



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CIVIL APPEAL NO 5 OF 2019

ALEX MUNENE NGARIRA.....APPELLANT

VERSUS

JOHN KIBANYA MWANGIRESPONDENT

(Appeal from original judgment and decree dated 21/11/2017 in Nanyuki CM Civil Case No 112 of 2014 – E Ngigi, SRM)

R U L I N G

1. The Appellant herein, **ALEX MUNENE NGARIRA**, filed his appeal on **18/03/2019**, out of time by about 1 year and 3 months, judgment having been delivered on **21/11/2017**. He has applied by **notice of motion dated 15/03/2019** for the court to admit the appeal out of time. The sum total of his explanation for the delay is that he was let down by his advocates.
2. The Respondent, **JOHN KIBANYA MWANGI**, has opposed the application.
3. I have read the supporting and replying affidavits. I have also given due consideration to the submissions of the learned counsels appearing.
4. Under the *proviso* to **section 79G** of the **Civil Procedure Act, Cap 21** 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.
5. I note that the appeal herein is against **quantum** only in a personal injury claim; liability is not challenged. Learned Counsel for the Appellant confirmed so to court. It appears that general damages of KShs. 3 million were awarded and specials of Ksh. 2,522,916/00. This court has not had the benefit of seeing the trial court's judgment, or even the pleadings filed before it. The plaintiff (Respondent here) was heard *ex parte*. An application to set aside the *ex parte* judgment was refused.
6. In the course of proceedings before this court the Appellant offered to pay KShs 1.5 million towards whatever the decretal sum shall eventually be adjudged to be in the appeal herein, the same to be paid in 4 monthly installments of KShs 400,000/00 except for the last instalment which would be KShs 300,000/00. This would be in exchange for regularising the appeal.
7. The Respondent rejected this offer and would accept only a payment of the entire special damages awarded, KShs 2,522,916/00. He says that this was the sum paid to the hospital where he was admitted for over 6 months, and that the sum was strictly proved before the trial court.
8. The right of appeal is an important right in the administration of justice in our jurisdiction. It will not be lightly denied. On the other side of the divide, however, there must be a very good reason to keep a successful litigant from enjoying the fruits of his litigation in a money decree.
9. Both parties in this matter have been quite reasonable in the proceedings leading up to the hearing of the application at hand. The Appellant has stated clearly that his appeal is against **quantum** only and not on liability. He has offered to pay up front quite a bit towards the decretal sum.
10. The Respondent too has not sought to drive a hard bargain and has not proceeded to execution even without an interim stay in place. He says, and this has not been contradicted, that he was admitted in hospital for over 6 months and that the hospital bill was KShs 2,522,916/00 which he paid. No doubt there must have been a receipt for that payment, which must have been produced before the trial court as strict proof of the payment.
11. I am satisfied that the ends of justice in this matter will be well served by permitting the Appellant to prosecute his appeal against **quantum** in exchange for the Respondent receiving up front the sum awarded in special damages.

12. I will therefore direct that the notice of motion dated 15/03/2019 is hereby allowed in the following terms -

(i) The appeal herein is deemed to have been duly filed and saved.

(ii) The Appellant shall pay to the Respondent KShs 2,522,916/00 towards the decretal sum within thirty (30) days from the date of this order.

(iii) In default of payment in (ii) above, the appeal herein shall stand dismissed with costs to the Respondent.

(iv) The costs of this application are hereby awarded to the Respondent, the same being taxable and payable at the disposal of the appeal.

It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 22nd DAY OF JULY 2019

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 25th DAY OF JULY 2019