



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**(Coram: Odunga, J)**

**CIVIL MISC. APPLICATION NO. 60 OF 2018**

**MUTUNGI NGULO.....APPLICANT**

**VERSUS**

**PAN AFRICAN INSURANCE CO. LTD.....1<sup>ST</sup> RESPONDENT**

**PAN AFRICA INSURANCE CO.LTD.....2<sup>ND</sup> RESPONDENT**

**PAN AFRICA LIFE ASSURANCE LTD.....3<sup>RD</sup> RESPONDENT**

**PAN AFRICA GENERAL INSURANCE LTD.....4<sup>TH</sup> RESPONDENT**

**APA INSURANCE COMPANY LTD.....5<sup>TH</sup> RESPONDENT**

**PA SECURITIES.....6<sup>TH</sup> RESPONDENT**

**(Being an appeal from the whole judgement of the Hon. A. Kibiru (CM)**

**delivered on 23<sup>rd</sup> August, 2017 in Machakos Chief Magistrate's Court**

**Civil Suit No. 294 of 2011)**

**BETWEEN**

**MUTUNGI NGULO.....PLAINTIFF**

**VERSUS**

**PAN AFRICAN INSURANCE CO. LTD.....1<sup>ST</sup> DEFENDANT**

**PAN AFRICA INSURANCE CO.LTD.....2<sup>ND</sup> DEFENDANT**

**PAN AFRICA LIFE ASSURANCE LTD.....3<sup>RD</sup> DEFENDANT**

**PAN AFRICA GENERAL INSURANCE LTD.....4<sup>TH</sup> DEFENDANT**

**APA INSURANCE COMPANY LTD.....5<sup>TH</sup> DEFENDANT**

**PA SECURITIES.....6<sup>TH</sup> DEFENDANT**

**RULING**

1. By a Motion brought on notice dated 17<sup>th</sup> January, 2018, the Applicant herein, **Mutungu Ngulo**, seeks the following orders:

- (1) THAT the proposed Appellant be granted leave to appeal out of time against the whole judgment of the Chief Magistrate's Court in Machakos CMCC No.294 of 2011 delivered on 23.8.2017.**
- (2) THAT the Memorandum of Appeal annexed hereto be deemed as duly filed and served upon payment of the requisite fees.**
- (3) THAT this Honourable Court be pleased to set aside the judgment delivered on 23.8.2017 and all subsequent orders and decrees.**
- (4) THAT this Honourable Court be pleased to determine the issue of liability against the defendants.**
- (5) THAT the costs of this application be provided for**

2. The application was based on the following grounds:

- (1) The trial court in Machakos CMCC 294 of 2011 entered judgment in favour of the applicant but awarded liability at 100% against the 1<sup>st</sup> defendant and disregarded the nexus between the 1<sup>st</sup> defendant and 2<sup>nd</sup>-6<sup>th</sup> defendants hence dismissed the case against them.**
- (2) The proposed appellant had disappeared and his phone was not going through.**
- (3) The proposed appellant's advocates wrote to him severally but no response was forthcoming.**
- (4) The proposed appellant has now resurfaced.**
- (5) It has emerged that the proposed appellant was indisposed for a long period and that is why he was not reachable.**
- (6) The applicant is aggrieved by the trial court's finding and wishes to appeal against the same.**
- (7) The delay was inadvertent on the applicant's part.**
- (8) The delay is not ordinate.**

3. The said application was supported by an affidavit sworn by the applicant, **Mutungu Ngulo**, on 17<sup>th</sup> January, 2018. According to the applicant, the trial court in the above referred suit entered judgement in his favour but dismissed the suit against the 2<sup>nd</sup> – 6<sup>th</sup> defendants apportioning liability against the 1<sup>st</sup> Defendant at 100%. However, the 1<sup>st</sup> Defendant is a non-existent entity hence he cannot enforce the said judgement. It was the applicant's deposition that he is aggrieved by the said decision and wishes to appeal against the same.

4. It was deposed that the delay on the part of the applicant was inadvertent and was caused by a breakdown in communication between himself and his advocates on record hence he was unable to instruct them concerning the matter. He explained that the said breakdown in communication was due to the fact that he was indisposed for a long time and upon his recovery, he sought out his advocates who informed him of the judgement.

5. In his view, since the delay is not inordinate, the application ought to be granted since he will suffer substantial loss.

6. In his submissions, the applicant reiterated the foregoing and relied on **Edward Njane Nganga & Another vs. Damaris Wanjiku Kamau & Another [2016] eKLR**, in which the court cited the pronouncements of the Court of Appeal in **Stanley Kahoro Mwangi & 2 others v. Kanyamwi Trading Company Limited [2015] eKLR**.

