



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

MISCELLANEOUS APPLICATION NO. 96 OF 2018

ABDUL MUGAMBI.....1ST 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. On 26th day of June, 2019, this court after granted leave to the applicants to file their appeal out of time and directed that the memorandum of appeal to be filed and served within 10 days of the date of the delivery of the said ruling and in default thereof, the application for extension of time would stand dismissed with costs.

2. It has turned out that the said decision was never complied with and the applicants are once again before this court vide an application dated 26th July, 2019, seeking an order that the said period be enlarged. They also seek that there be a stay of execution of the judgement and decree in Kangundo Senior Resident Magistrate's Court Civil Suit No. 130 of 2015 pending the hearing and determination of the intended appeal.

3. According to the applicants, their advocates on record, the firm of M/S Kairu & Mcourt Advocates failed to file a memorandum of appeal within the prescribed period since they were not aware of the delivered ruling and its conditions and by the time the advocate having the conduct of the mater made an inquiry it was realised that was delivered on 26th June, 2019 in the absence of the applicants hence the delay in complying with the decision. The applicant deposed that the time required to file the Memorandum of Appeal out of time expired 20 days after the said ruling. To the applicants, they ought not to be penalised for the mistake of their advocates.

4. It was averred that the applicants were ready, able and willing to furnish such reasonable security as the court may deem fit and that the Respondent would not be prejudiced by the grant of the orders sought herein. The applicants however believed that there is likelihood that they will not recover the decretal sum once paid over to the Respondent.

5. It was submitted on behalf of the Applicants that the application has been made without undue delay and/or the delay occasioned herein is not so inordinate as to be inexcusable as the defendants were not present in court when the ruling was delivered in open court. That the Respondent will not suffer any prejudice or any damage that is not capable of being compensated by way of costs. That the Applicants stand to suffer prejudice substantial loss as there is a likelihood that they will not recover the decretal amount if it is paid over to the Respondent. Since Order 40 Rule 6 of the *Civil Procedure Rules* was intended to ensure that indolent and static litigants are kept in check, it was submitted that in the circumstances of this case and in the cumulative litigation history, the Applicants cannot objectively be deemed to have been lethargic and static in their approach to the prosecution of their suit.

6. It was submitted that upon knowing about the ruling the applicants moved the court 15th/07/2019 but the in charge of the registry declined to acknowledge receipt and assessment of the fees to be paid for the memorandum of appeal on the 15/07/2019 on the ground the time had elapsed as expressly ordered by the Judge.

7. According to the applicants, they intend to appeal against the judgment and the intended appeal is merited, arguable and it raises pertinent points of law thus it has overwhelming chances of success and that the Applicants are ready, able and willing to furnish such reasonable

security as this honourable court may deem fit. It was further averred that the Applicants had nothing to do with the inadvertent delay in filing the appeal and so they should not be punished for mistakes of their advocates.

8. According to the applicants, in applications for stay pending Appeal in the subordinate courts it is not a requirement to show that the Appeal has high chances of success, the Applicant only needs to show he has an arguable appeal.

9. In view of the foregoing explanation, it was submitted that the Applicants demonstrated a good and sufficient cause for not filing the Appeal on time and the Applicants therefore prayed that they be granted leave to file their Appeal out of time.

10. As such, it is the Applicants' submissions that the delay for filing the Appeal has sufficiently been explained by the Applicants and the same constitutes a sufficient cause.

11. It was submitted that this Court has a wide power and discretion to enlarge time and/or grant leave for the filing of a Memorandum of Appeal out of time if an applicant can demonstrate a *good and sufficient cause* for not filing the Appeal on time. In this matter, the Applicants submitted that they had demonstrated a good and sufficient cause for this Court to exercise discretion and grant leave to the Applicants to Appeal out of time. Accordingly, the Applicants implored the Court to exercise its wide discretion judiciously in favour of the Applicants and grant the Applicants leave to Appeal out of time.

