



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC APPL NO. 41 OF 2015

NELSON MURIUNGI LAIBUNI.....PLAINTIFF

VERSUS

PROTASIO MUTHEE.....1ST DEFENDANT

DANIEL GICHARU KARANJA.....2ND DEFENDANT

RULING

Leave to file appeal out of time

[1] By application dated 3rd June 2015, the Applicants have sought for leave of court to file Meru High Court Civil Appeal No.5 of 2015 out of time, against the Judgment of the Hon Nasimiyu in Meru Chief Magistrate's Court Civil Case No. 101 of 2012 delivered on 26th November 2014. The said Application is expressed to be brought pursuant to Order 22 Rule 22, Order 42 Rules 4 and 6, Order 51 Rules 1 and 3 of the Civil Procedure Rules 2010, Section 3, 79G and 3A of the Civil Procedure Act and all other enabling provisions of the Law. The Application is supported by Supporting Affidavit sworn by the SANDRA NYAKWEBA, Claims Director of Directline Assurance Company Limited and the grounds set out on the face of the application.

[2] Sandra Nyakweba averred that Directline Assurance Company, averred are the insurers of motor vehicle registration number KBL 874B at whose instance the claim was being defended. She stated further that on 26th November 2014, judgment was entered against the Applicants in which they were held 70% liable and ordered to pay General Damages of Kshs 1,000,000 and Kshs 113,590 as special damages less 30% contribution plus costs and interests. She contended that they were aggrieved and dissatisfied by the said judgment and instructed the firm of Kairu and McCourt to appeal against the said judgment. But, the time required to file an appeal has since expired and the delay in filing the appeal on time was due to pending certified copies of judgment. She said that this application has been made without undue delay. According to her, the intended appeal is merited, arguable and raises pertinent points of law and so she urged the court to extend time for filing the intended appeal.

[3] The Application was opposed via a Replying Affidavit filed in court on 17th October 2015, where the Respondent deposed inter alia that the judgment in the said case was delivered on 26th November 2014 and the Applicants advocates duly informed on the same date. But, it is only on 30th January 2015, over two months from the date of delivery of judgment, the Applicant filed an Application seeking stay of execution of the decree pending appeal which was settled by consent. The Respondent further contended that the Applicants purported to file an appeal on 14th January 2015, which was filed out of time. Yet, there was no explanation given as to why the appeal was not filed on time. There was no evidence that the

Applicants applied and paid for the proceedings or judgment of the court within time. To make matters worse, the Respondent argued that this Application was filed on 30th September 2015, ten months after delivery of judgment and therefore, the delay was inordinate and not explained. Further there was no certificate of delay from the lower court applied to show that there was failure of the court in preparing the record. Consequently, the Respondent contended that there were no sufficient grounds given for the exercise of the courts discretion and should dismiss the application with costs.

Directions

[4] When the matter came up for hearing on 7th April 2016, it was agreed that the application shall be canvassed by way of written submissions. Both parties filed their respective submissions in support of their cases. I will evaluate those submissions below.

Submissions by the Applicants

[5] The Applicants submitted that the substantive law that grants the court's power to enlarge time is Section 95 of the Civil Procedure Act. Similarly, the inherent power conferred under Section 3A of the Civil Procedure Act also enables the court to do justice. Therefore, this honourable court has the discretion to admit an appeal out of time. It was further submitted for the Applicants that the Memorandum of Appeal herein was arguable and raised serious issues of law that warrant interference by an appellate court. They took the view that in Application like this, the Applicant only needs to show an arguable appeal. For this proposition the Applicant sought to rely on the case of **BAKE 'N' BITE (NRB) LIMITED vs. DANIEL MUTISYA MWALONZI (2015) eKLR.**

[6] The Applicants further submitted that they had demonstrated that they had a good and sufficient cause for this Honourable court to exercise discretion and grant leave to the Applicants to appeal out of time. Finally, it was submitted that there was no prejudice to be suffered by the Respondent in the event that the Appellant proceeded with the appeal but, on the other hand the Appellants stand to suffer prejudice as they had a viable appeal which if struck out would remove the Appellants from the seat of justice. Consequently the Applicants urged the court to carefully weigh the prejudice if any, to be suffered by the Respondent in the event that the appeal is admitted out of time vis-a vis the hardship and/or injustice to be suffered by the Appellants in the event that this Appeal is struck out. To them, the scale would tilt in favour of the Appellants and admit the appeal out of time.

Submissions by the Respondents

[7] On the other hand, the Respondent submitted that there were no good and sufficient reasons advanced by the Applicants to warrant the issuance of the orders sought. The court should, therefore, be satisfied on the reasons advanced by the Applicants for the failure to file the appeal in time and must consider all the necessary factors including duration of the delay, whether there is an arguable appeal and the possible prejudice to the parties. According to the Respondents, the Applicants were guilty of delay and the Applicant's annexure SN3 was prepared for the purposes of showing that the Applicants made an application for the lower court record, when there not even at attempt to apply for the trial court record. They contended that it was not for the Respondent to prove to the court what prejudice he will suffer. Nonetheless, it was sufficient prejudice to keep the Respondent away from funds awarded in the judgment herein by injudicious conduct of the Applicants.

