



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISCELLANEOUS CIVIL APPEAL NO. 51 OF 2020

EM (MINOR SUING THROUGH

FATHER & NEXT OF KIN EM).....APPLICANT

VERSUS

KIMERU ENTERPRISES.....1ST RESPONDENT

NATHAN MUTWANIA.....2ND RESPONDENT

RULING

Application

1. This is a ruling on an application by Notice of Motion dated 24th June 2020 for extension of time to file an appeal seeking specific relief as follows:

“1. THAT time to Appeal by the Applicant be extended to enable the Applicant to Appeal on the issue of quantum out of time.

2. THAT the applicant be granted leave to file appeal out of time

3. THAT the cost of this application be provided for”

2. The facts and grounds for the application are set out in the Affidavit of EM sworn on 24th June 2020 as follows:

“1. THAT I am the applicant and the legal guardian of the minor herein and suing on his behalf hence competent to make and swear this affidavit in support of the application herein.

2. THAT the minor was deeply aggrieved by the Judgement of the Honourable Trial Magistrate in this matter as the general damages awarded were inordinately low and do not commensurate the injuries occasioned on the minor.

3. THAT the learned Magistrate awarded the minor a sum of Kshs. 100,000 which I am advised is extremely on the lower side. (Annexed herein and marked a EM1- is the decree and certificate of cost)

4. THAT my advocates have been waiting for the judgment and proceedings, however, the efforts were frustrated due to inability to access the court registry as result of the directive by the Honourable Chief justice for closure of the courts due to the Covid 19 pandemic.

5. THAT a copy of my grounds on the Appeal (Annexed hereto and marked EM-2 is a copy of the Memorandum of Appeal).

6. THAT the appeal has merit and I pray that this Application be allowed in the interest of justice.”

Memorandum of Appeal

3. By the Memorandum of Appeal dated 11th March 2020, through his counsel M/S Kithome L. Mutinda & Co Advocates, the appellant seeks to appeal on the grounds set therein as follows:

“MEMORANDUM OF APPEAL

The Appellant herein, being aggrieved by and dissatisfied with the judgment delivered by the Honorable Maureen Odhiambo Resident Magistrate, delivered on 17th February, 2020 in in Chief Magistrates Court Meru CMCC No. 134 of 2019 HEREBY APPEALS to this Honorable Court against the said judgment on the following main grounds amongst other grounds to be adduced the hearing hereof, namely:

- a. That the learned trial magistrate erred in law by failing to take into account matters he ought to have taken into account while assessing the quantum of general damages awarded to the appellant.
- b. That the Learned Magistrate erred in law and in fact in awarding general damages to the appellant amounting to Kshs.100,000/=as the amounts are inordinately low.
- c. That the learned trial magistrate erred in law by giving a low award not commensurate with the injuries suffered by the appellant.
- d. The learned magistrate erred in law and in fact by directing that the monies be deposited in an interest account to be opened by the legal guardian and the executive officer which sums shall be released upon the minor attaining the age of the majority.

IT IS PROPOSED TO ASK THE COURT FOR ORDERS THAT:

- 1 THAT the appeal be allowed;
2. THAT this Honourable Court be pleased to assess upwards the quantum of damages that may be awarded to the appellant;
3. THAT the respondent doe pay the cost of this appeal and the Costs in the lower court.
4. THAT such further relief as may appear just to the Honourable Court.”

4. The application is opposed by the respondent who filed GROUNDS OF OPPOSITION dated 30th October 2020 filed by M/S GITONGA KAMITI, KAIRARIA & CO. Advocates for the Respondent as follows:

1. That the Application is frivolous, vexatious, bad in law and an abuse of the court process.
2. That the Application is an afterthought and is lacking in substance as the applicant has no good and sufficient cause for not filing the appeal within time.
3. **That the Application is amounts to fishing expeditions and that the delay of nearly four (4) months was inordinate.**
4. That the Application ought to be dismissed with costs.
5. That there must be an end to litigation.”

5. The application was argued orally by virtual session by counsel for the applicant in the absence of the counsel for the respondent who did not attend the hearing date having been given in her presence. When Counsel came onto the virtual session after the application had already been heard and ruling reserved, she explained that she had had challenges in connecting to the court’s virtual session site. The court will, however, consider the grounds of opposition filed in court before making its decision.

Issue for determination

6. The issue for determination, therefore, is whether the court will extend time to file appeal out of time in this matter.

DETERMINATION

Principles for extension of time to appeal

Power to extend time to file appeal

7. Section 79G of the Civil Procedure Act provides the statutory basis for extension of time to file an appeal as follows:

“79.G Time for filing appeals from subordinate courts

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.

[Act No. 10 of 1969, Sch.]”