12. As regards stay, it was submitted that the applicants are ready, able and willing to furnish the court with such reasonable security as this court may deem fit. The applicant is willing to deposit the entire decretal amount in court or in a joint interest earning account. On the other hand, the Respondent's means are unknown and it is highly unlikely that the Respondent will be capable of refunding the decretal amount in the event that the Applicants' Appeal succeeds since the Respondent has not disclosed nor furnished the Court with any documentary evidence to prove his financial standing. To the applicants, the Respondent herein is the only one who can specifically show that he has means to repay the decretal amount if the court allows the filing of the Memorandum of Appeal and the said appeal succeeds. In the absence of an affidavit of means, it may be construed that the respondent is not possessed of sufficient means and therefore not in a position to reimburse decretal money should the appeal succeed.

13. The Applicants submitted that judgment in this case was delivered in favour of the Respondent against the Applicants for general damages of a sum of Kshs. 1,203,000 plus costs and interest as of the date of the Judgment together with liability of 80% against the defendant. In the applicants' submissions, this is a substantial sum and in the event that the Respondent is unable to repay the decretal sum, the Appeal will have been rendered nugatory and the Applicants exposed to irreparable damage since the subsequent Decree would be no more than a paper Decree. In the circumstances, this is a suitable case where this court should exercise its discretion and order stay of execution.

14. It was submitted that there has been no inordinate delay on the part of the applicant in appealing the matter as the judgment was read in the absence of the parties and the applicants were not aware of the judgment and only learnt of it after they were served with the decree by the respondent's and before they could get a copy of the judgment, stay of execution had lapsed thus necessitating the present application before this court.

15. It was therefore the applicants' case that having satisfied all the conditions set out in Order 42 Rule 6 of the **Civil Procedure Rules**, they ought to be granted an order of stay of execution pending the hearing and determination of the Appeal aforesaid.

16. The application was however opposed by the Respondent. According to the Respondent, whenever the applicants are granted leave to file appeal out of time they just sleep on their right and the Respondent has been frustrated for almost two years by the making of several applications by the Applicants.

17. In the submissions filed on behalf of the Respondent, it was contended that from the history of this litigation, that the applicants are engaged in a tactical and strategic scam of frustrating the respondent herein by filing application after another with a sole intention of delaying payment of the decree and as such denying the respondent an opportunity to enjoy fruits of his judgment. The Respondent lamented that it is almost 2 years from the date the respondent received a judgment which has never been settled or appealed against up to date. Despite the applicants having been allowed to lodge an appeal but they choose to sleep on that right, all along riding on the interim orders for one and half years now.

18. It was contended that the applicants' application herein is incompetent, defective and an abuse of court since the applicants are seeking what had already been granted on 26th June, 2019. It was therefore submitted that the applicant's application dated 26th July, 2019 is res judicata as there was a similar application dated 10th March, 2019 which was allowed but with a condition that the memorandum of appeal be filed within 10 days from the delivery of this ruling and in default thereof the application shall stand dismissed with cost. It was contended that it is clear that the applicants are attempting to escape the consequences of disobeying the earlier ruling since as it stands, the applicant's application dated 10th March, 2018, stands dismissed with costs. It was therefore submitted that the applicants should have filed an application seeking reinstatement of the said application other than filing two similar applications, and since the applicants did not do so, this court should dismiss the application dated 26th June, 2019 for being res judicata.

19. It was noted that neither of the parties' representatives attended court on 26th June, 2019. Nevertheless, the applicant having filed their submissions, they were under a duty to inquire the date for judgment and if they did not, only to be awakened on by a letter from the respondent's counsel, then it was their own fault. According to the Respondent, the respondent or even the court, in the circumstances of this case which proceeded to hearing *inter partes*, with each party ably represented by advocates, there is absolutely no justification for requiring that notice for judgment date be given, especially when the both parties had filed their respective submissions.

20. The Respondent's position was that the applicant has disobeyed court order and as such their application has been dismissed accordingly. Further the instant application is incompetent, defective and abuse of court proceeding and as such should be dismissed with costs. It was

submitted that the respondent is also entitled to equal treatment before the law and the fact that the applicant a company and can afford to advocates cost to represent them in court for ever without any financial constrains should not be used to trample on the respondent's rights. It is in the interest of justice that the respondent interests should be taken care of and expeditiously. It is trite law that justice delayed is justice denied. The respondent has been in corridors of justice since 2015, almost 5 year and litigation must come to an end and justice be served upon the victim.

