



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC CIVIL APPLN NO. 497 OF 2018**

**KENNEDY MWANGI.....APPLICANT**

**VERSUS**

**ELIZABETH KALINDE KIEMA.....1<sup>ST</sup> RESPONDENT**

**KITONYI KIEMA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application for determination before me is the Notice of Motion dated 24<sup>th</sup> September 2018 in which the applicant seeks leave to file an appeal out of time against the judgment and decree delivered on 13<sup>th</sup> March 2018 in Milimani CMCC No. 1088 of 2015 and orders staying execution of the said judgment pending hearing and determination of the intended appeal.
2. The application is expressed to be made under *Sections 1A; 1B; 3A; 63 (e); 79G and 95 of the Civil Procedure Act and Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules* and all enabling provisions of the law. It is premised on the grounds stated on its face which are largely reproduced in the depositions made in the supporting affidavit sworn on 24<sup>th</sup> September 2018 by Mr. Paul Kibet, a legal officer employed by the applicant's insurer the *Kenya Orient Insurance Limited*.
3. The background against which the application was filed as can be ascertained from the averments in the supporting affidavit and the judgment of the lower court which is annexed to the supporting affidavit and marked as *Exhibit PK-1a* is that the applicant, *Mr. Kennedy Mwangi* was the second defendant in a fatal accident claim instituted by the respondents then the plaintiffs in Milimani CMCC No. 1088 of 2015. The 1<sup>st</sup> defendant *Mr. Abdi Abdirashid* did not enter appearance in the suit and the suit was subsequently withdrawn against him on 18<sup>th</sup> May 2018.
4. Hearing proceeded against the applicant and on 13<sup>th</sup> March 2018, the trial court rendered its decision and entered judgment on liability in favour of the respondents against the applicant at 100%. The respondents were also awarded a total of KShs.1,818,800 in both general and special damages under *The Law Reform Act* and the *Fatal Accidents Act*; costs of the suit and interest thereon.
5. The applicant was aggrieved by the trial court's decision on both liability and quantum and now seeks leave to file his intended appeal out of time since the time prescribed for filing of appeals to the High Court has already expired. The application is mainly predicated on grounds that the applicant has an arguable appeal with high chances of success; that the delay in lodging the intended appeal was caused by inadvertence and excusable mistake by the applicant's insurer who gave its advocates instructions to prefer an appeal against the impugned judgment when the prescribed period for filing appeals had lapsed; that the application is made in good faith and the applicant is ready to comply with any conditions that may be imposed by the court including an order to deposit the entire decretal sum in court or in an interest earning account in the names of the advocates on record as security for payment of the decretal sum if the appeal is unsuccessful.
6. The application is opposed through an affidavit sworn on 5<sup>th</sup> October 2018 by the 1<sup>st</sup> respondent *Ms Elizabeth Kalinde Kiema*. In her affidavit, the 1<sup>st</sup> respondent denied that the applicant's intended appeal is arguable or that it has any chances of success and urged the court to dismiss the application on grounds that it lacks merit; that the eight months delay in filing the application has not been sufficiently explained and that in any case, the application has been overtaken by events as her counsel had already filed a declaratory suit and there is therefore no threat of execution; that the applicant's insurer filed this application through the applicant after it was awoken from slumber by the statutory letter dated 19<sup>th</sup> September 2018; that the applicant is thus not deserving of the exercise of the court's discretion in his favour.
7. To counter the depositions made in the replying affidavit, *Mr. Paul Kibet* filed a supplementary affidavit in which he denied that the insurer was awoken from sleep by the respondent's statutory notice and claimed that the main reason for the delay was both inadvertence on the insurer's part and the fact that being a corporate entity, decisions regarding whether to appeal or not take time as they are not made by

one individual but are processed through a structure of approvals; that the applicant has already applied for certified copies of the proceedings, judgment, decree and certificates of costs to enable him prepare the record of appeal; that the filing of the enforcement suit does not mean that the application has been overtaken by events since by operation of the law, if the application is allowed, the suit will be automatically stayed pending determination of the appeal.

