REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

MISC. APP. NO. 401 OF 2018

NGINYANGA KAVOLE.....APPELLANT/APPLICANT

-VERSUS-

MAILU GIDEON.....RESPONDENT

RULING

1. By a Motion brought on notice dated 3rd December, 2018, the Applicant herein, **Nginyanga Kavole**, seeks that leave be granted to him to file an appeal out of time from the decision made in Kithimani SRMCC No. 164 of 2013; ***Nginyanga Kavole vs. Mailu Gideon*** and that the annexed Memorandum of Appeal be deemed as duly filed. He also seeks that the costs of the application be provided for.

2. According to the applicant, he was the plaintiff in the said case in which judgement was delivered on 6th June, 2018. It was his case that the last time his former advocate communicated to him was around 14th March, 2018 when he received a call from them informing him that judgement would be delivered on 18th April, 2018. The applicant deposed that on 8th June, 2018 he decided to visit the said advocates 'office where he was informed that they had perused the judgement on 6th June 2018 and that the applicant's case had been dismissed. However, the said advocates informed the applicant that they would call him to go for a copy of the said judgement. The appellant averred that by the time he received the same, the time within which to appeal had lapsed by 5 months.

3. Upon seeking advice from his current advocates on record, he was informed that his appeal had high chances of success. It was therefore his position that mistakes of his legal advisers should not be visited on him. To his mind, no prejudiced will be occasioned to the Respondent by allowing this application and it is only just and fair that he be given leave to appeal out of time.

4. In his submissions, the applicant contended that Applicant herein has since filed a Notice of Change of Advocates accompanied by a Consent for Change of Advocates dated 21st January and 23rd January 2019 respectively. The firm of Ngigi Njuguna & Co. Advocates is therefore properly on record.

5. It was submitted that this Court's power to entertain an Application to file an intended appeal out of time are discretionary and unfettered and reference was made to section 79G of the ***Civil Procedure Act***. As regards the conditions for grant of such application the applicant relied on **Edward Kamau & Another vs. Hannah Mukui Gichuki & Another [2015] eKLR**, **Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 Others, SC Appl 16/2014** and **Stanley Kahoro Mwangi & 2 Others vs. Kanyamwi Trading Company Limited [2015] eKLR**. According to the applicant, a look at the annexed proceedings will show that the Plaintiff's counsel was not in court when the judgment date was given after several adjournments. The Defendant was directed to issue a judgment notice to the Plaintiff but the same was never done. The Plaintiff's counsel was therefore not in court on 6th June 2018 when the judgment was delivered. Paragraph 4 of the Replying Affidavit dated 23rd January 2019 is therefore false and misleading. Needless to say, the Applicant herein had been informed by his former Advocates on the 8th June 2018 that they would inform him when he ought to come and receive a copy of the typed judgment. He was informed by the said Advocates that they had already drafted a letter requesting for a copy of the judgment and would be sending their clerk to Kithimani law courts the coming week. The former Advocates did indeed request for a copy of the typed judgment on or about 12th June 2018 as per the annexed letter dated 12th June 2018 and marked as Appendix A. The Applicant reminded the former Advocates several times but it was only in late November 2018 that he was told the typed judgment had been obtained but he would need to instruct another firm to take over the matter.

6. According to the applicant, it is trite law that mistakes of a Counsel should not be visited upon a litigant and reference was made to **Lucy Bosire vs. Kehancha Div Land Dispute Tribunal & 2 Others [2013] eKLR** and it was submitted that the Applicant herein has demonstrated due diligence in that he did not waste time in giving instructions to the current Advocates who received instructions on 30th November 2018 and filed this Application on 4th December 2018. The said Advocates have obtained typed proceedings from the lower Court as per the annexed proceedings marked as Appendix B and will be able to prosecute the intended appeal expeditiously.

7. To the applicant, a look at the annexed memorandum of Appeal and judgment will show that the Appeal has high chances of success as it raises serious critical issues that cast serious questions of infallibility of the decision of the trial magistrate which made fundamental errors occasioning injustice that ought to be corrected. The trial magistrate made an error when he found that the Plaintiff had not produced any documentation to prove that he was an employee of the Defendant while in fact this burden was upon the Defendant since the Plaintiff had all along stated that he worked as a casual employed on a daily basis and paid by cash. The Plaintiff's assertion that he was a casual labourer hired by the Defendant's driver remained unchallenged as the Defendant failed to produce any evidential fact such as the muster roll or records of payment. Further, the failure by the Defendant to summon the driver to testify greatly weakened the Defendant's assertion that he paid the casual labourers himself while indeed it was the driver who picked and paid the sand loaders himself. The trial magistrate also made an error in finding that the Plaintiff was performing an activity not related to his employment while both PW 1 and PW 2 testified that the said motor vehicle had stuck in a cliff wherein the driver told them to add their weight in the front of the vehicle as it was fully loaded and failing to move uphill. The Plaintiff being an employee was therefore not in a position to decline the instructions of the driver. The trial magistrate erred in failing to find that the Defendant was vicariously liable for the actions of his driver since the same was pleaded at paragraph 6 of the Plaint.

