (DCD).....APPLICANT

VERSUS

SIBED TRANSPORT COMPANY LTD.....RESPONDENT

RULING

1. By an application dated 18th June 2020 and filed in court on 21/8/2020, the applicant seeks from this court leave to file an appeal out of time against the judgment delivered on 26/2/2020 in Ukwala SRM CC No 62 of 2018.
2. The grounds upon which the application is predicated are that the applicant and her advocate were prevented by sufficient cause from filing an appeal within the prescribed time. Secondly, that the applicant desires to pursue an appeal against the said judgment but the time within which to appeal has lapsed. The applicant also claims that the intended appeal raises triable issues and finally, that the Respondent shall not be prejudiced in any way if leave to appeal is granted.
3. The Application is supported by an affidavit sworn by Francis Omondi Advocate, counsel for the applicant, on 18/6/2020.
4. In the said affidavit, counsel for the applicant deposes that judgment in Ukwala SRMCC No. 62/2018 was delivered on 26/2/2020 in the absence of parties and that he managed, after several efforts, to peruse the said judgment on 12/3/2020 and communicated its contents to the applicant who instructed him to file an appeal then he prepared the memorandum of Appeal on 16/3/2020 but on 15/3/2020 the Chief Justice issued a directive suspending all court operations which included attending to the court registries physically due to the advent of covid-19 pandemic, which directives effectively paralyzed court operations and therefore the applicant was unable to file her appeal in time, despite the subsequent upscaling of court services which came after the time had lapsed for filing of the appeal.
5. The Applicant's counsel annexed a draft memorandum of appeal and internal memos from the Hon. the Chief Justice on the downscaling and upscaling of court services.
6. The application by the Applicant was opposed by the Respondent who swore an affidavit through Mohammed Said, a Director of the Respondent contending in depositions that the application by the Applicant is frivolous, vexatious and an abuse of court process; that the applicant is guilty of laches hence not worthy of this court's sympathy.
7. It was deposed that after judgment was delivered on 26/2/2020, the applicant's counsel forwarded a bill of costs to the Respondent's counsel which bill of costs was assessed by the court by way of written submissions and a Ruling delivered on 15/7/2020 awarding the applicant costs of Kshs. 143,305 and that the applicant has been paid the whole decretal sum of Kshs. 256,000 together with the assessed costs.
8. According to the Respondent, by the time the applicant served the Respondent with a bill of costs for assessment, time for filing of the appeal had not lapsed hence this appeal is an afterthought, mischievous as the applicant waited until she was paid the whole decretal sum only seek to appeal later.
9. The respondent contends that the covid-19 pandemic is being used as an excuse to cover up indolence. Further, that court registries were neither closed during the scale down and if that were the case, the applicant who is allegedly applying double standards could not have filed his bill of costs in court on 22.5.2020 during the covid-19 pandemic period, which bill was canvassed by way of written submissions.
10. The Respondent also attacks the affidavit sworn by Mr. Francis Omondi, counsel for the applicant who is not a party to the proceedings,

claiming that as an advocate he is not competent to swear an affidavit on behalf of his client.

11. It was further deposed that the intended appeal raises no triable issues and that pursuing the same is a waste of precious judicial time.

12. That there is no sufficient reasons advanced to warrant grant of the orders sought and that the Respondent will suffer great prejudice if the orders sought are granted as it has already honoured the decree of the trial court hence, litigation must come to an end and that as the applicant has not come to court with clean hands. She should not benefit from equity or the discretion of the court.

13. The Respondent urged the court to dismiss the application with costs.

14. The application was canvassed by way of written submissions. In the submissions dated 6th October 2020 and filed on 12/10/2020 by the applicant's counsel, he reiterated his grounds and depositions and restated Section 79G of the Civil Procedure Act on time for filing if appeals from the subordinate court to the High Court and the proviso on extension of time where such time has lapsed. Counsel cited **Kiambu HC Misc Application No. 108/2017 Samuel Mwaura Muthumbi V Josephine Wanjiru Ngugi & Another** on what constitutes sufficient cause.

15. It was submitted that the Respondent's Replying affidavit does not sufficiently counter the reasons set forth in the application. Further submission was that it was proper for counsel for the applicant to swear an affidavit on behalf of his client as the matters deposed were issues in the public domain and matters counsel was conversant with, having conducted the main case for the applicant in the lower court.