8. The application was argued orally before me on 26<sup>th</sup> November 2018. Learned counsel *Mr. Ochieng* represented the applicant while learned counsel *Ms. Amboko* appeared for the respondents. Both counsel in their submissions buttressed the position taken by their respective clients in support and in opposition to the motion as summarized herein above.

9. I have considered the application, the affidavits on record, the rival submissions made on behalf of the parties and all the authorities cited. The law governing the filing of appeals to the High Court against decisions made in the lower court is set out in *Section 79 G* of the *Civil Procedure Act* ( the Act) which states 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.”***

10. The proviso to *Section 79G* above shows clearly that the law contemplates a situation where an aggrieved litigant will be unable to file his intended appeal within the time limited by the law hence the power given to the court to enlarge the time within which an appeal should be filed or admitted out of time.

11. It is now settled law that enlargement of time within which to file an intended appeal is not automatic or a right of the applying party but is a matter which is dependent on the exercise of the court’s discretion. It is evident from the proviso to *Section 79 G* that the court’s discretion can only be exercised at the instance of a party who gives good and reasonable explanation for failure to file the intended appeal on time to the satisfaction of the court. See: Supreme Court’s decision in *Nicholas Kiptoo Arap Korir Salat V IEBC & 7 Others, [2014] eKLR*.

12. In my view, in the new constitutional dispensation brought in by the *Constitution of Kenya 2010* which lays emphasis on the citizen’s right of access to justice and the need for courts to dispense substantive justice, when faced with an application of this nature, the court should not be overly concerned with the length of the delay but should be more concerned with whether the delay in question has been satisfactorily explained. A delay of even a few days may be found to be inexcusable if no good explanation is given for the delay while a delay of several months may be excused on the basis of the reason or explanation given for the delay. Each case must therefore be determined on its own facts and circumstances.

13. In this case, the impugned judgment was delivered on 13<sup>th</sup> March 2018. The applicant therefore ought to have filed his intended appeal on or about 13<sup>th</sup> April 2018. He did not do so because he left the matter in the hands of his insurers. According to the insurer’s legal officer, the insurer due to inadvertence and the nature of its administrative structure failed to give its advocates instructions to appeal against the trial court’s decision within time and only did so after the time limited for filing of appeals expired.

14. Though the date on which the said instructions were given to the insurer’s advocates was not disclosed, it is clear from the explanation given in support of the application that the applicant was not to blame for the delay in making the instant application or for failure to file the intended appeal within time. The delay does not appear to have been deliberate or caused with the aim of obstructing the course of justice.

It is worth noting in this regard that the applicant has offered to secure the decretal amount by depositing it in court or in an interest earning account held by the advocates on record so that the amount will be easily accessible to the respondents in the event that their appeal is unsuccessful.

15. Having taken all relevant factors into account, I am persuaded to find that the applicant has demonstrated sufficient cause to justify the exercise of the court’s discretion in his favour. And in order to balance the competing interests of the parties given that the respondents are also entitled to access and enjoyment of the fruits of their judgement without undue hardship should the intended appeal become unsuccessful, I will allow the application on the following terms:

- i. The applicant shall file and serve his intended appeal within the next 21 days.
- ii. In the same period of time, the applicant shall deposit the entire decretal amount in an interest earning account to be held jointly by the advocates on record.
- iii. If the applicant fails to comply with any of the two conditions above, the leave granted herein shall automatically lapse.

16. Given that it is not disputed that the respondents have already filed a declaratory suit, I find no need to address my mind to the applicant’s prayer for stay of execution pending determination of the intended appeal since the filing of the enforcement suit has extinguished any immediate threat of execution.

17. To further balance the scales of justice, the respondents are awarded costs of the application assessed at Kshs. 20,000 to be paid before the filing of the intended appeal.

It is so ordered.

**DATED, DELIVERED and SIGNED** at **NAIROBI** this 20<sup>th</sup> day of December, 2018.

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Ms Amboko for the respondents

No appearance for the applicant

Miss Kavata: Court Assistant