REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

MISCELLANEOUS APPLICATION NO. 339 OF 2018

(Coram: Odunga, J)

FRANCIS MWANZA MULWA…..……..……...…..……..APPLICANT

VERSUS

KANJI VAGJIANI……..……..…….……..…1ST RESPONDENT

AFRICAN BANKING CORPORATION…....……..2ND RESPONDENT

KESHRA & SONS LIMITED…….3RD RESPONDENT

RULING

1. The applicant herein seeks by a Motion on Notice dated 11th October, 2018 that the time fixed by the Rules within which to lodge appeal be enlarged and that if necessary, he be granted leave to appeal against the ruling and order of **Y. A Shikanda, SRM**, Machakos in Civil Case No. 1059 of 2010 dated 24th May, 2018.

2. According to the applicant, he was the plaintiff in civil suit No. 1089 of 2010 in the Chief Magistrate's Court at Machakos. In that case judgement was delivered on 25th September, 2012 wherein he was awarded the sum claimed together with costs and interests at court rates. However the Respondents appealed to this Court vide Civil Appeal No. 173 of 2012 which appeal was dismissed with costs. Thereafter the Respondents made part payment of the decretal amount leaving a balance of Kshs 1,145,727/= as at 13th December, 2017. As a result the applicant applied for execution for the said balance which had remained unpaid after the part payment of Kshs 1,287,000/=. In the same vein the Respondents applied *inter alia* that the execution proceedings levied against the Defendant was null and void.

3. It was the applicant's case that it was surprising that the court of the rank of Senior Resident Magistrate before which the application was canvassed set aside the decree which had been passed by a Senior Resident Magistrate Court.

4. It was deposed by the applicant that being under the belief that leave to appeal was necessary, he applied for leave to appeal first but the said application was dismissed on 1st October, 2018. It was the applicant's view that the grounds herein far outweigh any prejudice that may be occasioned to the Respondents if time is extended.

5. In opposition to the application, it was deposed that on 23rd July, 2018 the application filed an application seeking leave to appeal against the ruling and order of the court delivered on 24th May, 2018 and that the body of the said application and the affidavit in support thereof sought the same prayers sought herein. However the said application was dismissed with costs to the 2nd Respondent.

6. It was the Respondents' case that no sufficient reasons have been advanced by the applicant for the delay in filing the appeal since 24th May, 2018 and that the six months delay is inordinate. It was further contended that the applicant has not attached a draft memorandum of Appeal in order for the Court to gauge the arguability of his appeal. To the Respondents, they stand to be prejudiced if the orders sought are granted since the application filed before the Court below sought leave to appeal hence the applicant is forum shopping, as the Court below has determined the issue herein.

Determination

7. Section 79G of the ***Civil Procedure Act*** provides that:

> ***Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for***

the preparation and delivery to the appellant of a copy of the decree or order:

Provided that 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.

8. 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 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. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.

9. As to the principles to be considered in exercising the discretion whether or not to enlarge time in **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65** the Court set out the factors to be considered in deciding whether or not to grant such an application and these are (i). the explanation if any for the delay; (ii). the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; (iii). Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

10. Similarly in **Leo Sila Mutiso vs. Helen Wangari Mwangi Civil Application No. Nai. 255 of 1997 [1999] 2 EA 231** the Court of Appeal set out the factors to be considered in deciding whether or not to grant such an application and these are first, the length of the delay; secondly the reason for the explanation if any for the delay; thirdly, (possibly), the chances of the appeal succeeding if the application is granted i.e. the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; and fourthly, the degree of prejudice to the respondent if the application is granted and whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

11. In this case the Respondent took issue with the fact that the applicant had made a similar application before the Court below seeking similar orders for leave to appeal which application was dismissed. To the Respondent therefore the applicant is forum shopping. Section 75(1) of the Civil Procedure Act provides that:

An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted-

12. Order 43 rule 1(3) of the ***Civil Procedure Rules*** however provides that:

An applications for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.

13. It therefore follows that an application for leave to appeal to this Court from a decision of a Magistrate's Court against which there is no automatic right of appeal ought to be made to the Magistrate's Court either orally or within 14 days of the decision and where the application is disallowed the applicant is at liberty to make the same application before this Court. The second application, in my view is not an appeal and this Court in deciding such an application exercises an original jurisdiction. Therefore the applicant cannot be accused of forum shopping when he was merely complying with the law.

14. The applicant contends that the reason for the delay was because of that same application which he had to make before the Magistrate's Court first. In my view the pendency of the application for leave, even if the same was misconceived, may well constitute a sufficient reason for appealing out of time. As was held in **Shital Bimal Shah & 2 Others vs. Akiba Bank Limited Civil Appeal (Application) No. 159 of 2005 [2006] 2 EA 323:**

"An error of judgement on the part of a legal adviser may help build up sufficient reason under rule 4 to induce the court to exercise its discretion to extend time for the doing of any act under the Rules of the Court. Mistakes of counsel come in all shapes and sizes but some have been rejected by the Court such as total inaction by counsel disguised as a mistake. A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by a senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictate."

