



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

MISCELLANEOUS APPLICATION NO. 238 OF 2018

(Coram: Odunga, J)

SHARON NZULA KYALO and

ALPHONSE MUTUA NDUNDA

(Suing on their behalf and as administrators of the

estate of the late STEPHEN KYALO NDUNDA (DECEASED).....APPLICANTS

VERSUS

BENCHMARK DISTRIBUTORS LIMITED.....RESPONDENT

RULING

1. By a Motion on Notice dated 2nd July, 2018, the applicants herein seek that this Court be pleased to grant leave to them to appeal out of time against the judgement in Kithimani PM's Court Civil Case No. 209 of 2016. By the said judgement, the said found that the applicants herein had failed to prove their case on a balance of probabilities and dismissed the suit with costs.

2. According to the applicants on the day of delivery of the said judgement, their counsel requested another counsel to hold his brief but as the terms thereof were unclear he tried to peruse the court file but the same was not available as the file was still before the trial magistrate who was correcting the judgement. By the time he was able to peruse the file, the thirty days period prescribed for appealing had lapsed.

3. It was deposed that the applicants being aggrieved by the said decision instructed their advocates to appeal against the same whose time for appealing lapsed on 16th June, 2018. To the applicants, the intended appeal is merited, arguable and raises pertinent points of law as regards quantum and liability hence has overwhelming chances of success. It was contended that the applicants had nothing to do with the circumstances leading to the delay in the filing of the appeal and ought not to be penalised for the same.

4. Since the application was made without inordinate delay which delay is excusable, it was deposed that the respondent will not suffer any prejudice or damage which is incapable of being compensated by way of costs. On the other hand the applicants stand to suffer prejudice if not granted a chance to appeal the said judgement.

5. In opposing the application, the Respondent averred that the applicants have no good and sufficient cause for not filing the appeal out of time. It was argued that as the affidavit in support of the application herein was deposed to by an advocate as regards contentious issues, the same ought to be struck out. The Respondent took issue with the correctness of the averment made on behalf of the applicant and disclosed that based on the information from its advocates, a memorandum of appeal filed on 23rd May, 2018 against the decision in Kithimani PMCC No. 118 of 2015: John Chege Nganga vs. Benchmark Distributors Ltd was served on the said firm of advocates on 29th May, 2018. It was averred that the suit from which these proceedings arise and the said Kithimani PMCC No. 118 of 2015: John Chege Nganga vs. Benchmark Distributors Ltd were heard together and a joint judgement delivered on 16th May, 2018. It was therefore contended that if the advocates were able to file that appeal within time, there is no reason why the intended appeal herein was not filed within time.

6. The applicants were therefore accused of being guilty of non-disclosure of material facts and that the intended appeal seeks to overturn the decisions of the Court of Appeal as regards the issue of vicarious liability. It was the respondent's case that there ought to be an end to litigation and that costs apart, the Respondent will suffer prejudice in that a cause of action which arose in 2004 is still being litigated on 4 years later.

Determination

7. I have considered the application, the supporting affidavit, the grounds of opposition and the submissions filed as well as the authorities

relied upon.

8. 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.

9. 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 be based 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 applicant for such orders. See **Gharib Mohamed Gharib vs. Zuleikha Mohamed Naaman Civil Application No. Nai. 4 of 1999.**

10. 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.

11. 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.

12. 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.

13. In this case the Respondent took issue with the fact that the supporting affidavit was sworn by an advocate rather than the client. The general law as relates to the swearing of affidavits was restated in **East African Foundry Works (K) Ltd. vs. Kenya Commercial Bank Ltd. Nairobi (Milimani) HCCC No. 1077 of 2002 [2002] 1 KLR 443; [2002] 2 EA 366**, where Ringera, J (as he then was) held that an advocate should not swear to contentious averments of facts in a case where he is appearing as such so as to avoid the unseemly prospect of counsel being called upon to be examined in matters in which they appear as counsel. However even in that case the Court appreciated that where the advocate swears to his understanding of the law in response to an affidavit by a fellow advocate, the affidavit is not defective. However Gacheche, J in **James Onyango Josiah T/A Nyaluoyo Auctioneers vs. Bullion Bank Ltd. Kisumu HCCC No. 462 of 2001** was of the view that where the matters sworn by counsel are personal to himself and within his knowledge, he is the right person to swear the affidavit as it would amount to hearsay if the client were to swear such an affidavit especially if the said matters do not form part of the evidence in the suit.

