



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 28 OF 2017

JAMES AGGREY MAHERO ALARE.....APPELLANT

VERSUS

GUARDIAN COACHES BUS T/A NYAMIRA LUXURY EXPRESS...RESPONDENT

RULING

By a notice of motion dated 24.3.17 brought under Sections 79G and 95 of the Civil Procedure Act Cap 21 Laws of Kenya and all enabling provisions of the Law, the applicant/ appellant prays for orders that

- a. THAT leave be granted to appeal out of time against the whole judgment and decree in Case No. 310 of 2013 by Hon. Mr. Harrison Adika, Senior Resident Magistrate delivered on 8th February 2016
- b. THAT the Memorandum of Appeal dated 20th March 2017 and filed on 21st March 2017 be deemed as filed and served upon the respondent within the prescribed time
- c. That there be stay of execution of decree/judgment entered against the applicant on 8.2.16 in Case No. 310 of 2013 pending the hearing and determination of this appeal
- d. Costs of the application be provided for application is based on the grounds among others that:
 - a) The failure to file the appeal in time was due to an inadvertent mistake of the advocate handling the matter at the time judgment was delivered
 - b) The delay was due to the delay by the trial court in availing proceedings in time
 - c) The proposed respondent is unlikely to suffer any prejudice
 - d) The appeal has overwhelming chances of success, is arguable and not without merit

The application is supported by the affidavit of **James Aggrey Mahero Alare**, the appellant, sworn on 24th March 2017 in which he reiterates the grounds on the face of the application. Annexed to the supporting affidavit is a certificate of delay dated 6.3.17 marked **JAMA-1** and Memorandum of Appeal marked **JAMA-2**.

The application is opposed on the grounds set out in a replying affidavit sworn on 3.4.17 by Julius Mokaya who describes himself as a director of the respondent. He avers that the applicant's suit was dismissed on 8.2.16. That thereafter the costs of the case were assessed and a certificate of costs **JMO-4** was issued on 5.9.16. That the certificate of costs was served on the applicant on 9.1.17 by way of

registered post as shown by certificate of postage *JMO-5*. He further avers that the delay on the part of the applicant is unreasonable and unjustifiable only meant to inhibit the respondent's right to the fruits of the judgment.

When the application came up for hearing on 4.4.17; the parties' advocates agreed to have it disposed off by way of written submission which they dutifully filed. It was submitted for the applicant that he has already filed an appeal in line with the decision in compliance with Section 79G of the Civil Procedure Act. It was further submitted that the applicant has established a reasonable cause for not filing the appeal on time. To this end, the applicant cited *Mwangi v Kenya Airways Ltd [2003] KLR* where the Court of Appeal cited *Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No. Nai. 255 of 1997) (unreported)*, with approval where the Court expressed itself thus:-

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted”.

It was additionally submitted for the applicant that mistakes of counsel should not be visited on the applicant. To this end; the applicant cited *Philip Keipto Chemwolo & another v Augustine Kubende [1986] eKLR* where the court of Appeal stated:-

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits.”

It was as well submitted for the applicant that the right to appeal is a constitutional right and that costs would adequately compensate the respondent for any prejudice that the delay may have occasioned.

It was submitted for the respondent that the applicant did not have a right to file this appeal before obtaining leave to file it out of time. It was further submitted that the delay is inexcusable and that the application is an afterthought and an abuse of the court process.

Issues for determination

i. Did appellant have a right to file an appeal before obtaining leave to appeal out of time

I have considered *Gerald M'limbine V Joseph Kangangi [2008] eKLR* cited by the applicant in which Emukule J (as he then was) stated:

My understanding of the proviso to section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal, and at the same time seek the court's leave to have such an appeal admitted out of the statutory period of time. The proviso does not mean that an intending appellant first seeks the court's permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the court's process under section 79B

From the foregoing; I find that the appellant rightfully filed the appeal before seeking leave to admit it out of time.

ii. Length of delay

The appellant blames his advocate for the delay. No advocate has sworn an affidavit explaining the reasons for the delay.