Determination

21. I have considered the issues raised in this application.

22. The main and only ground for seeking extension of time is that the ruling extending time within which the applicants were to lodge their appeal was delivered in the absence of the appellant's counsel.

23. Order 50 rule 6 of the *Civil Procedure Rules* provides that:

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

24. In this case the time for lodging the appeal was fixed by this court's order. Accordingly, this court has the discretion to grant the orders sought herein. It was contended that since the court in its ruling stated that in default of compliance with the conditions prescribed, the application would stand dismissed, it follows that the said application was dismissed and therefore the only application that can be considered is one for reinstatement of the same as opposed to enlargement of time to file memorandum of appeal. In my view the Respondent's position is not completely without merit. I agree that where a party has been granted leave to appeal out of time and the conditions prescribed in the said leave are not complied with, it is incompetent to simply assume that such an application was never made in the first place and make another application seeking similar orders. Such action amounts to an abuse of the court process. In my view since the said provision states that enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed, even though the earlier application is deemed as dismissed, nothing bars the court from entertaining an application for extension of time under the said rule whose effect if allowed would result in the revival of the deemed dismissed application. However, that is not what the applicants seek in the present application.

25. 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. However, 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 supplicant 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.

26. In this case, directions on the mode of hearing were given on 6th November, 2018 in the presence of counsel for both parties. The matter was then fixed for 21st January, 2019 for confirmation of compliance with the said directions and for reservation of a ruling date. For reasons which no attempt has been made to explain in this application, though the Applicant complied with the court's directions, there was no appearance on 21st January, 2019 and the ruling date was set for 21st March, 2019. On that day however since the parties had not complied with the directions to furnish soft copies, the matter was mentioned on 4th April, 2019 when a new date for the delivery of the ruling was set for 26th June, 2019. That date was set in the presence of counsel for the Applicant.

27. It is therefore clear that the failure by the applicant's counsel to attend court when the ruling was being delivered cannot be blamed on the court. There is clearly no reason advanced why the applicants were not represented thereat and they cannot rely on the absence as a ground for seeking favourable orders of the court. It is no wonder that the applicants have as a last resort contended that the mistake of their counsel ought not to be visited on them. However, this alleged mistake of counsel is not disclosed. In **John Kiragu Mwangi vs. Ndegwa Waigwa Civil Application No. Nai. 179 of 2000**, it was held by **Shah, JA** in dismissing a similar application for extension of time that a delay (simple inaction) to file appeal within time, that is sought to be explained away by contrived grounds is not made *bona fide*. In my view favourable orders cannot be sought and obtained on the basis of an affidavit that is less than candid and is meant to mislead. In that event, the application would be refused since default ought not to be explained away by contrived grounds. Not much emphasis can be placed on a deposition, which shows that the deponent is not candid enough in his affidavit and having been evasive and economical on the truth. Therefore, an application seeking exercise of the court's discretion must be supported by an honest explanation and it is a serious matter to attempt to mislead the court by untruthful or half-baked affidavits since sufficient reason for the purposes of the exercise of discretion cannot be established on the basis of an obviously incorrect or twisted affidavit. See **Hon. Mzamil Omar Mzamil vs. Rafiq Mohamed Walimohamed Ansari Civil Appeal No. 44 of 1982, Shaban Hamisi Kuriwa & Another vs. Joe M Mwangi & 3 Others Civil Application No. Nai. 122 of 1996, Peter Gachege Njogu vs. Said Abdalla Azubedi Civil Application No. Nai. 370 of 2001, Koyi Waluke vs. Moses Masika Wetangula & 2 Others Civil Appeal (Application) No. 307 of 2009 and John Kiragu Mwangi vs. Ndegwa Waigwa Civil Application No. Nai. 179 of 2000.**

28. Accordingly, the limb of the application seeking extension of time must be disallowed, firstly for being incompetent and secondly for lacking in merits. Consequently, the limb seeking stay pending the intended appeal must fall by the wayside since its foundation, the existence of an appeal, does not exist.

29. In the premises the application dated 26th July, 2019 is hereby dismissed with costs.

30. It is so ordered.

Read, signed and delivered in open Court at Machakos this 23rd October, 2019

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Odongo for Mr Musili Mbithi for the Respondent

CA Geoffrey