8. As regards lack of the decree, it was submitted that an Application seeking leave to file an appeal from a subordinate Court out of time is premised under Section 79G of the ***Civil Procedure Act*** which section does not state that a party must extract a decree before instituting such an application. Therefore, an application seeking for leave to file an appeal out of time is very different from an application seeking leave to appeal. The Respondent is therefore mistaken in arguing that a Decree must be extracted before an application seeking for leave to appeal out of time is entertained in the High Court. In this regard the applicant relied on **Abdullahi Mohamud vs. Mohammud Kahiye [2015] eKLR** and **Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Appeal Nairobi 263/2009.**

9. The application was however opposed by way of an affidavit sworn by **Andrew Makundi**, the advocate for the Respondent. According to him, the application seeks leave to appeal against a judgement which was delivered 6 months earlier yet the grounds advanced in the application do not meet the legal threshold but is a mere afterthought meant to delay and frustrate the payment of costs whose bill had already been filed in court.

10. It was averred that at the trial the applicant was represented by counsel and on 6th June, 2018 when the judgement was delivered his said counsel was present and two days later he was informed of the outcome of the case by the said counsel. It was further averred that the trial court gave out copies of the said judgement immediately after its delivery hence the contention that the judgement was not available is not correct.

11. It was contended that the applicant admits that he was aware that his case had been dismissed since 6th August, 2018 yet he does not say that any good and sufficient cause existed for not filing the appeal as stipulated under section 79G of the ***Civil Procedure Act***. Further, the applicant did not demonstrate any mistake on the part of his erstwhile advocates who were deemed to be advocates on record since the current advocates did not comply with Order 9 of the ***Civil Procedure Rules*** and is hence not properly on record. Therefore, there is no competent application before this court.

12. In the deponent's view, the intended appeal is manifestly hopeless and is misguided and is amenable to summary rejection. The Respondent further averred that in any event there cannot be a proper appeal as no decree has been extracted or applied for hence the view that the application was merely filed in a vain attempt to delay the execution process.

13. On behalf of the Respondent it was submitted that counsel sneaked in a consent for change of advocates purporting that it was dated 3rd December, 2018 but was only served on counsel for the Respondent on 7th February, 2019. Accordingly, the court was urged to strike out the said notice as well as the documents filed by the new firm of advocates as they were filed out of time without leave.

14. It was submitted that since the applicant was informed on 8th June, 2018 about the dismissal of his appeal, he knew about the outcome of the case two days after the judgement yet he waited till December, 2018, almost 6 months to come to court. It was submitted that there was no plausible reason for the delay given and was only woken up by the reality of having to pay costs of the suit which he was ordered to pay. According to the Respondent there must be an end to litigation and reliance was placed on **Ms Joseph Kangéthe Kabogo & Others vs. Michael K. Ngari HCCC No. 944 of 2011** and **Nicholas Kiptoo Arap Korir Salat vs. IEBC & 6 Others [2013] eKLR.**

15. As regards the alleged mistake of counsel, it was submitted that there was absolutely no mistake of counsel and reliance was placed on **Rajesh Rughani vs. Fifty Investment Ltd [2016] eKLR**. It was submitted that the applicant's submissions have dealt with matters not on record and should be struck out.

Determination

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

17. The first issue is the competency of this application. Order 9 rule 9 of the ***Civil Procedure Rules*** provides as follows:

> ***When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—***
>
> ***(a) upon an application with notice to all the parties; or***
>
> ***(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.***

18. It follows that in this case since judgement had been delivered dismissing the applicant's suit, for the change of the applicant's advocates to have been effected leave of the court was required which could be obtained either on an application or by consent of the incoming and outgoing advocates. In this case the Motion was filed on 4th December, 2018 while the consent was filed on 23rd January, 2019. The Notice of Change of Advocates on the other hand was filed on 21st January, 2019. It is therefore my view that without an order of the court regularising the already filed Motion, the Notice of Change of Advocates and the consent that were filed after the Motion could not cure the incompetency of the application. However, it is my view that the phrase "*having previously engaged an advocate"* must refer to proceedings in which the judgement was entered. This is my understanding of the decision of **Koome, J** (as she then was) in **Ahamed Mohamud Adam vs. Jimmy Tomino & 2 Others Nakuru HCCC No. 244 of 1998** where the learned judge held that:

