



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISC. CIVIL APPLICATION NO. 20 OF 2016

SUNIPU LIMITED.....APPLICANT

VERSUS

HUDSON MASIBO WEPUKHULU.....1ST RESPONDENT

BEATRICE NASWA NYONGESA.....2ND RESPONDENT

RULING

1. The applicant prays for extension of time to lodge an appeal. The intended appeal is against the judgment and decree of the lower court delivered on 16th February 2016 in Eldoret Chief Magistrates Civil Suit 829 of 2013.
2. The respondents had presented the suit praying for general and special damages for negligence. The applicant denied the claim *in toto*. The lower court found that the applicant was 50% liable for the accident. The applicant is aggrieved; and, intends to lodge an appeal in terms of the annexed draft memorandum of appeal marked "A".
3. The applicant filed the present notice of motion on 23rd March 2016. The gravamen of the motion is that the intended appeal is arguable and has "overwhelming chances of success". The applicant avers that the delay was caused by failure of its insurers to instruct counsel; and, that no prejudice will be suffered by the respondents. Those matters are buttressed by the supporting affidavit of Sunil Keshwala, a director of the applicant, sworn on 23rd March 2016.
4. The motion is contested. There is a replying affidavit sworn by the 1st respondent on 8th April 2016. The pith of the deposition is that the supporting affidavit is defective; that the judgment of the lower court was read in the presence of counsel for the applicant; that no security has been offered; that the appeal is hopeless; that the respondents are entitled to the fruits of their decree; and, that no sufficient reasons for the delay have been placed before the court.
5. On 27th April 2016, I heard brief submissions from the learned counsel for both parties. I have considered the application, depositions and the rival submissions.
6. The legal parameters in a matter of this nature are well settled. This court has wide and unfettered discretion. The discretion must however be exercised judiciously. Some of the factors to be considered include the length of delay, the reasons for the delay, the nature of the intended appeal and whether the respondent will suffer prejudice if the court extends the time. See generally, *Leo Sila Mutiso v Rose Mwangi*, Court of Appeal, Nairobi, Civil Application 251 of 1997 (unreported).
7. The Court must also pay heed to the overriding objective to do justice to the parties. See Article 159 of the Constitution and sections 1A, 1B and 3A of the Civil Procedure Act. See also *Harit Sheth T/a Harit Sheth Advocate v Shamas Charania*, Court of Appeal at Nairobi, Civil Application No 68 of 2008 [2010] eKLR.
8. There is no dispute that the impugned judgment was delivered on 16th February 2016. The time

- prescribed for lodging an appeal expired on 15th March 2016 or thereabouts. The present motion was lodged on 23rd March 2016. The delay was thus for just *one week*. The applicant has explained the delay: it resulted from failure by its insurers to promptly instruct its counsel to file an appeal. I accept that there is no documentary evidence to support that assertion. Documentary evidence is but only one of the avenues of proving a fact. The applicant is *not* seeking a stay of the decree. The averment by the 1st respondent that security should be offered is misplaced.
9. It would be inappropriate to comment on the merits of the intended appeal at this stage. But I am unable to say that it is not arguable. I do not see serious prejudice that is likely to be suffered by the respondents. Certainly, there could be a postponement of the decree. But like I stated, there is *no* application for *stay* of execution before this court. I am also alive that any prejudice can be remedied in costs. And, I am prepared to grant the 1st respondent costs.
 10. Granted those circumstances, I will exercise my discretion under section 79G of the Civil Procedure Act in favour of the applicant. See *Leo Sila Mutiso v Rose Mwangi*, Court of Appeal, Nairobi, Civil Application 251 of 1997 (unreported).
 11. The upshot is that the applicant's notice of motion dated 23rd March 2016 is allowed *subject* to two *conditions*. The intended appeal shall be filed and served within the next *seven days* of today's date. Secondly, the applicant shall pay the 1st respondent *thrown away* costs of Kshs 3,000 within the next *fourteen* days. If the applicant fails to meet *any* of the two conditions within the set *time*, the leave to appeal out of time shall automatically be rescinded.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 28th day of April 2016

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Mr. Oribo for the applicant.

Mr. Kigamwa for Mr. Yego the respondent.

Mr. J. Kemboi, Court clerk.