



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
MISC. APPLICATION NO. 168 OF 2014

1. PHARES NJENGA KIBAKI.....1ST APPLICANT

2. TIMOTHY MWANGI.....2ND APPLICANT

VERSUS

1. VINCENT KIBOR CHEPKUI.....1ST RESPONDENT

2. POINT A COMMERCIAL AGENCIES LIMITED.....2ND RESPONDENT

3. DAVID KARANJA MWANGI.....3RD RESPONDENT

4. JONAH GITHINJI.....4TH RESPONDENT

RULING

1. The Application before this court is brought under the provisions of **Sections 3, 3A, 79G and 95 of the Civil Procedure Act and Order 51 rule 1 of the Civil Procedure Code.**

The applicants seek the following orders:

1. -----

2. That this court be pleased to grant the applicants leave to file an appeal out of time against the whole judgment of Honourable. R. Amwayi delivered on the 4th June 2014 as per the attached draft Memorandum of Appeal.

3. That this court be pleased to grant an order of stay of execution of the judgment/decree in **Nakuru CMCC No. 754 of 2012** pending the hearing and determination of the intended appeal.

4. That in the alternative this Honourable court be pleased to make any other such orders that it may deem just and expedient pending the hearing and determination of this application.

2. The application is based on the grounds as appear on the face of the application, that the Applicants intend to file and appeal against the trial courts judgment, that the time allowed to file such appeal had lapsed by two weeks, that the applicants took time to get a copy of the judgment to be able to analyse the same, that initial orders of stay granted by the trial court lapsed on the 4th July 2014 and that if orders sought are not granted, the applicants shall suffer irreparable loss and the intended appeal shall be rendered nugatory. It is supported by an affidavit sworn by one Kerogo Maatwa Advocate who had

conduct of the case in the trial court.

3. The application is opposed. The 1st respondent has filed a replying affidavit sworn on the 12th August 2014. The 2nd, 3rd and 4th Respondents filed grounds of opposition on the 19th August 2014. All parties have filed submissions on the application.

4. The Applicants' case and submissions

The applicants state that they had no notice when judgment in the lower court was delivered on the 4th June 2014, and only knew about the ruling on 18th June 2014 and that the delay by only two weeks is excusable, that they are ready to deposit the full decretal sum in court if leave to file the intended appeal is granted, and that the respondents shall not suffer prejudice – if orders sought are granted.

It is their submission that the appeal has high chances of success. They have relied on the case **Asma Ali Mohammed -vs- Fatime Mwinyi Juma (2014)e KLR** where the court held that lapses inform and procedures which do not go to the jurisdiction of the court, or cause prejudice or miscarriage of justice to the opposite party ought to be excused, and urge court to allow the application.

5. Respondents case and submissions

The Respondents collectively urge this court to decline the orders sought for reasons, that no plausible explanation was offered why the appeal was not filed on time, that the 2nd, 3rd and 4th respondents have settled their 70% portion of the decretal sum, that the applicant did not tender evidence on liability in the trial court and can therefore not fault the courts discretion on the apportionment of liability which is said to have been too generous. It is their submission that the intended appeal has no remote chances of success.

6. The Respondents' stated that on the 14th May 2014 the Applicant's Advocates were in court when judgment was deferred to the 4th June 2014 hence misleading the court that they had had no notice of the judgment date. They further state, that date was known by a letter by the 1st Respondent to their Advocates that was received by Advocates for the Applications and duly stamped as received on the 11th June 2014. It is therefore that false that the notice of judgment date was not communicated to the Applicants.

It is further stated by Respondents that based on the Judgment on 4th June 2014 the Applicants thereafter have recorded consent judgments on liability in **Nakuru CMCC 1263 of 2012** on the 18th June 2014 thus defeating itself on its submissions that they are serious on pursuing an appeal on liability.

7. Findings and determination

The court has considered the application, the supporting affidavit and grounds upon which it is filed, together with grounds of opposition and replying affidavits by the respondents and counsel submissions.

The decision of a court to extend time or not to file an appeal out of time is discretionary which ought to be exercised in a principled manner with reason and justice. This can only be reached by weighing and balancing all relevant factors as presented before it.

As stated in the case **Leo Sila Mutiso -vs- Rose Hellen Wangari C.A Nairobi 255 of 1997**, timelines are made to promote expeditious disposal of cases and a party should not be denied adjudication of his claim on merits because of procedural default unless it causes prejudice which cannot be compensated with costs.

8. Reasons advanced by the Applicants for failing to file the intended appeal within time have been found to be founded on falsehoods and actually made to mislead the court. The court finds that it is not true that

the Applicants did not have notice of the date of the delivery of the Judgment as their advocate was present in court on the 14th May 2014 when a date for delivery of judgment on the 4th June 2014 was given by the court and a letter showing the judgment date was received and stamped by the Advocates on the 11th June 2014.

9. As to length of the delay, the two weeks may not be said to be inordinate in my view, but the reasons which were falsified out weighs the delay which as submitted by the Respondents, was an after thought. This is confirmed by entry of a consent judgment in **Nakuru CMCC No.1263 of 2012** on the 18th June 2014 on the basis of the Judgment delivered on 4th June 2014 which the applicant seeks to appeal. This is a contradiction, and shows no seriousness and consistency on the applicants stand on the matter.

10. The court has considered the draft memorandum of appeal attached to the application. The respondents have submitted that there is no chance of success should the appeal be filed.

The Applicants did not call evidence on liability in the trial court. They left the court to exercise its discretion, and basing its finding on the evidence before it, found the application's 30% liable. It is submitted that the 2nd, 3rd and 4th Respondents who were co-defendants in the lower court with the Applicants have since settled their 70% of the decretal sums to the plaintiffs, and that the intended appeal by the applicants will, to a great extent prejudice their interests and will not serve justice to either the claimants or themselves, having settled their portion to the claimants.

11. The court is not persuaded that the Applicants have demonstrated existence of *prima facie* grounds of appeal which merit serious consideration. The applicants have since compromised other cases in other courts arising from the same accident on liability on the Judgment sought to be appealed from. As stated above, the 2nd, 3rd and 4th Respondents having settled their share of the decretal sum would prejudice their interests should the intended appeal be allowed. See **Asma Ali Mohamed -vs- Fatuma Mwinyi Juma (2014) e KLR**.

12. Having considered the justice of the case and pronounced myself as above, the reasons given for the delay, chances of success of the intended appeal and the decree of prejudice that the respondents may suffer if orders sought are granted, and notwithstanding that the Applicants are ready to deposit the decretal sum in court as security, this court finds the application without merit, but an afterthought and made only to delay the payment of the 30% decretal sum to the claimants thereby defeating the ends of Justice and expeditious disposal of the case. The court declines to grant leave to the applicants to file an appeal out of time. It follows that an order for stay of execution of the judgment and decree of the lower court pending hearing and determination of the intended appeal cannot lie.

13. For the above reasons, the application dated 17th July 2015 is dismissed with costs to the Respondents.

14. This application was by consent of parties consolidated with similar applications in **Nakuru High Court Misc. Application Numbers 164 of 2014 and 167 of 2014**.

The ruling hereof shall therefore apply to the two applications above stated.

It is so ordered.

Dated, signed and delivered in open court this 17th day of September 2015.

JANET MULWA

JUDGE

In the presence of]

Mwangi holding brief for Murunga for 1st and 2nd Applicants

Gekonga holding brief for Ndubi for 1st Respondent

Court clerk – Lina.