7. It was submitted that in the instant case, the applicant has stated that the reason for the failure to appeal within time was because he was indisposed for a long period which resulted to a breakdown in communication with his advocates. As such he was not able to instruct his advocate to file an appeal within the requisite time frame. According to the applicant, it is trite that an advocate cannot act without instructions. Although the respondent has disputed the delay on the part of the applicant to instruct his advocate within the proper time limit, the same has been explained to the effect that the said failure was due to sheer inadvertence. In the applicant's view, the mistake by the applicants is excusable and the court can exercise its discretion in their favour. In this respect reliance was sought from **Edney Adaka Ismail vs. Equity Bank Limited [2014] eKLR** in which the case of **CMC Holdings Limited vs. Nzioki [2004] 1 KLR 173** was quoted.

8. It was submitted by the applicants that he met the conditions for grant of leave to appeal out of time and we urged this court to find and hold so.

9. The rest of the submissions dealt with the prayer for setting aside which with due respect is misconceived as that prayer cannot be granted in an application of this nature.

10. In opposing the application, the 4<sup>th</sup> and 5<sup>th</sup> Respondent filed a replying affidavit sworn by **Rina Welemba**, the 5<sup>th</sup> Respondent's Legal

Officer. According to her, the applicant has failed to explain the delay of over one year and half in filing the appeal within the required time. It was therefore contended that since the applicant is guilty of laches, he is undeserving of the exercise of the Court's discretion in his favour.

11. The said Respondents contended that they will be highly prejudiced if the application is allowed as the appeal will be reopened as a liability in their books yet they have been absolved of liability. It was their contention that the applicant's indisposition was never disclosed to them at the time the decree was being extracted.

### **Determination**

12. I have considered the application, the supporting affidavit, the grounds of opposition and the submissions filed as well as the authorities relied upon.

13. In this application apart from the application seeking leave to appeal out of time, the applicant also seeks that the Memorandum of Appeal annexed hereto be deemed as duly filed and served upon payment of the requisite fees. This Court has severally held that in a miscellaneous application the court cannot even if the leave to appeal out of time were to be granted, deem the annexed draft memorandum of appeal as duly filed. Not even if the applicant were to pay the requisite fees. The correct procedure, if an applicant seeks to have the draft duly filed would be to file an appeal and seek that time be extended within such a period as would validate the already filed appeal.

14. In fact, section 79G of the *Civil Procedure Act* provides that:

***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.***

15. Clearly therefore section 79G aforesaid employs the use of the phrase "an appeal may be admitted out of time" as opposed to "time may be extended to lodge an appeal out of time". However, even in cases where the law uses the latter phraseology, it has been held that it is prudent to regularise the default before seeking to extend time. This was the position in **Mugo & Others vs. Wanjiru & Anor [1970] EA 482** where it was held that:

**"Clearly, as a general rule the filing and service of the notice of appeal ought to be regularised before or at least at the same time as an application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused."**

16. On his part, Emukule, J in **Gerald M'limbine vs. Joseph Kangangi [2009] eKLR**, expressed himself as follows:

**"My understanding of the proviso to Section 79G is that an applicant seeking an appeal to be admitted out of time must in effect file such an appeal and at the same time seek the court's leave to have such an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the court's permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the court's process..."**

17. It is however my view that an application by way of miscellaneous application seeking leave to appeal out of time or extension of time to file an appeal is not necessarily fatally incompetent by the mere fact that an appeal is non-existence. To the applicant it may make economic sense not to file an appeal until leave has been granted in order to save the costs. However, where an applicant files a miscellaneous application he cannot seek to validate a draft memorandum of appeal in the same proceedings. My position is supported by the decision in **Stanley Mugacha vs. King Woolen Mills Ltd. Nairobi HCMA No. 767 of 1994**, where it was held an appeal should not be filed in a miscellaneous application. It therefore follows that such a prayer can only be granted where leave to appeal out of time is being sought in an already filed appeal. In a miscellaneous application such a prayer is misconceived.

18. The applicant also seeks, quite improperly in my view, that this Honourable Court be pleased to set aside the judgment delivered on 23<sup>rd</sup> August, 2017 and all subsequent orders and decrees and that this Court be pleased to determine the issue of liability against the defendants. How the applicants expect this court to grant those orders in a miscellaneous application seeking leave to appeal out of time before an appeal is filed, heard and determined defeats me. In my view the said prayers are with respect, mischievous and ought not to have been sought at all. They simply cannot be granted.

19. Under the proviso to section 79G of the *Civil Procedure Act*, an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so. This must be so since it was held in **Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633** that there is no difference between the words "sufficient cause" and "good cause". It was therefore held in **Daphne Parry vs. Murray Alexander Carson [1963] EA 546** that though the provision for extension of time requiring "sufficient reason" should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of *bona fides*, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time but has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.