14. In my view, an advocate should therefore avoid the temptation to stray into factual contentious matters where he is appearing for his client. However where the facts deposed to are within his knowledge as counsel and the same are matters arising from the conduct of proceedings in which he was present and do not relate to the evidence in the suit, I agree that it is the advocate who is competent to depose to the same. It would for example be ridiculous to have a client swear to an affidavit where it is contended that due to illness his advocate was unable to attend court. Whereas the client may well do so based on information emanating from his advocates, to expect the client to answer to the nature of the illness of his advocate would be unreasonable.

15. In this case what is deposed to is the inability of an advocate to access a court file which was purportedly with the magistrate who was correcting the judgement. To my mind in these circumstances it was the advocate who was based placed to swear the affidavit and there is nothing incompetent about that.

16. In this case the reason for the delay is that the applicants' advocate could not access the court file in order to understand the nature of the judgement which was read in his absence though there was counsel holding his brief and that by the time he was able to access the file, time limited for filing the appeal had lapsed. It is not uncommon for courts to deliver their decisions and later on make the typographical errors noticed during the delivery thereof. It is unfortunate that sometimes the period taken to "clean" a decision is unnecessarily long and do occasion injustice to the parties. However, that such circumstances exist is not in doubt and those circumstances, in my view constitute sufficient reasons for admission of an appeal out of time or extension of time to appeal out of time.

17. In this case, it is however contended that the suit from which these proceedings arise and the said Kithimani PMCC No. 118 of 2015: John Chege Nganga vs. benchmark Distributors Ltd were heard together and a joint judgement delivered on 16th May, 2018. 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.

18. It is however clear that in this application the applicants are seeking to appeal against a decision in Kithimani PM's Court Civil Case No. 209 of 2016: Sharon Nzula Kyalo & Another vs. Benchmark Distributors Limited. It is clear that judgement herein was delivered on 16th May, 2018, the same day the judgement in Kithimani PMCC No. 118 of 2015: John Chege Nganga vs. Benchmark Distributors Ltd was delivered. However I cannot state with certainty that if one file was available, then the other must also been available. In the absence of any evidence to the contrary, I cannot fault the deposition that the court file in respect of Kithimani PM's Court Civil Case No. 209 of 2016: Sharon Nzula Kyalo & Another vs. Benchmark Distributors Limited was with the trial magistrate since it has not been contended that the contents of both judgements were the same.

19. As regards the issue of the previous decisions of the Court of Appeal, the applicants no doubt have a right of appeal, and the applicants may well be able to satisfy the court that the facts of the other cases were not the same as in the present case. In **Official Receiver vs. Sukhdev Nairobi HCCC No. 423 of 1966 [1970] EA 243, Madan, J** held that:

“In a court of justice parties are entitled to be heard and to insist upon every possible objection. It would be wrong for this or any other court to refuse to hear an objection even if it appears meritless and tedious. Woe be to the day when this will be allowed to happen. It would be honourable to abdicate from the seat of justice than to allow such a performance of denial to take place. The court may disallow an objection, reject a motion or refuse a plea but it must never refuse to hear it. A court of law is for the preservation not usurpation of rights of the parties.”

20. Whereas it may well be that the mistake herein could be traced to the failure by the applicants' advocates to attend court on the date of judgement, it is usual for counsel to instruct their colleagues to hold their briefs in the hope that they would get the substance of the judgement and 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.”

21. In this case the delay was from 16th June, 2018 since it is only the period falling after the date when the action ought to have been taken that ought to be explained. From 16th June, 2018 to 4th July, 2018 is a period of less than a month. 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. Accordingly, the delay was not inordinate.

22. As regards the merits of the contemplated action, the applicants have indicated that the appeal will be centred on both quantum and liability. In my view, the intended appeal cannot in the circumstances of this case which was a suit for damages arising from fatal accident, be said to be frivolous.

23. The Respondent has contended that litigation must come to an end. That is true however as I have stated the applicants have an undoubted right of appeal. That right cannot be denied simply because of the fact that the cause of action arose long time ago particularly where there is no evidence that the delay in prosecuting the suit was occasioned by the applicants. I am not therefore satisfied that any prejudice to the Respondents cannot be adequately be compensated in costs as a result of a favourable exercise of discretion in favour of the applicants. 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**.

24. In the premises I find that this application is merited. Accordingly, I grant leave to the applicants to file the appeal out of time. Let the Memorandum of Appeal be filed and served within 10 days from the date hereof. In default the application shall stand dismissed.

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 Watta for Mr Ngare for the applicant

Mr Matagaro for Mr Karanja for the Respondent

CA Geoffrey