15. As regards the length of the delay, it is deposed that the application for leave was dismissed on 1st October, 2018. It is only then that the applicant could have moved this Court since he could not foretell the outcome of his application which had it been allowed would have rendered these proceedings unnecessary. This application was filed on 11th October 2018 barely 10 days after the dismissal of the said application. Since the cause of action in so far as the instant application is concerned only arose after the dismissal of the application for leave made before the Court below, the only period that is relevant for the purposes of determination of the instant application is the said 10

days. In **Concord Insurance Company Limited vs. Susan Nyambura Hinga Civil Application No. Nai 251 of 2002** it was held that a delay for 28 days is not inordinate for purposes of an application for extension of time to appeal.

16. As regards the merits of the contemplated action, the applicant has indicated that the appeal will be centred on whether the Learned Trial Court decision had the effect of overturning the judgement issued by a court of superior. That issue in my view cannot be said to be frivolous. Whereas the usual practice is that a party seeking leave to appeal out of time ought to exhibit a draft memorandum/grounds of appeal, there is nothing objectionable about a party disclosing what his grievance is in the supporting affidavit as the applicant did here.

17. As regards prejudice the Respondent's only issue is that the applicant sought similar prayers in the court below. As I have held hereinabove that procedure was in order. It has been said there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such advantage or that it cannot be cured by the application of that healing medicine. See **Waljee's (Uganda) Ltd vs. Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188.**

18. In the result I find the application for leave to appeal out of time merited.

19. As regards leave, it is clear that the applicant does not have an automatic right of appeal. That the decision whether or not to grant leave to appeal is discretionary was stated by the Court of Appeal in **Kenya Shell Limited vs. Kobil Petroleum Limited [2006] eKLR** where it was held that:

"Whether or not the court would grant leave to appeal is a matter for the discretion of the court. As in all discretions exercisable by courts, however, it has to be judicially considered."

20. The rationale for requiring leave to appeal in certain instances was stated in **Rene Dol vs. Official Receiver of Uganda [1954] 21(1) EACA 116** where it was held that:

> **"The general purpose of requiring leave to appeal from some orders is to restrict appeals from made in minor procedural or interlocutory matters which do not go to the root of the litigation or determine finally the substantive rights of the parties and which can themselves be brought into question in an appeal from the final decision.."**

21. According to the decision in **Sango Bay Estates Ltd and Others vs. Dresdner Bank AG [1971] EA 17:**

> **"Leave to appeal from an order in civil proceedings will normally be granted where prima facie it appears that there are grounds of appeal which merit serious judicial consideration but where, as in the present case, the order from which it is sought to appeal was made in the exercise of judicial discretion, a rather stronger case will have to be made out**."

22. In **Muhamed Yakub & Another vs. Mrs Badur Nasa Civil Application No. Nai. 285 of 1999**, the Court of Appeal held that leave to appeal is granted unless the appeal has no realistic prospects of success and also in exceptional circumstances though the case has no such prospects of success if the issue involved is of public interest. This was the position in **Machira T/A Machira & Company Advocates vs. Mwangi & Anor [2002] 2 KLR 391** where the court stated that:

> **"The court will only refuse leave if satisfied that the applicant has no realistic prospects of succeeding on the appeal. The use of the word "realistic" makes it clear that fanciful prospects or an unrealistic argument is not sufficient. When leave is refused, the court gives short reasons which are primarily intended to inform the applicant why leave is refused. The court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the court is not satisfied that the appeal has no prospects of success. For example, the issue maybe one which the Court considers should in the public interest be examined by this court or, to be more specific, this Court may take the view that the case raises a novel point or an issue where the law clarifying. There must however almost always be a ground of appeal which merits serious judicial consideration."**

23. In this case I have found that the intended appeal cannot based on the material placed before me be termed as frivolous.

24. In the premises the application dated 11th October, 2018 succeeds and is granted in terms of prayers 1 and 2 thereof. Let the applicant file and serve his memorandum of appeal within 10 days from the date of this decision.

25. As regards costs of this application, although this Court directed the parties to furnish it with soft copies of the pleadings and submissions in word format, none of the parties complied therewith by the time of the drafting of this ruling. Section 1A(3) of the ***Civil Procedure Act*** provides as hereunder:

> ***A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.***

26. One of the overriding objectives of the ***Civil Procedure Act*** is the facilitation of expeditious resolution of the civil disputes governed by the Act. The direction that Advocates and parties do furnish the Court with soft copies of their pleadings and submissions is geared towards that same objective and where they fail to comply therewith, it amounts to a failure to comply with a statutory mandate which may call for a penalty in costs or deprivation of costs even where the same would have been granted. Accordingly, there will be no order as to the costs of this application.

27. It is so ordered.

Read, signed and delivered in open Court at Machakos this 28th day of November, 2018.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Ajiambo for Mrs Karani for the 2nd Respondent

CA Geoffrey