



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISC. CIVIL APPLICATION NO. 523 OF 2016

VERONICA GATHONI MWANGI

SIMON NJUGUNA SEUR

(suing as legal representatives of the estate of the late)

RICHARD MWANGI GATHONI (Deceased).....APPLICANTS

VERSUS

SAMUEL KAGWI NGURE

BIRYA MWAKOMBE BIRYA.....RESPONDENTS

R U L I N G

Outline of facts

1. There is before court for determination a Notice of Motion dated 15/7/2016 seeking orders that time be extended for the applicant to lodge an appeal out of time.
2. The reasons for delay disclosed on the face of the application and on the affidavit of David Kamau Wachira Advocate, are that after the decision sought to be appealed against was delivered, the Applicant instructed his law firm to lodge an appeal and the lawyers drafted a memorandum of appeal but due to some inadvertence on the part of the court clerk the same was never filed and by the time the advocate inquired about the appeal time for lodging same had already passed hence the need for leave to file it out of time.
3. There is equally the assertion that although the parties had recorded a consent on liability at 50:50%, after hearing, the trial court still dismissed the plaintiffs suit with costs on the grounds that it was filed outside the timelines set by the Law Reform Act as well as the Fatal Accidents Act.
4. The application was opposed by the Respondent by the grounds of opposition dated 26/7/2016 and filed in court on the 27/7/2016. The grounds of opposition brand the application as being frivolous and an abuse of the process of the court for being bad for inordinate delay and having little prospects of success.
5. Both parties filed submissions on the 25/10/2016 and 9/11/2016 respectively. Those submissions are supported with court decisions enunciating when a court would exercise its unfettered discretion to enlarge time for filing an appeal where there has been default to do so within the time set. Parties then

attended court on 10/11/2016 to highlight the submissions filed.

6. On the applicants side, Mr. Wachira reiterated the reasons for delay and relied on the provisions of order 50 rule 6 Civil Procedure Rules as giving the court jurisdiction and setting parameters for consideration in such cases. He explained the delay between the 26/4/2016 when the judgment was delivered and the 18/7/2016 when the application was filed on an inadvertence on the part of the court clerk one Samuel Ngugi Gicheru who filed the prepared memorandum of appeal in the office file rather than filling same in court. The applicant also exhibited the proceedings sought to be appealed against in the application to show that he was doing everything in readiness to urge his appeal.

7. On the prospects of the appeal succeeding the applicant faults the court for having dismissed the suit on a technicality raised *suo motto*. Mr. Wachira then cited three decisions of the court of appeal by a single Judge of the court. All the three decisions are for the proposition of law that whether or not to enlarge time is a matter of judicial discretion to be exercised judiciously while the court get guided by four general principles which in themselves are not an exhaustive list but could be expanded regard being had to the facts and circumstances of each individual case.

8. On the part of Respondent Ms. Mango opposed the application and submitted that there was inordinate delay in bringing the application coupled with lack of diligence on the part of the Applicant. In her view the applicant had not discharged his onus under section 79G, Civil Procedure Act, to show sufficient cause to be allowed to file the appeal out of time. She pointed out that the delay of 3 months prior to bringing the application was itself inordinate and evidence of lack of diligence. It was added that the delay of three months had not been explained. She then relied on a decision of a single judge of the court of appeal for the proposition that even where the proposed appeal is meritorious but there is unexplained inordinate delay leave ought not to be granted to lodge an appeal out of time.

Analysis and determination

9. It is common ground that the delay between the date of judgment and filing of the application was about 3 months. However the real period of delay must be computed from the last date the appeal ought to have been filed and the time the extension of time was sought.

10. In my computation, the judgment having been delivered on the 26/4/2016 the appeal was due for filing or on before the 26/5/2016. The period of delay is therefore a period of some 50 or 51 days. The explanation given is that a legal clerk inadvertently filed the memorandum of appeal, itself dated 20/5/2016 to show it was ready within time, away rather than in court. To this court the duration for delay is not inordinate nor is the explanation given for the delay inexcusable.

11. It is not like the circumstances prevailing in the decision of **G.B.M KARIUKI, JA, in Aviation Cargo Support Ltd vs St. Mark Freight Services Ltd [2014] eKLR** where the delay was for a period of some six months between the date of getting typed proceedings and filing the application for extension of time. Equally in the decision in Edward Kamau Ndungu vs Peter Njogu Gitau, Okibas JA, extended time although there had been delay of some 9 nine months which the judge considered not unreasonable. These decision demonstrate there is no dogma on what time amounts to unreasonable delay.

12. I have taken due regard to the cited decisions and I have no hesitation in following the same as the proper position of the law.

For the period of delay, I find as the judges of the court of appeal found that a delay of less than 3 months when explained is not and cannot be inordinate. On the reason given for failure to lodge the appeal in time, the memorandum of appeal having been duly drafted, I am persuaded that mistakes, even if called blunders, will continue to occur and the fact that one or some have occurred should not be the reason enough to shut the doors of justice to a litigant who desires to be heard. The purpose the law grant to the court discretion to extend time is so that substantial justice may be achieved. Substantial justice will not be achieved if a party leaves the court with the impression that he has been denied an opportunity to present his grievance. See Judgment of **Kuwasi Apaloo JA in Chemwolo & Another vs Augustine**

Kubebe and Madam JA in Belinda Murai vs Amos Waimaina EACA No. 9 of 1978.

13. Equally important is the consideration about the prospects of the appeal succeeded if time is enlarged. Without delving into the merits of the appeal, I have had a chance to read the judgment sought to be challenged in the proposal appeal and the gist is to be found in the following excerpt at Page 15 of the Judgment:-

“As it is clear from the foregoing provisions, the limitation period within which action must be brought for recovery of damages under the two Acts is six months from the time of taking out representation under the Law of Succession Act. As set out herein above, a grant of representation was sought and obtained on 4/10/2010. This proceedings were taken on 18/9/2012. By then, the period of limitation allowed by both Cap 26 and 32 had long lapse. So this proceedings shall not be maintainable. This suit must therefore fail”.

14. It is not obvious from the proceedings that the issue of limitation was ever pleaded or canvassed before the court or brought to the attention of the parties by the court for purposes of them addressing their minds to it. That to me is an arguable point and the appellate court will at the right time seek to find out whether that was a basis to dismiss the suit when the parties had agreed on the apportionment of liability.

15. Lastly, the parties, particularly, the Respondent, rested their case without pointing out on any prejudice that is likely to be visited on them if time is enlarged and an appeal allowed to be filed out of time. One can only infer that no such prejudice is foreseeable.

16. For the reasons foregoing, I find merit in the application under consideration and allow the same. Let the appeal be filed within 7 days from today's date.

17. However this is one case that costs cannot follow the event as of course. The costs cannot be awarded to the applicant even where he succeeds because he has already got a benefit in time being extended for a mistake and to award to him cost would be to reward him for such mistake. No wonder Order 50 Rule 6 at the proviso make it clear that the applicant even if successful bears the costs of the application. In this matter, I order that the costs of the application be to the Respondent to be recoverable in the appeal. However if no appeal shall be filed, the Respondent shall be at liberty to have the costs taxed by the Deputy Registrar and recovered in the usual manner. It is so ordered.

Dated and signed at **Mombasa** this day **15th** day of **December 2016**.

HON. P. J. O. OTIENO

JUDGE