



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS CIVIL APPLICATION NO. 23 OF 2017

MOSES MURIITHI NJAGIAPPLICANT

VERSUS

PRISCILLA LEWA.....RESPONDENT

RULING

[Notice of Motion application dated 27th April, 2017]

1. Moses Muriithi Njagi, the Applicant was the defendant in Kilifi SPM Civil Suit No. 379 of 2009. The Respondent, Priscilla Lewa was the plaintiff. On 28th February, 2017, the trial Court entered judgement in favour of the Respondent in the sum of Kshs. 602,700.

2. Through the Notice of Motion application dated 27th April, 2017, the Applicant seeks leave to appeal out of time. She also prays for stay of execution pending the hearing and determination of the intended appeal. The application is brought under sections 1A, 3, 3A, 79G and 95 of the Civil Procedure Act, Cap 21; Order 42 Rule 1, Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010; and all other enabling provisions of the law.

3. The basis of the application is that upon learning that the judgement had been delivered on 28th February, 2017, the Applicant requested for a copy of the judgement so as to appreciate the reasoning of the Magistrate and thereby make an informed decision on whether or not to lodge an appeal. That the Applicant was issued with the handwritten copy of the judgement and has since made efforts to have the same typed.

4. It is the Applicant's case that by the time sufficient instructions could be obtained from his insurer, the time allowed to file an appeal had run out. That the delay occasioned herein is not so inordinate or so great as to be inexcusable. Further, that the intended appeal has overwhelming chances of success and unless leave to appeal out of time is granted the Applicant who is aggrieved and dissatisfied by part of the judgement will be prejudiced.

5. It is the Applicant's case that he is prepared to comply with any conditions set by the court.

6. The Respondent opposed the application by swearing an affidavit dated 19th May, 2017. The Respondent's position is that the suit has been inordinately delayed by the acts of the Applicant. She avers that she filed her suit in 2009 and the same was stayed at the instance of the Applicant, pending the hearing of the test suit being Kilifi S.R.M.C.C. No. 375 of 2009 Joseph Njuguna Macharia v Moses

Muriithi Njagi which was determined on 23rd May, 2011. It is her averment that after the test suit was determined, the Applicant filed an appeal which was dismissed on 15th August, 2016.

7. The Respondent states that her case was determined on 28th February, 2017 and the Applicant went to sleep up to 27th April, 2017 when this application was filed. The Respondent's case is that the Applicant has not given any cogent reason for failing to file the application within the statutory timelines.

8. It is the Respondent's position that the fact that the Applicant can furnish security is not enough reason to grant a stay as she is also entitled to justice. The Respondent contends that she has suffered as a result of the delayed disposal of her matter. She therefore urges this court to dismiss the application with costs.

9. The parties filed submissions in support of their positions. The Applicant submits that immediately he was made aware of the judgement on 2nd March, 2017 the same was forwarded to the insurer so as to make payment or decide whether to appeal. As the insurer is a body corporate with systems and a chain of command several approvals had to be sought before instructions were given to appeal. By then, the time to appeal had lapsed thus necessitating the filing of this application. The Applicant's position is that the delay is not so inordinate so as not to be excusable and leave should be granted to appeal out of time.

10. The Applicant relied on the decision of G.S. Pall, JA in **Hon. John Njoroge Michuki & another v Kentazuga Hardware Limited [1998] eKLR** and submitted that an application to file an appeal out of time should be granted liberally.

11. The Applicant also relied on the decision of the Court of Appeal in Civil Application No. NAI 356 of 1996 as cited in **Hon John Njoroge Michuki & another** (supra) where it was stated that: -

“Lastly we would like to observe that the discretion granted under rule 4 of the Rules of this Court to extend time for lodging an appeal is, as is well known, unfettered and is only subject to it being granted on terms as the court may think just. Within this context, this court has on several occasions granted extension for time on the basis that the intended appeal is an arguable one and it would therefore be wrong to shut an applicant out of court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances inexcusable and his opponent was prejudiced by it.”

12. The Applicant points out that he has an arguable case with high chances of success as the general damages awarded are inordinately high and not commensurate with the injuries sustained.

13. The Applicant contends that he will suffer irreparable and substantial loss if the application is not allowed. Further, that the Respondent has not placed anything on record to show that she is in a position to refund the decretal amount if the same is paid to her and his intended appeal later succeeds. The Applicant prays that the application be allowed.

14. The Respondent commences her submissions by pointing out that this court should adhere to the timelines provided by the Constitution and statute. Referring to Section 79G of the Civil Procedure Act, Cap. 21, the Respondent points out that an 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 and this period can only be enlarged if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

15. It is the Respondent's position that the timeline provided for filing an appeal must be respected. Relying on the decision of the Supreme Court in **County Executive of Kisumu v County Government of Kisumu & 8 others [2017] eKLR** the Respondent submit that extension of time is not a right of a party and a party who seeks extension of time has the burden of laying a basis for enlargement of time to the satisfaction of the court.

16. It is the Respondent's contention that the Applicant has not disputed the facts as contained in her

affidavit. Further, that the affidavit in support of the application was sworn by one Pauline Waruhiu the Claims Director of Directline Assurance Company Ltd, a company that deals with litigation on a day to day basis and is thus conversant with the law.

17. The Respondent cited the case of **Nandi Tea Estates Ltd. v George Ochieng Oduogo [2016] eKLR** to demonstrate that a delay of twenty days, if not satisfactorily explained, will result in the dismissal of an application for extension of time.