16. Opposing the application, the Respondent's counsel filed written submissions dated 16/10/2020 and filed on the same day relying on the Replying affidavit and citing decisions from the Court of Appeal in **Paul Musili Wambua Vs AG & 2 Others [2015] eKLR** on the conditions to be considered in an application for extension of time.

17. Counsel also framed two issues for determination namely:

1. Whether the delay to file the appeal was inordinate,

2. Whether the appeal has any chances of success.

18. On the first issue, it was argued on behalf of the Respondent, citing **Section 79G of the Civil Procedure Act**, that the applicant has not demonstrated to this court reasons for the delay in filing his appeal and that the averments relating to covid-19 pandemic as the reason are not true as alleged. The Respondent's counsel reiterated deposition in the Replying affidavit which I need not reproduce here as I have already reproduced them above. He relied on **Dilpack (K) Ltd Vs William Muthama Kitonyi [2018] eKLR Machakos HCCA 142/2013** where Odunga J. dismissed an application of similar nature citing **Benben Ali Bhai Manji Vs Sultan Hasham Lalli & 2 Others [1990-1994]EA 337** where it was stated that inaction on the part of an advocate as opposed to error of judgment or a slip is not excusable and neither is it a mistake which ought not to be visited on the client.

19. On the second issue of whether the appeal has any chances of success, it was submitted that the applicant having received all the decretal sum of the judgment in the lower court plus assessed costs before filing this application, the intention to challenge that decree is an afterthought and mischievous and that this court has been rendered *functus officio*.

20. On whether the application is merited, it was submitted that the same is defective as the advocate not being a party to proceedings should not have sworn an affidavit on behalf of his client.

21. Counsel reiterated that allowing the application herein will prejudice the Respondent as they already honoured the judgment of the court below by settling the entire decretal sum plus costs. They urged this court to dismiss the application dated 18/6/2020 with costs.

DETERMINATION

22. I have considered the applications dated 18/6/2020, the Responses thereto and the written submissions canvassing the said application. I have also considered the authorities relied upon.

23. The applications in all the case files herein HC Misc. 34, 35 and 36 are brought under Section 79G of the Civil Procedure Act.

24. Under section 79G of the Civil Procedure Rules, an appeal from the subordinate court to the High Court shall be filed within 30 days from the date of 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 of the appellant satisfied the court that he had good and sufficient cause for not filing the appeal in time."**

25. The applicants assert that the delay in filing of the appeals in time was because the court files were inaccessible for counsel to peruse the judgements and advise the clients, and the directive issues by the Chief Justice on 15.3.2020 downscaling the court operations including attendances to registries and premises for purposes of filing with an aim of mitigating the ravaging effects of covid-19 pandemic. However, the Respondent's counsel countered this assertion with a factual argument which was not controverted that the applicants counsel was aware of the judgment date and even served the Respondent's counsel with a judgment notice dated 26/2/2020.

26. Further, that upon delivery of the said judgment, the applicants counsel forwarded his bill of costs to the Defendant's advocates on 12/3/2020 which was before the scaling down of court operations, which bill of costs was assessed on 15/7/2020, about 4 months later. It is

argued that even if the court file was not available for perusal until 12.3.2020 when bill of costs was filed, the applicant was still within time to appeal hence there is no excuse for the failure to file the appeal or inform his client of the judgment's outcome and file the appeal within time.

27. The Respondent's counsel argues that downscaling of court's operations did not close down courts due to the covid-19 pandemic and that in any event, upscaling Notice is dated 8.6.2020 and that the applicant has only woken up to seek leave to appeal out of time after being paid the entire decretal sum plus costs hence the idea of filing an appeal out of time is an afterthought.

28. In *Thuita Mwangi Vs Kenya Airways Ltd [2018]eKLR*, it was held:

“It is well settled that the decision whether or not to extend time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first; the length of the delay; secondly; the reason for delay; and thirdly; (possibly) the chances of the appeal succeeding if the applicant is granted.”

29. The Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat Vs IEBC & Others [2014]eKLR* stated:

- 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 discretion to extend, it 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 Respondent if the extension 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.**

30. The judgment intended to be appealed against was delivered on 26/2/2020 before the covid-19 pandemic and on 15/3/2020, the downscaling of courts operations was pronounced by the Hon the Chief Justice. However, on 12/3/2020, the applicant's counsel had his client's costs in the matter assessed and from the deposition by the Respondent, the entire decretal sum plus the assessed costs were paid to the applicant in full and final settlement.

