



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS CIVIL APPLICATION NO. 118 OF 2015

CHARLES KABUCHA.....1ST APPLICANT

PATRICK GAKAU.....2ND APPLICANT

VERSUS

CYRUS MUSYIMI.....RESPONDENT

RULING

The Application

The application before the court for determination is a Notice of Motion dated 29th May 2015, filed by the Applicants under the provisions of sections 79G, 95, 1A, 1B and 3A of the Civil Procedure Act, and Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules. The Applicants are seeking the following substantive orders:

- a. That there be a stay of execution of the judgment delivered on 14th April 2015 in Makindu PMCC No. 137 of 2013 pending the hearing and determination this application.
- b. That the Applicants be granted leave to file and serve an appeal against the said judgment out of time.

The Applicants' application is premised on the grounds that they are highly aggrieved by the judgment delivered by the court on 14th April 2015 in Makindu PMCC No. 137 of 2013, and wish to lodge an appeal. However, that the time for lodging the said appeal has since lapsed, and the failure to file the appeal within time was due to the disruption of communication between the Applicants and their Advocates. The Applicants also stated that they have a good and arguable appeal.

The Applicant relied on a supporting affidavit sworn by the 2nd Applicant on 29th May 2015, wherein he reiterated the said grounds, and explained that he lost his cell phone, as a result of which he was not able to communicate with his Advocates to know the outcome of the suit in the lower Court and give instructions in good time.

The Response

The Respondent opposed the Applicant's application in a replying affidavit he swore on 22nd June 2015, wherein he stated that after judgment was delivered in Makindu PMCC No. 137 of 2013, the Applicants' Advocate who was present in Court requested for 30 days stay and the same was granted. Further, that the stay lapsed on 15th May 2015 and her Advocates wrote to the Applicants requesting for the settlement

cheque, and it is only when execution became imminent that the Applicants filed the instant application.

The Respondent averred that explanation for the delay tendered by the 2nd Applicant showed laxity, negligence and bad faith on the part of the Applicants. Further, that the 2nd Applicant had not stated the actual date that he lost his cell phone, and had not explained what prevented him from going to his advocate's office to enquire about his case. The Respondent also contended that his claim is a Third Party claim and that the Applicants' insurer, African Merchant Insurance Company Ltd, having not disputed liability, was liable for the decretal sum and had the means to pay.

Lastly, the Respondent deponed that he required the decretal sum to undergo treatment, and the undue delay in payment of the decretal sum would occasion great prejudice to him. He urged that should this Court be inclined to allow the application, the Applicants should deposit at least three quarters of the decretal amount to the Respondent, and the balance to be held in an interest earning saving account held in joint names of both advocates on record, since the appeal is only on quantum and there was a consent on liability

The Issues and Determination

The parties canvassed the Applicants' application by way of written submissions, which they relied on at the hearing of the application on 23rd September 2015. The Applicants' Advocates, Morara Apiemi & Nyangito Advocates filed submissions on 28th September 2015, while S.N. Ngare & Co Advocates for the Respondent filed submissions dated 18th September 2015.

The Applicants argued that the 30 days within which to file an appeal lapsed on 14th May 2015, and that the instant application was brought on 29th May 2015 barely 15 days after the lapse.

The Applicants referred to section 79G of the Civil Procedure Act that grants the court power to admit an appeal out of time. They stated that that the delay was not inordinate and was excusable, and urged the Court to exercise discretion in their favour. Reliance was placed on the decisions in **Gichohi Susana Vs Philip Muchoki & Another, Nairobi HC Misc. 127 of 2015**, and **Edward Kamau & Another Vs. Hannah Mukui Gichuki & Another, High Court Misc. Application No. 78 of 2015** in this regard.

The Respondent on the other hand submitted that that the reasons for the delay by the Applicants were not sufficient. He cited the case of **Mutiso Vs. Mwangi (1997) KLR 630** for the position that the decision to extend time is discretionary, and the Court will take into account the length of delay, the reason for delay, the chances of the appeal succeeding and the degree of prejudice to the Respondent.

Furthermore, that the Applicants had a duty to follow up on their case by visiting the advocates as was held in **Bi-Mach Engineers Ltd Vs. James Kahoro Mwangi, (2011) eKLR**. The Respondent prayed that the application be dismissed for insufficient reasons as to delay as happened in the case of **Kenya Tea Development Authority & Another vs Julius Boithi Atheru, (2014) eKLR**.

The Respondent further argued that the application did not meet the requirements of Order 42 rule 6(2) of the Civil Procedure Rules. He cited the cases of **Fleetwood Enterprises Ltd vs. Kenya Power & Lighting, (2000) eKLR**, **Lucy Nyamanu Kimani vs Lawrence Mburu Muthiga, (2006) eKLR**, and **Mukuma vs Abuoga, (1988) KLR 645** for the argument that the Applicants had not demonstrated the substantial loss that they would suffer, and that the delay in filing their appeal had not been sufficiently explained. The Respondent asked the court to consider that he was entitled to enjoy the fruits of the judgment as was held in **Stephen M. Kimani & Another vs Stephen Rurigi Njoroge (2013) eKLR** and in **Wilson K. Kanyingi vs. Alice Wangari & Another (2007) eKLR**.

I have considered the pleadings and arguments by the parties. There is only one issue to be determined in this application. This is whether the Court should exercise its discretion in favour of the Applicants and grant them leave to file an appeal out of time. I note that the second prayer for stay of execution of the lower court's judgment was sought by the Applicants pending the hearing of this application, and will

therefore be spent upon delivery of this ruling. I also agree with the Respondent in this regard that the applicable provisions for this prayer were not cited by the Applicants, neither was the issue of stay of execution argued in the Applicants' supporting affidavit and/or submissions.

On the issue of leave to appeal out of time, section 79G of the Civil Procedure Act provides as follows as regards appealing out of time:

"Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."

The Supreme Court of Kenya in the case of Nicholas Kiptoo Arap Korir Salat – Vs – IEBC & 7 Others, (2014) eKLR laid down the principles for extension of time for filing an appeal as follows:

- 1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- 2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- 3) Whether the court should exercise the discretion to extend, is a consideration to be made on a case to case basis;
- 4) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- 5) Whether there will be any prejudice suffered by the respondent if the extension is granted
- 6) Whether the application has been brought without undue delay; and
- 7) Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

The Supreme Court decision largely incorporates the factors stated by the Court of Appeal in Mutiso Vs. Mwangi (1997) KLR 630 which was cited and relied upon by the Respondent.

In the present application, the 2nd Applicant has given the reason that he was not able to communicate with their Advocates to find out when the judgment would be delivered, and to give instructions, due to his telephone having been lost. He stated that he eventually replaced his telephone on 18th May 2015, which is the date he learnt of the judgment given by the lower Court. He averred that the failure to file the appeal was not intentional but due to circumstances beyond his control.

I also note that it is not disputed by the parties that judgment in Makindu PMCC No. 137 of 2013 was delivered on 14th April 2015. The instant application was filed on 29th May 2015, and I do not find the delay unreasonable given the reasons the Applicants have given. Lastly, the Respondent will not be unduly prejudiced as there are no stay of execution orders in place. I will therefore exercise my discretion in the Applicants' favour for these reasons.

I accordingly allow the Applicants' Notice of Motion dated 29th May 2015 only to the extent of granting the Applicants leave to file an appeal out of time within 14 days from the date of this ruling.

The costs of the Notice of Motion dated 29th May 2015 shall be borne by the Applicants.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 17th day of November, 2015.

P. NYAMWEYA

JUDGE