



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 83B OF 2015

DELINA GENERAL ENTERPRISES LTD.....APPLICANT/APPELLANT

VERSUS

MONICA KILONZO NZUKI(Suing as

the legal representative of the Estate

of Elizabeth Mutheu Paul(Deceased).....RESPONDENT

RULING

The Application

The application before the court for determination is a Notice of Motion dated 3rd June 2015. The Applicant is seeking orders that the court enlarges time to enable it file its Memorandum of Appeal. The application is premised on the grounds that the judgment in Machakos CMCC No. 841 of 2012 was delivered on the 16th March 2015 in the absence of the Applicant and without his knowledge, and being dissatisfied with the said judgment it wishes to appeal against it. Further, that it has a triable appeal with high chances of success, and the delay in filling the Memorandum of Appeal within time was inadvertent.

The Applicant relied on an affidavit sworn on 3rd June 2015 by Paul Kariba, the legal officer at APA Insurance Company. The said deponent averred that the judgment on CMCC No. 841 of 2012 was to be delivered on 13th March 2015, but on the said date the same was not ready, and was to be delivered on notice. He stated that the Plaintiff later informed them by way of a letter dated 30th March 2015 that the judgment had been delivered on 16th March 2015, which letter was delivered to their advocate's offices on 22nd April 2015 a month after delivery of judgment.

The Applicant's learned counsel, Archer & Wilcock Advocates, filed written submissions dated 8th December 2015 and argued that there was sufficient cause for allowing the application since the memorandum of appeal had triable issues with high chances of success. Secondly, it was stated that the Applicant got to know of the delivery of judgment on 22nd April 2015 and by then the time to file appeal had lapsed. Thirdly, that there was no unreasonable delay since the memorandum of appeal was filed on 12th May 2015 and the instant application on 4th June 2015. Finally, that there was no prejudice if the application is allowed, and it was in the interest of justice that the Applicant is allowed to pursue the appeal. Reference was made to the decision in **Njagi Kabuthia alias Cyprian Njagi Ileri vs Richard Njogu Ileri C.A Civil Appl No NYR 20 of 2015** in this regard.

The Response

The Respondent opposed the Applicant's application in a replying affidavit she swore on 12th October 2015, wherein she averred that the application was frivolous, vexatious and bad in law. According to the Respondent, the Applicant was given 30 days stay of execution after the delivery of judgment which lapsed on 16th April 2015. Further, that the lower court on 4th September 2015 granted the applicant conditional stay pending appeal, but that the Applicant had failed to satisfy the conditions.

Furthermore, that her Advocate on record wrote to the Applicant's advocate on 30th March 2015 computing costs. The Respondent stated that the Applicant failed to pay the costs and chose to file the current appeal on 12th May 2015 without seeking leave of court.

The Respondent's learned counsel, Annie W Thoronjo & Co Advocates, on their part filed submissions dated 11th January 2016. It was argued therein that the Applicant had not met the threshold to have its application allowed as it filed the appeal almost 2 months after the delivery of the judgment; and because the instant application was brought 3 months after delivery of judgment. The learned counsel relied on the decisions in **Kenyatta vs Karanja, (1984) KLR** and **Wasike Vs Swala, (1984) KLR 591** for these submissions.

The Issues and Determination

I have read and carefully considered the pleadings and submissions filed. The issue to be determined is whether this Court should extend the time within which the Applicant should file its Memorandum of Appeal. The law as regards the filing of appeals in the High Court is found in section 79G of the Civil Procedure Act which provides 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.”

The question therefore is whether the Applicant has shown sufficient cause for this Court to exercise its discretion in its favour. The Applicant main ground for the exercise of this discretion is that it was not aware of the date the judgment in the lower court was delivered.

The grant of leave to file an appeal out of time is a matter of judicial discretion, which principle was espoused in the case of **Machira & Company Advocates V Mwangi & Another ,(2002) e KLR** and expounded in **Kenya Shell Ltd Vs Kobil Petroleum Ltd, (2006) 2 EA 132**. The Supreme Court of Kenya in the case of **Nicholas Kiptoo Arap Korir Salat – vs – IEBC & 7 Others, (2014) eKLR** laid down the principles for extension of time for filing an appeal 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 for 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, 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 respondent 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.

The Applicant submitted that the judgment in the lower court was to be delivered on 13th March 2015, but was delivered without notice and without the Applicant being aware on 16th March 2015, which was when time effectively started to run for purposes of filing an appeal. I note that the Respondent has not controverted or denied this averment, nor the averment that the Applicant only became aware that judgment had been delivered upon receipt of the Respondent's letter dated 30th March 2015 on 22nd April 2015. By this date the 30 days within which an appeal was to be filed had expired, and I therefore find that the Applicant's reason for the delay in filing the appeal is credible and reasonable.

In addition I note that the instant application was eventually filed on 4th June 2015, and I do not find the delay in filing the application inordinate given that the Applicant became aware of the judgment on 22nd April 2015. It is also my finding that the proceedings in the trial Court referred to and annexed by the Respondent were commenced by a Notice of Motion dated 5th June 2015, after the filing of the instant application, and cannot be evidence of any knowledge of the judgment date on the part of the Applicant. On the contrary, the said proceedings reinforce the Applicant's arguments that it was not aware of the judgment. In addition the said proceedings are on stay of execution, and have no bearing on the application for extension of time to file an appeal.

Lastly, I note that any prejudice that the Respondent may suffer was adequately addressed by the ruling of the trial Court dated 4th September 2015 which was annexed to the Respondent's replying affidavit, that ordered a stay of judgment on condition of payment to the Respondent of half of the decretal sum and deposit of the other half in a joint interest earning account. The Respondent is at liberty to execute the trial court's judgment if the Applicant has failed to meet these condition of stay as alleged.

I will consequently exercise my discretion in the Applicant's favour for the foregoing reasons. I accordingly allow the Applicant's Notice of Motion dated 3rd June 2015 and extend the time for filing the Memorandum of Appeal by 30 days from the date of this ruling.

The costs of this application shall follow the costs of the appeal.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 25th day of May 2016.

P. NYAMWEYA

JUDGE