8. Order 51 Rule 6 of the Civil Procedure Rules provides for the mechanics of extension of time even where the application to extend is brought after the lapse of the time allowed for the doing of the action or taking of the step relevant to the application as follows:

“Power to enlarge time [Order 50, rule 6.]

6. Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

9. In my view, on principle, an applicant for leave to appeal out of time must firstly, show a substratum of a right of appeal; secondly, a serious question to put before the appeal court, or what is sometimes called an arguable case, and, thirdly, a reasonable explanation for the delay, which must not be inordinate, in the circumstances.

On the merits

Right of appeal

10. This is an intended appeal from a final judgment of the trial court, and, therefore, an original decree thereof, in a personal injury claim and the applicant has a right of appeal under section 65 (1) (b) of the Civil Procedure Act as follows:

“65. Appeal from other courts

1. Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court –

a. deleted by Act No. 10 of 1969, Sch.;

b. from any original decree or part of a decree of a subordinate court, on a question of law or fact;

c. from a decree or part of a decree of a Kadhi’s Court, and on such an appeal the Chief kadhi or two Kadhis shall sit as assessor or assessors.”

Whether there is an arguable case or whether the appeal is frivolous

11. Although it is not expressly stated it would be against the overriding objective of the Civil Procedure Act and rules to grant an extension of time to file an appeal where such appeal is demonstrably frivolous or where, put in another way, there is no arguable case or serious question to present before the appeal court.

12. The applicant seeks the setting aside of award of Ksh.100,000/- made in the personal injury claim for the minor, and although the court has not seen the evidence before the trial court, it is satisfied that being a ground for interference with the award of damages by a trial court, the claim that the damages were inordinately low cannot be said to be frivolous. See **Butt v. Khan** where the principles for interfering with an award of damages was settled, as held in **Shabani v. City Council of Nairobi** (1985) KLR 516, 518-9 as follows:

*“The test as to when an appellate Court may interfere with an award of damages was stated by Law JA in **Butt v Khan**, Civil Appeal 40 of 1977 (a case referred to in another context by the learned judge) as follows:*

“An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that the misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

13. There is clearly an arguable case in the intended appeal as to whether the award of damages was inordinately low. However, an arguable case does not mean one that must eventually succeed.

Reasons for the delay and whether delay inordinate

14. It is a matter for judicial notice in terms of section 60 of the Evidence Act that the National Council for Administration of Justice NCAJ on 15th March 2002 under its **ADMINISTRATIVE AND CONTINGENCY MANAGEMENT PLAN TO MITIGATE COVID-19 IN KENYA'S JUSTICE SECTOR** resolved to inter alia to scale down the court operations and directed particularly to "**4. All appeals, hearings and mentions in Criminal and Civil cases in all courts are suspended with immediate effect**", and subsequently in-person services of the court were halted for a long period thereafter.

15. In the circumstances of the long interruption of the court operations following the outbreak in Kenya of the Covid-19 pandemic, it cannot be held as urged by the respondent that the delay of four (4) months in filing the appeal from the judgment of the court herein was inordinate. Moreover, the delay is sufficiently explained by the circumstances surrounding the scale down of the court operations which involved stopping of in-person operations with subsequent guidelines formulated for electronic filing of documents and virtual hearing sessions. Indeed, counsel for the respondent explained post hearing that she was unable to be present at the virtual hearing because of challenges in internet connectivity. The court has, however, considered the grounds of opposition filed by the respondent and in the interests of expedited disposal of the appeal must proceed to give directions suitable for progression of the matter to final determination of the dispute. The explanation that the appellant was unable to extract the judgment of the court for purposes of the appeal is reasonable in the circumstances detailed herein.

16. The Court will allow the application for extension of time to file the appeal whose memorandum of Appeal is ready since 11th March 2020, or at latest 24th June 2020 when the application for extension of time was filed.

Costs

17. In the circumstances of the case where the delay in filing the appeal is partly explained by the Court's closure by the Hon. the Chief Justice on advice of the National Council for Administration of Justice upon the outbreak of the COVID-19 pandemic, it is unfair to impose costs on the applicant, and it affords the court a reasonable ground for not making the general order for costs under the Proviso to Rule 6 of Order 50 of the Civil Procedure Rules hereinabove set out.

ORDERS

18. Accordingly, for the reasons set out above, the court makes the following orders:

1. Leave is granted to the Applicant to file appeal out of time.
2. The Applicant shall file the Memorandum of Appeal within 7 days.
3. The Appellant shall file the Record of Appeal within 14 days.
4. There shall be no order as to Costs of the application.

Order accordingly.

DATED AND DELIVERED THIS 4TH DAY OF FEBRUARY, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Kithome L. Mutinda & Co. Advocates, the appellant.

M/S Gitonga Kamiti, Kairaria & CO. Advocates for the Respondent