31. Therefore, whereas between 15th March 2020 to 8/6/2020 there was downscaling of court operations, it is clear and I take judicial notice of the fact that the courts never closed their registries and that is why the applicant had his bill of costs filed in court on 22/5/2020 and assessed before settlement of decree in full by the Respondent.

32. This court has not been shown any letter written by the applicant addressed to the trial court, during the period to 26/2/2020 and 8/6/2020, asking for copies of proceedings and or judgment of the trial court to enable her file an appeal. Neither has the applicant annexed any certificate of delay to demonstrate that it was the trial court that delayed supplying her with the copies of proceedings and or judgment.

33. In addition, by the time the applicant's counsel was having his client's costs assessed and receiving payment in full settlement thereof, he should have intimated his intention to appeal. He did not. It is clear to this court that the applicant, after receiving and utilizing the decretal sum plus costs as assessed by the court is when she now purports to challenge quantum of damages awarded to her. That in my humble view is an afterthought and an act of bad faith. Litigation must come to an end and especially where decree has been settled without any protest or contestation from the decree holder. What is this exceptionally compelling ground of appeal that can persuade this court to find for the applicant that the intended appeal has high chances of success? I find none. I find the applicant is being an opportunist. She is using the covid-19 pandemic to have a second bite at the cherry. The fact that the period for appeal ended during the covid-19 pandemic on 27/3/2020 is in itself no excuse for the applicant to wait until she has been paid all the decretal sum and eight months after the judgment and settlement of decree to seek to challenge the judgment of the trial court.

34. The Ruling of the trial magistrate on taxation was delivered on 15th July 2020. Those costs were filed in court on 22/5/2020. By a Notice of 6th February 2020, the applicant notified the Respondent's counsel that judgment would be delivered on 26/2/2020 which was long before the downscaling of the court operations on 15/3/2020.

35. In the draft Memorandum of Appeal, the applicant seeks for enhancement of the award of general damages to a sum proportionate to the injuries sustained by the Applicant/Plaintiff.

36. In my humble view, the applicant is mischievous as she did not have to wait until settlement of the decree for her to emerge and claim that the award was inordinately low.

37. In *E.T. Monks & Company Ltd Vs Evans & 3 Others [1974]*, the court held that public policy demands that the business of the court be conducted with expedition.

38. Further in **Dickson Miriti Kamonde Vs Kenya Commercial Bank Ltd [2006]eKLR**, it was held that:

“.....the delay cannot be excused and an indolent party must reckon with consequences of inaction”.

39. In **Gideon Sitelu Konchella Vs Daima Bank Ltd [2013]eKLR** citing **Mobil Kitale Service station Vs Mobil Oil(K) Ltd and Another [2004]eKLR**, it was held:

“It is the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice by delay would be a thing of the past. Justice would be better served if we dispose of matters expeditiously. The overriding objectives of the Act and the Rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.”

40. I find that the application for leave to appeal out of time is made with inordinate delay and the delay is not satisfactory explained to the court. I also find no good or sufficient reason to grant the orders sought which will set a very bad precedent to the extent that parties whose decrees are settled will keep returning to court long after settlement to ask for more by way of an appeal.

41. Delay defeats equity. Furthermore, Article 159 of the Constitution abhors procrastination. It provides that justice shall be administered without undue delay. As the applicant has come to court after undue delay whose explanation is not satisfactory to the court, I find this application and all other applications in the series of Misc Application Nos 35 and 36 of 2020 to be devoid of merit. The application herein and all applications in HC Misc Appl No 35 of 2020 and 36 of 2020 are hereby dismissed.

42. I would have condemned the applicant to pay costs to the Respondent but as I find no fault on the part of the applicant who did not even swear the affidavit in support of the application herein, though failure to swear the affidavit is not fatal to the application, I order that each party do bear their own costs of this application.

43. This order shall apply with necessary modifications to Misc. Civil Application No. 36 of 2020 and Misc. Civil Application No. 35 of 2020.

44. File closed.

45. Orders accordingly.

Dated, signed and delivered at Siaya this 26th day of October 2020 virtually in the presence of both parties' advocates via Microsoft Teams.

R.E. ABURILI

JUDGE