



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC. CIVIL APPLICATION NO. 75 OF 2019

JM (suing as Next Friend of KN MINOR).....APPLICANT

VERSUS

NICHOLAS NYAGA.....RESPONDENT

RULING

1. This is a ruling on the Motion on Notice dated 15/8/2019 brought pursuant to **Order 50 Rule 6, Order 51 rule 1 of the Civil Procedure Rules 2010, Section 1B, 3A, 79G and 95 of the Civil Procedure Act**. In the motion, the applicant sought leave to file an appeal out of time against the judgment of **Hon. E. M. Ayuka (SRM)** delivered on 17/1/2019 in Nkubu PMCC No. 82 of 2012.

2. The application was based on the grounds on the face of the motion and in the supporting affidavit of **JM**. These were that; the impugned judgment dismissing his claim was against the weight of the evidence produced, that the same was delivered in the absence of the applicant, and that in the circumstances, he stands to suffer grave prejudice and irreparable loss if no appeal is preferred from the said judgment.

3. The application was opposed through the replying affidavit of **Nicholas Nyaga** sworn on 9/9/2019. He deponed that; when the matter before the trial court came up for mention on 13/12/2008(sic) to confirm whether the parties had filed submissions, the applicant was represented and the same was fixed for judgment on 17/1/2019, that the judgment was delivered on schedule and that therefore the applicant was aware of the date of delivery.

4. I have considered the opposing affidavits. This is an application for leave to appeal out of time. The jurisdiction to grant the remedy sought is grounded upon **section 79G of the Civil Procedure Rules**. The principles applicable were set out in the case of **Mutiso vs. Mwangi CA NO NAI 255 of 1997(UR)** which was cited with approval by the court of appeal in **James Herberts Odhiambo v Far East Chinese Medical Centre & Anor [2002] eKLR thus:**

"It is now well settled that the decision whether or not to extend the 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: firstly, the length of the delay; secondly, the reason for the delay; thirdly, (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted"

5. In the present case, the impugned judgment was delivered on 17/1/2019 and the present application was filed on 15/8/2019. That was a period of 7 months. That was a long period that could amount to inordinate delay calling for an explanation.

6. It was the applicant's contention that the judgment was delivered without notice to him; that he only learnt of the judgment long after it had been delivered whereby he rushed to file the present application; that he has an arguable appeal and he would suffer extreme prejudice if the appeal is not heard.

7. On the other hand, the respondent contended that the parties were aware of the date of delivery; that when the matter came up for mention on 13/12/2008 (sic), judgment was fixed for delivery on 17/1/2019; that the applicant's advocate knew of the date of delivery and that the appeal is not arguable.

8. It is clear that the parties are at loggerheads as to whether there was notice of delivery of judgment. The copy of the judgment produced by the applicant clearly shows that the respondent was represented at the delivery thereof. There was no representation on the part of the applicant. I note that the respondent swore that the applicant was represented on 13/12/2008 (sic) when the date for delivery was fixed. Although the record of the trial Court was not produced to prove that fact, that averment was not denied as no further affidavit was filed by the applicant. That means that the said averment was not challenged.

9. The next issue is the chances of the appeal succeeding. I have seen a draft Memorandum of Appeal exhibited to the supporting affidavit.

One of the issues that the applicant intends to argue is that the trial Court erred when it dismissed his case on the basis that the ownership of the motor vehicle that caused the accident was not established. The judgment shows that a police abstract was produced which pointed towards the respondent as the owner of the subject vehicle.

10. The trial Court was of the view that the respondent having denied the ownership of the vehicle, it was incumbent upon the applicant to produce the copy of the records. To this Court's mind, that is a serious issue to be argued in the intended appeal.

11. The applicant has submitted that he would be relying on the decisions of this Court in **Jotham Mugalo v. Telkom (K) Ltd [2005] eKLR** and **Samuel Mukunya Kamunge v. John Mwangi Kamuru [2005] eKLR**. If those decisions are anything to go by, I am of the view that the appeal is not frivolous. Put in another way, the appeal has high chances of success.

12. The last issue to consider is the prejudice, if any, to be suffered by the parties if leave is granted. It was contended that the suit before the trial Court was for the benefit of a minor who had sustained serious injuries in an accident. That if he was denied a chance to challenge the judgment he would suffer irreparable loss. The respondent on his part did not indicate the prejudice he will suffer if the judgment is challenged.

13. No doubt, having a litigation hovering over one's head like a sword of Damocles is not only stressful but may cause serious anxiety to anyone, the respondent included. However, such stress and anxiety cannot be compared to the loss that would be suffered by the minor in this case who suffered what was considered to be serious injuries for which he would not be compensated were the impugned judgment not challenged. Probably, if the minor was of age, he would have been more vigilant in following the matter with his lawyers than the applicant. For his age and position, the Court must exercise its discretion favorably and in his favor.

14. To this Court's mind, the prejudice that may be suffered by the respondent may be assuaged by an order for costs.

15. In the end, I find that the application is meritorious and I allow the same. Let the Memorandum of Appeal be filed and served within 14 days from the date hereof. The costs of the application will abide the outcome of the appeal.

It is so ordered.

DATED and DELIVERED at Meru this 24th day of October, 2019.

A. MABEYA

JUDGE