[8] Finally it was submitted that Sandra Nyakweba who described herself as the Claims Manager of Directline Insurance Company, was a total stranger to the proceedings since Directline Assurance Company was not a party to these proceedings. Therefore, her entire affidavit offended the provisions of Order 19 Rule 3 of the Civil Procedure Rules which provided inter alia that affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove. Consequently, the Respondent contended that the Application was without merit and should be dismissed.

DETERMINATION

[9] I have carefully considered this Application, the rival submissions by the parties and the authorities relied on by the parties. This essentially is an application for leave to file appeal out of time against the judgment delivered by Hon Nasimiyu in Meru Chief Magistrate's Court Civil No. 101 of 2012 delivered on 26th November 2014. There are ample judicial decisions on this subject and I need not multiply except to state that under section 79G of the Civil Procedure Act, the test for admitting an appeal filed out of time is that ***good and sufficient cause for not filing the appeal in time must be shown to the satisfaction of the court.*** Other than the prospects of the intended appeal, it is mandatory that an explanation of the delay is given if an application for extension of time is to succeed. On this point I am content to cite Omolo JA in the case of **RELIANCE BANK LTD (In liquidation) and SOUTHERN CREDIT LIMITED** that:-

"...even good appeals must be filed within the prescribed periods and when that is not done, some explanations must be given...for the delay".

Accordingly, from the string of judicial decisions on this matter, in an application for extension of time, the court should consider:-

(a) The amount of delay, the reasons given for the delay and the bona fides of those reasons;

(b) The prospects of the appeal;

(c) The degree of prejudice to the Respondent if the application is granted; and

See the decision of the Court of Appeal in **CIVIL APPLICATION NO. NAI 259 OF 2014 NATIONAL CEREALS AND PRODUCE BOARD vs. PETER GITHINJI.**

[10] I have set out test which I will apply. What is the amount of delay herein? The party applying should show that there has been no inordinate delay in applying for extension of time. There may be no precise measure of what amounts to inordinate delay, but looking at the circumstance of each case, any delay which is beyond acceptable limits should be easily discernible, and such is the delay that the law says it is inordinate. And, where such the delay has not been sufficiently explained, it is said to be inexcusable. Accordingly, despite the length of delay, reasonable explanation must be given for the delay if the court is to exercise its discretion in favour of the applicant. Applying this test to this case, I note that the judgment herein was delivered on 26th November 2014 whereas this application was filed on 30th September 2015- a period of almost 10 months. No attempt was made by the Applicant's to explain this delay. The Applicant's contention that the delay in filing the appeal was due to pending certified copies of judgment was not properly substantiated. I also note that the letter "SN3" annexed to the application was a request for a decree in order to file a record of appeal. The said letter is dated 10th October 2014 and was filed in court on 9th January 2015; I believe the date was an error. I also note annexure SN1 is a Memorandum of Appeal in Civil Appeal No 5 of 2015; it is dated 12th January 2015, but the court stamp shows it was filed on 14th January 2014; again the date of filing must have been an error. Therefore, it seems that the appeal was filed on 14th January 2014. Thus, it is inconceivable that the Applicant's could have been aware of the outcome of the judgment herein. But, the Applicant, either out of sheer negligence on the part of their advocates failed to explain these lapses; instead they set out to state that the delay in filing the appeal was due to pending certified copies of judgment without any clear elaboration. This approach by counsel for the Applicants obscures this matter which I believe should be straight-forward. But, despite the inadequacies, I will be guided by the constitutional command to serve substantive justice in the case. I have observed that parties deemed the appeal MERU HCCA NO 5 OF 2015 to have been duly filed and so engaged in resolving the application for stay of execution through a consent filed in court on 25th April, 2015. The Applicant complied with the terms of the consent. My view is that perhaps if the Applicants' counsel gave attention to the provisions of order 50 rule 4 of the Civil Procedure Rules, their approach on the matter could have been different and perhaps "the delay herein" would be excusable. That notwithstanding, I am satisfied that there will be no prejudice to the Respondent especially taking into account the consent order herein. Accordingly, I deem the appeal filed to be properly filed; the same to be served on the Respondent within 7 days. I also direct the Deputy Registrar

within 14 days to send notice of the appeal to the lower court from whose decision the appeal is preferred to provide this court with all record of the lower court for purposes of directions on this appeal under section 79B of the Civil Procedure Act. Each party shall bear own costs of the application dated 3rd June 2015. It is so ordered.

Dated, signed and delivered in open court at Meru this 28th day

of November 2016

F. GIKONYO

JUDGE

In the presence of:

Mr. Murango advocate for respondent

M/s. Kairu & McCourt for appellant

F. GIKONYO

JUDGE