REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 255 OF 2015

DANIEL MUCHINJI NDUNGU.....APPLICANT

VERSUS

SALIM JUMA DZISHANGA.....RESPONDENT

R U L I N G

1. There is before court for a determination, a notice of motion dated 16/9/2015 primarily seeking leave to appeal out of time against the Ruling and decision of Hon. RM Katagwa, RM in Mombasa CMCC No. 2883 of 2008 delivered on the 30/1/2014.

2. The grounds upon which the application is made are that after the delivery of the default judgement the applicant made an application for stay and setting aside but the said application was dismissed on the 30/2/2014 in the absence of the parties. It is added that the applicant then instructed one Mwanamkuu Advocate but the said advocate failed to so act and did not inform the client of such failure hence the delay in lodging the appeal and the failure by the advocate was only brought to the attention of the client when a declaratory suit no. RMCC No. 131 of 2015, Mombasa, was filed.

3. For those reasons the applicant pleads that its intended appeal raises formidable challenge to the decision refusing to set aside and that leave should be granted and stay issued to protect the appeal to be filed from being rendered nugatory if leave is granted. To be noted is the fact that the hearing of the declaratory suit has been concluded and judgment delivered.

4. The consideration a court of law takes into account on an application for enlargement of time are now well settled. They are that the court must look at the length of delay, the reasons for delay, chances of the appeal succeeding, if leave is granted, and lastly the decree of prejudice the respondent may be exposed to if leave is granted. In considering those issues the court exercises a judicial discretion which must be exercised judiciously with the sole aim of meeting the ends of justice in each case. ***See Keya Shall Ltd vs Kobil Petroleum Ltd [2006] 2 EA 132.***

5. In the matter before me, I must say from the beginning that, the facts as disclosed on the face of the application and the affidavit are a little bit sketchy and muddled. Muddled because it is in both the application and the affidavit in support that the information about the delivery of the ruling of 31.2014 only came to the attention of the advocates after a declaratory suit was filed which necessitated the perusal of the court file on 7/2/2015. However, there is no indication as to when the declaratory suit was filed, just for the purposes of gauging how expeditions the applicant acted in seeking to peruse the court file and file this application. However of most concern to the court is the fact that although the court file was perused on 7/2/2015 when reasons for refusal to set aside became known, this application was not

filed till the 30/9/2015 some seven(7) months later. No attempt is made at all to explain that delay. To the court delay and indiscretions will always occur and the fact that a delay or mistake has occurred should not be a basis to deny a party his right to access the court. However for the court to exercise its discretion it is incumbent upon the party seeking that discretion to give an explanation how it came to be. It might just suffice to say for example that the file was misplayed or the advocate's clerk failed to file the prepared papers. Where there are no reasons given, the court would be hard-pressed to give reasons for its decision to justify a decision. When that occurs, then the decision is unfounded and therefore ceases to be judicious but whimsical or just capricious. On the foregoing, I have found that the delay was indeed inordinate and there are no reasons advanced to explain it. In the decision by ***CBM Kariuki JA, in Aviation Cargo Support Ltd -vs- St. Mark Freight Services Ltd [2014] eKLR***.

6. The next question is the prospects of appeal succeeding. To this Court, this issue is of paramount importance because even where the delay may be inordinate without plausible reasons advanced, the court may still grant the extension of time to hear a demonstratively strong or arguable appeal. In ***Sango Buy Estates Ltd vs Dresner Bank [1971]*** **EA 17**, the court said:-

> **"where there is an arguable case leave should be granted".**

7. The ruling sought to be appeal against is clearly a decision passed upon exercise of discretion to set aside. The *exparte* judgment was passed after the plaintiff was granted leave by the court to serve the summons by advertisement. The same was indeed so effected. On that point the trial court said of the applicants' charge that the summons were not served:-

> **"I cannot honestly comprehend the basis of this allegation when Lenah Maina has exhibited an affidavit of service by one Stephen Oddiaga clearly showing that service of process was by advertisement in the local dailies. I therefore find the denial of service by the defendant to be frivolous vexations and scandalous. It is one thing to complain about the mode of service and a completely different thing to deny service".**

8. The trial court is saying that on the material before it, there was service and the candid and honest thing the applicant ought to have done was to give other reasons for the failure to enter appearance. Now that decision is clearly made, pursuant to court otherwise wide and unfeltered discretion, it is now trite that it is indeed a strong thing for an appellate court to interfere with a decision of the trial court reached upon exercises of discretion. See **Musera vs Mwedisi and another [2007] 2KLR 159** where the court said:-

> **"An appellate court, has to be very slow to interfere with the trial judges finding unless it is satisfied that either or that the trial judge had mis understood the weight and bearing of the evidence before him and arrived at an unsupportable conclusion".**

There was absolutely no evidence to support the finding.

9. I have come to the conclusion that the application is not merited not because I am considering merits of the appeal. NO. That will come at an appropriate time if that time comes. I am however constrained to look at the decision and the draft memorandum of appeal to satisfy myself that the proposed appeal is indeed arguable. The 5 proposed grounds of appeal are to this court incapable of mounting any reasonable challenge to the trial court decision. For example, ground 3 seems to suggest that the appellant was served in Muranga. This is not born out in the decision by the trial court in which the service was found to have been by advertisement.

10. Equally grounds 1, 2 & 3 faulting the trial court for inadequate consideration of the merits of the application, the submissions offered and the demands for rules of natural justice are all not capable of justification on the material avail. All in all, I come to the conclusion that the appeal proposed to the filed out of time is not arguable and it therefore presents no compelling reason to enlarge time for it to be filed out of time.

11. The last consideration is the prejudice an applicant risk suffering unless the leave is granted. I take

note that the judgment was for a sum of Kshs.102,000. It is indeed a modest sum when regard is given to the general trend of awards. However, the most important consideration to be given regard is the fact that it is not the applicant now exposed to pay that sum. It is on record that a declaratory suit has been determined against the applicants' insurers who are not challenging the judgment, at least not before me. If that be true then I am unable to fathom any prejudice that awaits the applicant if leave is denied.

12. The upshot is that the application dated 16/9/2016 was misconceived, lacked merits and is dismissed with costs.

Dated at Mombasa this **14th** day of **December 2016**

HON. P.J.O. OTIENO

JUDGE