I have considered the provisions in Section 79G of the Civil Procedure Act Cap 21 Laws of Kenya which states:-

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

I have further considered Order 42 of the Civil Procedure Rules which states:-

(2) Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject summarily under section 79B of the Act until such certified copy is filed.

From the reading of the law; the applicant was only required, in the first instance, to file a memorandum of appeal within 30 days. Thereafter, the applicant would have applied for leave to file the certified copy of the decree or order appealed against if they were not ready as at the time 30 days lapsed. In the instant application, the applicant does not explain the reason for not lodging the memorandum of appeal before the expiry of the 30 day period from 8.2.16. And even if one were to accept the fact that the decree and typed copy of judgment were not supplied within 30 days from 8.2.16, there is no explanation why the applicant did not move the Court soon after 9.3.16 (when the memorandum of appeal should have been lodged) for extension of time or leave to file the memorandum of appeal out of time. Instead, the applicant waited for 13 months and it was not until 24.3.17 when the application herein was made.

Further to the foregoing; the certificate of delay marked *JAMA-1* confirms that the applicant did not apply for copies of proceedings and judgment until 1.12.16 which was a period of 10 months from the date the judgment was delivered. I am content to cite the case of **CIVIL APPLICATION NO. NAI 98 OF 2013 AVIATION CARGO SUPPORT LIMITED v ST. MARK FREIGHT SERVICES LIMITED** where G.B.M. KARIUKI, J.A. held:-

Even where an appeal is meritorious, if the delay is too inordinate and has not been explained at all, leave ought not to be granted to lodge record of appeal out of time. An aspiring appellant ought to be zealous and to take the initiative to comply with the law.

From the foregoing; I find that the applicant filed this application 13 months after the judgment sought to be appealed against was delivered and is therefore guilty of indolence.

iii. The chances of appeal succeeding if the application is granted

On whether the appeal has chances of success, the appellant faults the trial court among other grounds for its failure to address the issues before it and instead dwelling on the lack of explanation for delay in reporting the accident. I have considered the grounds of appeal and find that they raise triable issues.

iv. The degree of prejudice to the respondent if the application is granted.

No evidence was presented to prove that the respondent stands to suffer any prejudice if leave to appeal out of time is granted to the appellant. The foregoing notwithstanding, no prejudice would be so great that would not be adequately compensated by an award of costs if leave to appeal out of time was granted. (See **Factory Guards Ltd V Abel Vundi Kitungi [2014]eKLR**).

Although I have found the applicant guilty of unreasonable delay; the overriding objective of the court is to exercise latitude in its interpretation of the law so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out. Section 3A of the Civil Procedure Act Cap 21 Law of Kenya provides that:

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.

Consequently and for the reasons stated hereinabove, I find that it would be in the interest of justice to exercise my discretion in favour of the applicant.

As a result, the notice of motion dated 24.3.17 is allowed on the following terms:

a. THAT leave be and is hereby granted to appeal out of time against the whole judgment and decree in Case No. 310 of 2013 by Hon. Mr. Harrison Adika, Senior Resident Magistrate delivered on 8th February 2016

b. The Memorandum of Appeal dated 20th March 2017 and filed on 21st March 2017 be and is hereby deemed as filed and served upon the respondent within the prescribed time

c. That there be stay of execution of decree/judgment entered against the applicant on 8.2.16 in Case No. 310 of 2013 pending the hearing and determination of this appeal

d. The applicant shall pay the respondent thrown away costs in the sum of Kshs. 10,000/- within 30 days from today's date.

DATED AND DELIVERED THIS 28th DAY OF June 2017

T. WANJIKU CHERERE

JUDGE

In the presence of: -

Court Assistant -Felix

For the Appellant - N/A

For the Respondent -N/A