18. The Respondent therefore urges this court to dismiss the application herein.

19. In my view, the issues for the determination of this court are:-

- a) Whether the application has been brought without unreasonable delay;
- b) Whether the delay can be satisfactorily explained;
- c) Whether the Applicant has an arguable appeal; and
- d) Whether the Respondent would be prejudiced if the application is allowed.

20. Section 79G of the Civil Procedure Act, Cap 21 provides for time for filing appeals from subordinate courts as follows: -

“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.”

21. The parties herein agree that the Applicant did not file an appeal within thirty days from the time of the delivery of the judgement by the trial Court thus necessitating the prayer for extension of time in the instant application.

22. The Supreme Court in the already cited case of the **County Executive of Kisumu** while quoting its decision in **Nicholas Kiptoo Korir Arap Salat v Independent Electoral & Boundaries Commission & 7 others [2014] eKLR** delineated the principles that should guide a court in the exercise of its discretion to extend time as follows:-

“1. 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;

2. A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court;

3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;

5. Whether there will be any prejudice suffered by the respondents if the extension is granted;

6. Whether the application has been brought without undue delay; and

7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

23. What is inordinate delay will vary from case to case and will also depend on the conduct of the parties to the application. In **Nandi Tea Estates Ltd.** (supra), Githua, J held that: -

“In this case, I am satisfied that the Applicant has failed to demonstrate that there was good or sufficient cause which prevented it from lodging its appeal within the prescribed time. I am persuaded to find that the delay of about 20 days was not satisfactorily explained. The delay in my view was inordinate and inexcusable. I therefore find no basis upon which I can exercise my discretion in the Applicant’s favour by granting it leave to file an appeal out of time.”

24. It is important for purposes of this ruling to reproduce at length the affidavit sworn on 27th April, 2017 by Pauline Waruhiu, the Claims Director of Directline Assurance Company Limited in support of the application. She avers from paragraphs 2 to 10 as follows: -

“2. THAT I am informed by our Advocates on record which information I verily believe to be true that on 28th February 2017, Judgement was delivered against the Applicants herein in which the Applicants were held 100% liable and ordered to pay the Plaintiff Kshs. 602,700/= plus costs and interest of the suit.

3. THAT I am informed by our Advocates on record, which information I verily believe to be true that a handwritten copy of the judgement has been obtained pending a typed copy.

4. THAT immediately thereafter the Applicants requested for a copy of the Judgement so as to appreciate the reasoning of the Magistrate and thereby make an informed decision whether or not to lodge an appeal. (Now produced and shown to me is a typed copy of the judgement marked as Exhibit “PW – 1.”)

5. THAT the Respondents’ advocates have threatened to take further action, which may include executing against our client, when stay lapses. (Now produced and shown to me is a copy of a letter by the Plaintiff/Respondent threatening action – Exhibit “PW – 2.”).

6. THAT being dissatisfied with the said judgement, we have instructed M/s Kairu & McCourt to appeal against the said judgement. (Now produced and shown to me is a draft Memorandum of Appeal dated 21st April, 2017 as Exhibit “PW – 3.”)

7. THAT the time required to file an appeal expired on 28th March, 2017, 30 days after Judgement was delivered by the Trial Court on 28th February, 2016 (sic).

8. THAT by the time we issued sufficient instruction to our advocates on record, the time within which to lodge an appeal had inadvertently lapsed.

9. THAT this application has been brought to court within a reasonable period after the expiry (of the time) within which to file a Memorandum of Appeal.

10. THAT the Applicants are ready, willing and able to furnish such reasonable security as this Honourable Court may deem fit.”

25. A perusal of the affidavit will immediately show that no reason is advanced as to why the Applicant did not appeal within the period provided by the law. The affidavit talks about counsel having obtained a handwritten copy of the judgement but the date of obtaining the judgement is not indicated. It is also deponed that a typed copy of the judgement is annexed to the affidavit as exhibit PW – 1 but there is no such annexure. The only annexure is a Memorandum of Appeal which according to the affidavit is

exhibit PW – 3. However, the Memorandum of Appeal is not marked as Exhibit PW – 3.

26. Since a copy of the judgement to be appealed from has not been exhibited, it follows that I cannot say whether the Applicant has an arguable appeal or not. I am therefore not in a position to allow to extension of time on the ground that the Applicant has an arguable appeal.

27. The claim that the delay was caused by the bureaucracy within the insurance company is only found in the submissions. In any case the insurer's admitted inefficiency cannot be a good reason for enlarging time.

28. Indeed it is clear that the Applicant only sprang into action upon the insurance company receiving the letter dated 24th April, 2017 from the Respondent's advocates indicating the intention to file a declaratory suit against the insurance company. This is a party who can only act upon prodding by the other party. This is not a good reason for exercising the court's discretion in favour of the Applicant.

29. In short there is no plausible reason advanced by the Applicant for enlarging the time for filing appeal as provided by Section 79G of the Civil Procedure Act, Cap 21. Prayer No. 2 which seeks for the extension of time within which to file an appeal therefore fails.

30. Consequently, the application for stay pending the hearing and determination of the intended appeal automatically fails. Had I found merit in the application for extension of time within which to file an appeal I would have granted stay on the condition the Applicant has already met; the deposit of the decretal amount in court.

31. Otherwise the application dated 27th April, 2017 fails in its entirety and the same is dismissed with costs to the Respondent.

Dated, signed and delivered at Malindi this 28th day of Sept., 2017.

W. KORIR,

JUDGE OF THE HIGH COURT