



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. APPLICATION NO. 311 OF 2016

JOYCE LEVINDA NYONGESA.....PLAINTIFF/RESPONDENT

VERSUS

JOHN SARO NGOWA.....1ST DEFENDANT/APPLICANT

TSUWI MKARE TSUWE.....2ND DEFENDANT/APPLICANT

R U L I N G

1. By an application dated the 17/3/2016, the applicant, as judgement debtor in Kaloleni SPMCC No. 108 of 2012 has applied and sought from the court order that:-

i) THAT this application be certified urgent and service thereof be dispensed with and the Application herein be heard ex-parte and in the first instance.

ii) THAT the Applicant be granted leave to file an appeal out of time against the whole Judgement written by the Honourable S.K. ONDIEKI delivered on the 28th of January 2016 as per the attached Draft Memorandum of Appeal.

iii) THAT this Honourable Court be pleased to order a stay of execution on the Judgment/decree in Civil Suit No. SPMCC No. 168 of 2012 – Kaloleni entered against the Defendant/Applicant by the Honourable Trial Court on 28th of January 2016, pending the hearing and determination of this Application.

iv) THAT in the alternative, this Honourable Court do make such other Orders as it may deem just and expedient pending the hearing and determination of this application.

v) THAT the costs of this Application be in the cause.

2. It is evident that Prayers (i) 9(iii) have been spent the application having been heard *inter-partes*. What therefore remains for consideration by the court is the prayer for leave to lodge an appeal out of time and the omnibus prayer for orders deemed just by the court.

3. The judgement sought to be appealed against was delivered on the 28/1/2016 while this application was filed in court on the 21/4/2016. On the application the reasons offered for the delay are that:-

a) There was a bit of delay in obtaining the relevant instructions of the defendant and that by

the time the same were received time had lapsed.

b) That the delay was not inordinate but excusable.

c) That the appeal has high chances of success and would be rendered nugatory and the appellant prejudiced while the Respondent stands to suffer no Prejudice.

d) That the application was presented without unreasonable delay.

4. The application is supported by the affidavit of SANDRA NYAKWEBA who gives the date of delivery of judgement as 8/4/2015 and not 28/1/2016. She depones that upon delivery of the judgment she sought a copy of the judgement to appreciate the reasoning of the trial court and make an informed decision on whether or not to appeal and that the instructions to appeal were given to her by the applicant. No attempt is made to show when the decision to appeal was reached, if a copy of the judgement was ever obtained and if it formed the basis of the decision to make the application nor is it disclosed when the applicant finally gave the instructions to appeal. These are matter it was incumbent upon the applicant or the deponent of the affidavit in support of the application to bring forth and set out.

5. From the affidavit it is not clear whether it was the defendant/applicant who delayed in issuing the instructions or if it was the need to read the judgement and find the justification for the findings in it.

6. However, for good measure the applicant's affidavit contends that the delay is not so great or so inordinate as to be inexcusable.

7. The application was opposed by the Respondent who filed a Replying affidavit sworn by JOYCE LEVINDA NYONGESA to the effect that the judgement was read in whole in open court in the presence of the advocate for the Applicant and that by a letter of 29/1/2016 the Advocates were notified of the aggregate of the sum demanded and therefore the Respondent contained that the current application is an afterthought designed and calculated to delay her from reaping the fruits of her litigation.

8. I have perused the papers filed and the rival reasons given by the parties. The issues for determination is whether or not the applicant was satisfied the prerequisites of extension or enlargement of time to file an appeal out of time. The provision to section 79 G Civil Procedure Rules is worded in the following terms:-

“.....an appeal may be admitted out of time if the

Appellant satisfies the court that he had a good

and sufficient cause for not filing the appeal in time”

9. A court faced with an application to extend time for filing an appeal consider among other considerations the length of delay, the reasons for delay, the prospects of the appeal succeeding if leave is granted and degree of prejudice likely to be visited upon the Respondent if the application is granted.

10. There is consensus between the two sides that the judgement was delivered on 28/1/2016. Although Ms Nyakwebas affidavit says it was on 8/4/2015 at paragraph 2, the same affidavit at paragraph 5 says and grounds of the application say that it was indeed delivered on 28/1/2016. That date is therefore when the time began to run and the Applicant had thirty days within which to lodge any appeal.

11. No appeal was lodge in time lived this application which was drafted on 17/3/2016 some 17 days after the time had lapsed and was filed on 31/3/2016.

12. It was the duty of the applicant so as to comply with the provisions of section 79 G to demonstrate good and sufficient cause for the delay. There is doubt from the affidavit filed whether the delay was due to the need to read the judgement or the delay by the applicant to issue instruction to appeal. I hold the

view that the manner the reasons are advanced in both the application and affidavit areand less candid.

I have however held that the delay of 30 or 31 days although unexplained is not inordinate even if no reason has been advanced to make it excusable. As was said in the decision in *Teachers Service Commission vs Pius Mwangi & 1a others* () EKLK, it is indeed a strong thing to shut out a litigant from the seat of justice. The judge, BOSIRE, JA, said13.
“ “

14. I am persuaded and guided by that decision that the right of a litigant to challenge a decision by an appeal should never be bargained but promoted the discretion sought from the being unfiltered and taking into account that the damages sought to be challenged were in a respect of personal injury to the Respondent while full aware that both sides have deemed it prudent to refrain from disclosing what the award was and while further noting that the draft memorandum of Appeal does not seem to challenge finding on liability; I exercise my discretion in favour of the application and grant the application as prayed in terms of prayer 2 but upon terms that:-

- i) The memorandum of appeal be filed and served within 7 days from the date hereof.**
- ii) The Appellant shall within 21 days of filing the Memorandum of Appeal cause the appeal to be placed before a judge for purposes by admission.**
- iii) The Appellant shall within 30 days from the date of this ruling pay to the Respondent a sum equal to ½ of the damages plus costs and deposit the other half in an escrow account in the names of the Advocates for the parties within the same period.**
- iv) Should the applicant fail to comply with any of the foregoing conditions, the application dated 17/3/2016 shall stand dismissed and the orders hereby granted discharged.**

15. In terms of section 79 G, Civil Procedure Act, the costs of this application are awarded to the Respondent to be paid by the applicant.

Dated and signed at **Mombasa** this day **16th** day of **September 2016**.

HON. P.J.O. OTIENO

JUDGE