



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO 98 OF 2016

ISHMAEL NYASIMI.....1ST APPELLANT

CHARLES MICHIEKA NYONGO.....2ND APPELLANT

VERSUS

DAVID ONCHANGU ORIOKI(Suing as personal

representative of Antony Nyabando Onchango).....RESPONDENT

RULING

1. By a notice of motion dated 8.5.18 brought under Sections 3A and 95 of the Civil Procedure Act Cap 21 Laws of Kenya and Order 50 Rule 5 of the Civil Procedure Rules and; the applicants appellant pray for orders that

a. ***The Honourable Court be pleased to extend time to the respondent to file and serve Notice of Appeal out of time***

b. ***THAT the costs of this application be in the cause***

The application is based on the grounds that among others:

a) Judgment was delivered on 19.3.18 in the absence of counsel for the Applicant and without notice

b) The time for filing and serving the Notice of Appeal expired 14 days after delivery of judgment

c) Applicant being aggrieved by the judgment intends to appeal

d) Applicant counsel did not know about the delivery of the judgment until 27.4.18

e) There is no delay in filing this application

2. The application is supported by the affidavit of Isaac Meroka, advocate for the Applicant sworn on 8.5.18 in which he reiterates the grounds on the face of the application. Annexed to the supporting affidavit is a copy of the Notice of Appeal marked **IM 1** and copy of letter dated 7.5.18 applying for proceedings is marked **IM 2**.

3. The application is opposed on the grounds set out in a replying affidavit sworn on 15.5.18 by Pauline Waruhiu, General Manager Claims Department of Directline Insurance Company. She avers that on 23.1.18, judgment was reserved for 27.2.18 in the presence of both counsels. That counsel for the respondent did not attend court on 27.2.18 when judgment was reserved for 8.3.18 when the judgment was again deferred to 19.3.18 when it was delivered in the absence of applicant's counsel. It has been averred that applicant has not tendered any plausible explanation for the 2 months delay and that the orders sought will prejudice the respondent since applicant's counsel is holding Kshs. 3,000,000/- paid by respondent as security for stay of execution.

4. I have considered the provisions of Order 50 of the Civil Procedure Rules which states:-

“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”

5. I have further considered the provisions of Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya which states:-

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

Section 95 of the Act on the other hand states as follows:

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

6. There is no dispute that on 23.1.18, judgment was reserved for 27.2.18 in the presence of counsels for both parties. There's also no doubt that the judgment was deferred to 8.3.18 and was finally delivered on 19.3.18. Mr. Gichaba advocate who had instructions to appear in court on behalf of applicant's counsel was in court on 27.2.18 when judgment was deferred to 8.3.18. The court record does not contain proceedings for the 8.3.18. There is therefore no evidence that applicant's counsel was served with notice that judgment had been deferred to 19.3.18 and it is therefore apparent that judgment was delivered without notice to applicant's counsel.

7. In the case of ***CITY CHEMIST (NBI) & ANOTHER V. ORIENTAL BANK LIMITED Civil Application No. Nai 302 of 2008 (UR 199/2008)***, the court held:-

“the overriding objective thus confers on the Court considerable latitude in the interpretation of the law and rules made thereunder, and in the exercise of its discretion always with a view to achieving any or all the attributes of the overriding objective. The overriding objective does not however facilitate the granting of orders seeking leave or extension of time to file record of appeal where the applicant has not shown to the satisfaction of the Court that the delay is not inordinate or has been explained to the satisfaction of the Court. In the instant application, the applicant is guilty of inordinate delay and has failed to explain it to the satisfaction of the Court. Consequently, I am unable to exercise my discretion in favour of the applicant as his application lacks merit.”

8. 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. A party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court. Applicant's counsel avers that he became aware of the delivery of the judgment on 27.4.18 has not been controverted. This application was filed 11 days thereafter and was thus filed without delay.

9. For the reasons hereinabove stated, I find that the applicant has satisfactorily explained his failure to file the Notice of Appeal in time. This application has also been filed without delay. As a result, the notice of motion dated 8.5.18 is allowed in the following terms:

a. ***The Honourable Court be and is hereby pleased to extend time to the applicant to file and serve Notice of Appeal within 14 days from today's date***

b. ***The costs of this application shall be in the cause***

DATED, DELIVERED AND SIGNED THIS 24th DAY OF May 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

For the Applicant - Mr. Gichaba holding brief for Mr. Meroka

For the respondents - Mr. Orieyo holding brief for Mr. Kisanga