REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. APPLICATION NO. 276 OF 2015

SIMBA COACH TRANSPORT COMPANY.....PROPOSED APPEALLANT

VERSUS

1. P N W

2. A W N (both suing as Administrators of the estate of **S K K.....PROPOSED RESPONDENTS**

CONSOLIDATED WITH

MISC. APPLICATION NO. 277 OF 2015

1. SIMBA COASH TRANSPORT COMPANY

2. GRIFFIN ODHIAMBO ADUDA ..... PROPOSED APPEALLANT

VERSUS

M N W (minor suing thr' her mother as next of of friend **G W..... PROPOSED RESPONDENT**

J U D G M E N T

1. SIMBA COACH TRANSPORT COMPANY, the Applicant, filed the Notices of Motion both dated 1/10/2015 expressed to be premised upon the provisions of section 1A, 1B 3A, 79G, 95 of the Act as well as Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rule 1 of the Rules and sought in the main orders that the Appellant be granted leave to appeal, out of time, the draft memorandum of Appeal deemed duly filed and one **Sure Auctioneers** be restrained from selling the Applicants motor vehicle Registration No. KBU 4655 attached pursuant to the judgments of the lower court delivered on the 17/6/2015 and 4/8/2015 respectively.

2. The applications were supported by the annexed affidavit sworn by one **Felix Buni** who describes himself as the Claims Manager of the defendant company. The application and the Affidavit in support delve very shallowly on the reasons for delay by merely stating that it was unable to get certified copies of the proceedings and judgment to enable him file an appeal and that it has good grounds of Appeal and should be accorded the chance to ventilate the same.

3. When served the Respondents did file Replying Affidavit whose gist was that the application had been brought after inordinate and undue delay in that the judgment was delivered on 17/6/2015 yet the application was not filed till the 1/10/2015. It was added that the application was merely intended to shield the Applicant from meeting its statutory obligation as a declaration suit, **PMCC No. 419 of 2015** had been filed to enforce the judgment.

4. There were also grounds of opposition to the effect that the application had failed to comply with the express provisions of the law and that it had been overtaken by events.

5. When parties attended court on 18/8/2016, they agreed that the two Applications, Misc. No. 276 and 277 both of 2015 be consolidated and heard together. It was also agreed that parties file and serve submissions within 30 days from that date. It turned out that only the applicant filed the submissions dated 12/4/2017 on the 13/4/2017. The matter was then set down for hearing on the 2/2/2018 for highlighting of the submissions and an affidavit of service was duly filed to show that the Respondents were indeed served on the 6/11/2017. However, the

respondents did not attend neither did they offer any submissions.

6. The matter therefore proceeded without the submissions of the Respondents. That however is not a bar to the court exercising its discretion as provided by law to interrogate whether or not the Applicant has made out a case for the court to exercise its otherwise wide and unfettered discretion to extend time to lodge an appeal out of time.

7. The principles to be considered by the court in such an application were set out by the Supreme Court in its decision in ***FAHIM YASIN TWAHA VS TIMAMY ISSA ABDALLA & 2 OTHERS [2015] eKLR*** as follows:-

> **“**
>
> **1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the court.**
>
> **2. A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court.**
>
> **3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.**
>
> **4. Where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the court.**
>
> **5. Whether there will be any prejudice suffered by the respondent, if extension is granted.**
>
> **6. Whether the application has been brought without undue delay and**
>
> **7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time”.**

8. All put together, the supreme court merely reiterated what has been held all along that the discretion of the court in matters of extension of time is wide and unfettered but like all discretion the same is exercised upon reason hence the court ought to be satisfied that the reason(s) advanced for delay is plausible and the ends of justice would be served by an order extending time. Put in the context of this matter, the only reason put forth for delay is that the applicant was unable to get copies of the judgment and proceedings to enable it lodge the appeal.

9. The question that this court must ponder over is whether it was mandatory or inevitable for the copies of proceedings and judgment to be available for the Applicant to lodge the Appeal. Under Order 42 Rule 1, an appeal from the subordinate court to this court is instituted by a Memorandum of Appeal and it is not mandatory that the certified copies of the proceedings and judgment be lodged with the Memorandum of Appeal. Infact even the certified copy of the decree is not mandatory because Rule 2 of the same order permit lodging of such proceedings and the decree after the Memorandum of Appeal within such time as the court may Order.

10. The only time it becomes necessary to have certified copies of the judgment and proceedings is at the time a judge gives directions on hearing of the Appeal Rule 13 (4) provides that before a judge allows the appeal to proceed to hearing the court must be satisfied that the 6 documents enumerated thereunder, including the proceedings and judgment are on the record.

11. Clearly therefore there was no obstacle or indeed any impediment placed before the Applicant by want of the Certified Copies of the Proceedings and Judgment before it could lodge the appeal.

12. In any event, even if the Applicant were to be taken to have of extreme circumspection and totally not prepared to take the option of filling a holding Memorandum of Appeal and seeking to amend it later under Order 42 Rule 3, nothing stopped them from simply getting photocopies of the handwritten notes and judgment of the court and using the same to craft a Memorandum of Appeal. In this era when procedural technicalities are to be shunned, such copies even if handwritten, provided they are readable can lawfully be and have been used even in the Record of Appeal.

13. Indeed in this application the applicant has exhibited the same handwritten judgment and a draft memorandum of Appeal it seeks to have deemed duly filed. That is the endevour the Applicant ought to have engaged in within the time allowed for appeal to be filed but it did not. I am therefore not satisfied that the delay has been explained to merit my exercise of discretion in favour of the Applicant. I am totally unable to find an explanation for the delay and to the court therefore to grant the orders sought without a good or just reasonable cause for the delay is to be injudicious and therefore whimsical or just capricious.

14. I add that there being no reason and explanation for delay, the other considerations that would be relevant would include the arguability of the proposed appeal. In this case other than the applicant saying he has good grounds of Appeal, no material, save for the Draft Memorandum of Appeal, have been provided. A cursory reading of that Draft Memorandum of Appeal reveal that what is sought to be challenged is the assessment of damages and not the find on liability.

15. To this court an award of damages is in the realm of judicial discretion and Appellate court are normally hesitant to interfere unless certain parameters be met[1]. On the materials availed I am additionally not convinced that the intended appeal presents an arguable appeal to merit this court overlooking the applicants failure to discharge its burden of laying a basis for the delay.

16. The third issue I have considered is the admitted fact that by the time the applicants, in Misc. No. 276 of 2015, came to court, its motor

vehicle Registration No. KBU 464S had been attached and seized for which reasons it sought stay of sale. That prayer was never granted then and when Ms Mukoya attended court to highlight her submissions I asked her the fate of the motor vehicle and she was unable to shed light. It may well be that the sale took place or the declaratory suit was determined and or the decreed was settled. That may be why the Respondent did not bother to file submissions or attend court to oppose the Application for to them nothing of substance turns round the application.

17. In the end, I find that the Application lacks merit and it is therefore dismissed. I however grant no orders as to costs for I take it that the respondent did not seriously contest the application.

18. In terms of the consent orders of 18/8/2016 this order shall apply to application in Misc. Civil Application No. 277 of 2015 to the effect that the same equally stands dismissed with no orders as to costs.

Dated and delivered at **Mombasa** this **15th** day of February **2018.**

P.J.O. OTIENO

JUDGE

---

[1] See James Gakinya Kurienye vs Preminus Kariuki Githinji [2015] eKLR and Peter M. Kariuki vs AG [2014] eKLR