



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

MISCELLANEOUS APPLICATION NO. 96 OF 2018

ABDUL MUGAMBI1ST DEFENDANT/APPLICANT

JULIUS NJOROGE GICHIA.....2ND DEFENDANT/APPLICANT

-VERSUS-

**CAROLINE TAFLADI NYAKINYUA (Suing as the administrator to the
estate of late LEAH WANGUI Deceased).....PLAINTIFF/RESPONDENT**

RULING

1. By a Motion dated on 10th march, 2018, the applicants herein seek orders that this Court extends time and grants leave to the applicants to lodge a memorandum of appeal out of time against the judgement and decree entered against the applicants by **Honourable Martha Opanga**, SRM, Kangundo delivered on 30th January, 2018 in Kangundo SRMCC No. 130 of 2015.
2. The application was supported by an affidavit sworn by **Kevin Ngiure**, General Manager Claims, at Direct Assurance Company Limited who are the insurers of Motor Vehicle Registration No. KAU 025R at whose instance the above cited suit was defended. According to the deponent, he swore the supporting affidavit by virtue of their rights of subrogation under the relevant policy of insurance and the common law rights to defend, settle and prosecute any claims in the insured's name.
3. According to the deponent, judgement was delivered against the applicants herein on 30th January, 2018 in which the applicants were held 90% liable and ordered to pay the plaintiff Kshs 1,673,877.60 as decretal amount plus costs and interests. Aggrieved by the said judgement on quantum, special damages, loss of dependency and loss of expectation of life the applicants instructed the firm of M/s Kairu and McCourt Advocates to appeal against the same but the said advocates failed to do so within 30 days.
4. It was deposed that based on information from the applicants' advocates that the advocate who had the conduct of the matter sought a copy of the judgement but the same was not obtained within time to allow the said advocates file the appeal within time. It was deposed that the time required to file the appeal expired after 30 days from the date of the delivery of the said judgement on 30th January, 2018. The applicants however believe that they have a meritorious appeal and they are ready, able and willing to furnish such reasonable security as the court may deem fit. To them, they had nothing to do with the factors that led to the delay in filing the appeal hence ought not to be penalised for the mistakes of their advocates. It was their case that no prejudice would be occasioned to the Respondents if the application is allowed.
5. The application was opposed by the Respondent. According to her, the application is incompetent since it is supported by an affidavit of a person who is not a party to these proceedings. The Respondent stated that it is almost 4 months since the judgement was delivered yet the applicants have not bothered to settle the judgement sum or appeal in time hence the applicants are guilty of inordinate delay.
6. The Respondent disputed the fact that the insurance company was unaware of the judgement since her advocates on record communicated to their advocates through a letter dated 1st February, 2018 which was received on 5th February, 2018, a copy of which was exhibited.
7. On a without prejudice, the Respondent urged the court to order the applicants to pay half of the decretal amount and to deposit the other half in a joint account.

Determination

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

9. 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.

10. It is clear therefore that the decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion and just like any other exercise of discretion This being an exercise of judicial discretion, like any other judicial discretion must on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the applicant for such orders. One of those judicial principles expressly provided for in the above provision is that the applicant must satisfy the Court that he has a good cause for doing so, since as was held in **Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633**, 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.

11. 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.

12. Similarly, in **Leo Sila Mutiso vs. Helen Wangari Mwangi Civil Application No. Nai. 255 of 1997 [1999] 2 EA 231** the Court of Appeal set out the factors to be considered in deciding whether or not to grant such an application and these are first, the length of the delay; secondly the reason for the explanation if any for the delay; thirdly, (possibly), the chances of the appeal succeeding if the application is granted i.e. 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; and fourthly, the degree of prejudice to the respondent if the application is granted and 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.

13. In this case the Applicant contended that the delay in filing the appeal was due to a mistake of their counsel who was instructed to file the said appeal. It is clear that a mistake of counsel may, if genuine, be a basis for extension of time. As was held in **Shital Bimal Shah & 2 Others vs. Akiba Bank Limited Civil Appeal (Application) No. 159 of 2005 [2006] 2 EA 323:**

"An error of judgement on the part of a legal adviser may help build up sufficient reason under rule 4 to induce the court to exercise its discretion to extend time for the doing of any act under the Rules of the Court. Mistakes of counsel come in all shapes and sizes but some have been rejected by the Court such as total inaction by counsel disguised as a mistake. A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by a senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictate."

14. In this case, it is contended that judgement was delivered on 30th January, 2018. The applicants had 30 days within which to file the appeal. Consequently, the appeal ought to have been filed somewhere around 2nd March, 2018. This application was filed on 12th March, 2018. Since it is only the period falling after the date when the action ought to have been taken that ought to be explained, the delay herein is about 10 days before the applicants moved the court. In my view that delay is not inordinate.

15. I associate myself with the position of 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."

16. The Respondent seems to be more concerned about the grant of stay. In this application however, the prayer for stay was restricted to the pendency of this application rather than the appeal. Accordingly, the issue whether or not the execution of the decree ought to be stayed does

not fall for determination in this ruling.

17. In the premises the application succeeds and the applicant is hereby granted leave to file their appeal out of time. The said memorandum of appeal to be filed and served within 10 days from the delivery of this ruling and in default thereof, this application shall stand dismissed with costs.

18. The costs of this application are however awarded to the Respondent.

19. It is so ordered.

Read, signed and delivered in open court at Machakos this 26th day of June, 2019.

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Geoffrey