> **"The mischief that was intended to be cured by the provisions of Order 3 rule 9A was to ensure that after judgement, a change of advocates was not effected without notifying the advocate who was on record. In other words, it was meant to secure the interest of the advocate who acted for the party up to the judgement."**

19. What is before me is a post judgement matter commenced by way of miscellaneous application. Under section 2 of the ***Civil Procedure Act***, "suit" means all civil proceedings commenced in any manner prescribed and "prescribed" means prescribed by rules while "rules" means rules and forms made by the Rules Committee to regulate the procedure of courts. While I appreciate that miscellaneous applications are not expressly provided for in the Rules, that procedure has acquired a force of law in this country by way of practice. It is therefore an accepted mode of commencing civil proceedings. By virtue of that practice it is now deemed as a prescribed manner of commencing civil proceedings by the Rules Committee. Therefore, the matter before me is a suit. That being the position, an advocate does not require leave of the court to commence a suit. Leave is only required for continuation of a suit where judgement has been entered. I therefore find that the application before me is not incompetent.

20. I must however decry the prayer in miscellaneous applications that "*the annexed Memorandum of Appeal be deemed duly filed and served upon payment of the requisite fees*" as was sought in this application. As was held in **Stanley Mugacha vs. King Woolen Mills Ltd. Nairobi HCMA No. 767 of 1994,** 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.

21. 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.***

22. 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."**

23. In this case however the law expressly provides that an appeal may be admitted out of time. That this is so was affirmed by **Emukule, J** in **Gerald M'limbine vs. Joseph Kangangi [2009] eKLR,** in which he 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 which under Section 79B says…"**

24. 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 and 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.

25. 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.

26. As regards the reason for the delay, it was contended that the applicant was not informed in good time of the judgement and that he requested for a copy of the typed judgement so as to appreciate the reasoning of the Magistrate and thereby make an informed decision whether or not to lodge an appeal but his advocates neglected to give him a copy. From the records, it is clear that on 16th May, 2018 when the matter was listed for judgement on 6th June, 2018, only the defendant was represented and the court directed counsel for the defendant to serve notice. However, on 6th June, 2018 when the judgement was delivered **Mr Lesaingor** is recorded as holding brief for **Mr Musili** for the plaintiff. Therefore, the plaintiff was duly represented at the delivery of the judgement and is deemed to have been aware of the reasons why the case was dismissed. It is his evidence that he was made aware that the case had been dismissed on 8th June, 2018 when he visited his advocate's office. The present application was however not made till 4th December, 2018, 5 months down the line. The application for this delay is given as being due to the fact that though his advocate sought for a copy of the judgement, by the time he received a copy of the judgement the time to appeal had lapsed with 5 months. He does not however disclose when he actually received the judgement. There is no affidavit sworn by his then advocates deposing to when they received a copy of the judgement, which the Respondents contend was available immediately after the delivery thereof.

27. It is not lost to the court that vide a letter dated 7th November, 2018, the Respondent's advocates notified the applicant's advocates of their intention to have their costs assessed. One can therefore be justified in concluding that the applicants was jolted into action by the Respondent's intention to pursue its costs hence this application may well have been an afterthought.

28. Five months' delay is clearly an afterthought and the applicant is under a duty to satisfactorily explain such delay. In this case the applicant who was represented by counsel during the delivery of the judgement ought to have been aware of the reasons for the dismissal of his case and should have moved with alacrity in filing his appeal. He himself was made aware of the fact of the dismissal of his case two days after the event but just went home for another 5 months. 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."**

29. 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."**

30. 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.

31. 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."**

32. While the applicant blames his erstwhile counsel for the delay in filing the appeal, I agree with the position adopted by the Court of Appeal in **Rajesh Rughani vs. Fifty Investments Limited & Another [2016] eKLR** that:

> **"Chesoni, J. in the persuasive decision of Ivita -v- Kyumbu Civil Appeal No. 340 of 1971 dismissed a suit for want of prosecution due to a 4 ½ year delay and stating that where an action has been dormant for twelve months or more, a defendant is entitled to dismissal of the suit for want of prosecution unless the plaintiff shows sufficient reasons for non-dismissal. In Paxton -v- Allsopp (1971) 3 All ER 370 at 371 it was reiterated 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 appellant took between 24th October 1998 and 7th April 2005 to ensure that the suit he had filed at the High Court was prosecuted. There is no credible explanation for the delay by the appellant's former advocate."

33. In my view the applicant cannot escape blame for the obviously inordinate delay in bringing this application

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

35. As regards costs, although this Court directed the parties to furnish it with soft copies of the pleadings and submissions in word format, none of the parties complied. 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.***

36. 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. Accordingly, the applicant will bear the costs of this application.

37. It is so ordered.

Read, signed and delivered in open Court at Machakos this 30th day of May, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Delivered in the absence of the parties

CA Geoffrey