20. As to the principles to be considered in exercising the discretion whether or not to enlarge time in **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC No. 2255 of 2000 [2002] 1 EA 65** the Court set out the factors to be considered

in deciding whether or not to grant such an application and these are (i). the explanation if any for the delay; (ii). the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; (iii). whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

21. In this case it was contended that the applicant was indisposed hence was unable to instruct his counsel. The delay of more than one year in filing the appeal, contrary to the position taken by the applicant, is clearly inordinate. In order to justify the grant of the leave as sought herein, the applicant must satisfy this court that he has a satisfactory reason for not complying with the rules of procedure prescribed doing so. If he was indisposed, he ought to, possibly disclose the nature i.e. was he involved in accident and for how long was he bedridden for example? When was he able to recover? He ought to present to the court material on the basis of which the court can find that he was in fact indisposed. Indisposition leading to such a long delay in taking an action prescribed by the rules cannot be explained away by bare averments as the applicant has attempted to do here. It is therefore my view that the reasons advanced by the applicant for not taking a necessary step in the proceedings are clearly unsatisfactory.

22. In this case, it would seem that the only reason why this application has been brought is the inability by the applicant to execute against the 1<sup>st</sup> Respondent. That in my view cannot be a basis for granting leave to appeal out of time. I do appreciate and agree with **Aburili, J in Edward Kamau & Another vs. Hannah Mukui Gichuki & Another [2015] eKLR** that:

**“The right of appeal, it has been held time and again, is a Constitutional right which is the cornerstone of the rule of law. To deny a party that right, would in essence be denying them access to justice which is guaranteed under Article 48 of the Constitution and also a denial of a right to a fair hearing guaranteed under Article 50 (1) of the Constitution which latter right cannot be limited under Article 25 of the said Constitution. In my view, it has not been shown that the intended appeal is frivolous or a sham and therefore it is only fair and just that the applicants be accorded an opportunity to ventilate their grievances where they are aggrieved by a decision of the lower court, to challenge it before a superior court.”**

23. However as was held in **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998:**

**“Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it.”**

24. In other words, what the applicant is entitled to is a reasonable opportunity of being heard on appeal and once that right is availed to him and he does not utilise him, he can no longer complain of being denied an opportunity of being heard on an appeal. He can only be heard on the reasons for him not utilising that opportunity.

25. I associate myself with the decision of the Court of Appeal (Kiage, JA) in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR** that:

**“I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.”**

26. I therefore agree in principle with the holding in **Stanley Kahoro Mwangi & 2 others vs. Kanyamwi Trading Company Limited [2015] eKLR** to the effect that:-

**“The principles guiding the court on an application for extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour...This was well stated in the case M/S Portreitz Maternity vs. James Karanga Kabia, Civil Appeal No. 63 of 1997 where the Court stated:**

**“That right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.”**

**A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercised. There have been numerous judicial pronouncements on this precise point. Aganyanya, JA in Monica Malel & Anor vs, R, Eldoret Civil Appln No. Nai 246 of**

2008, stated:

**“When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show...the applicants are not quite sure of why the delay in filing the notice of appeal within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay.”**

27. I adopt the position of the Court of Appeal in **Rajesh Rughani vs. Fifty Investments Limited & Another [2016] eKLR** that:

**“...when the delay is prolonged and inexcusable, and is such as to do grave injustice to one side or the other or to both, the court may in its discretion dismiss the action straight away. In Habo Agencies Limited -v- Wilfred Odhiambo Musingo [2015] eKLR this Court stated that it is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions in the conduct of litigation. Courts have always emphasized that the parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel. In Mwangi -v-Kariuki (199) LLR 2632 (CAK) Shah, JA ruled that mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant’s careless attitude. In the instant case, there is nothing on record to show what action the appellants took between 24<sup>th</sup> October 1998 and 7<sup>th</sup> April 2005 to ensure that the suit he had filed at the High Court was prosecuted.”**

28. In my view the applicant cannot escape blame for the obviously inordinate delay in bringing this application in light of the dearth of sufficiently satisfactory reasons for not following up the matter with his advocates.

29. Accordingly, I find the application unmerited and the same is dismissed.

30. As regards costs, although this Court directed the parties to furnish it with soft copies of the pleadings and submissions in word format, only the applicants partly complied by forwarding the submissions. Section 1A(3) of the ***Civil Procedure Act*** provides as hereunder:

***A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.***

31. One of the overriding objectives of the ***Civil Procedure Act*** is the facilitation of expeditious resolution of the civil disputes governed by the Act. The direction that Advocates and parties do furnish the Court with soft copies of their pleadings and submissions is geared towards that same objective and where they fail to comply therewith, it amounts to a failure to comply with a statutory mandate which may call for a penalty in costs or deprivation of costs even where the same would have been granted. In fact, in such circumstances, the court may well invoke its powers under section 56 of the ***Advocates Act*** and penalise advocates in costs personally.

32. Accordingly, though costs follow the event that the Respondent herein would have been entitled to the costs of this application, considering their failure to comply with their court’s directions there will be no order as to costs.

**Read, signed and delivered in open Court at Machakos this 30<sup>th</sup> day of May, 2019.**

**G V ODUNGA**

**JUDGE**

**Delivered in the absence of the parties**

**CA Geoffrey**