REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

MISC. APPLICATION NO 14 OF 2021

MKUNZI KANGO MAGONDO..APPLICANT

VERSUS

KENINDIA ASSURANCE COMPANY LTD...RESPONDENT

Coram : Justice R. Nyakundi

Court Clerk- Pacho S.

Mburu Kariuki for the applicant

Kishore Nanji for the defendant/respondent

RULING

This is an application by way of Notice of Motion under Certificate of urgency seeking orders for:

> **a. This honorable court to be pleased to enlarge time for appeal and grant leave to the applicant to lodge a memorandum of appeal out of time against the ruling of Hon. S. Ngii (in Mariakani) SRMC No. 27 of 2014.**

The notice of motion is supported with an affidavit of one **Mkunzi Kango Magondo** detailing the reasons why he thinks the court should exercise discretion for extension of time to file the intended appeal stated as follows;

> **1. THAT** in Mariakani SRMCC NO. 27 OF 2014 in which I had filed a declaratory suit against the Respondent Company following successful litigation in Mariakani SRMCC No. 202 of 2011 in which I was awarded a sum of Ksh.152,780/= in special and general damages plus costs for personal injuries and loss sustained in a road traffic accident and sought out to enforce the judgement in terms of the Insurance Motor Vehicle (Third Party Risks) Act Cap 405 Laws of Kenya against the Respondent as the Insurer of the subject motor vehicle.
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> **2. THAT** I am advised by my advocates on record which advise I verily believe that the ruling delivered in Mariakaani SRMCC No. 27 of 2014 on 30th April 2020 dismissing my application to reinstate my suit was captive to legal technicalities and failed to deliver substantive justice in circumstances where I have pursued substantive justice through active litigation and thus I was unfairly prejudiced in my bid to realize the fruits of long fought pursuit to justice
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> **3. THAT** I am further advised by advocates on record which advise I verily believe that my intended appeal has high chances of success. Annexed hereto is a copy of the draft Memorandum od Appeal marked ‘’MKM1’’
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> **4. THAT** ruling in Mariakani SRMCC No.27 of 2014 was delivered online through email on 30th April 2020 and that due to the covid-19 travel restrictions my advocates were unable to get in touch immediately for further instructions and that in the circumstances there has not been inordinate delay on my part
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> **5. THAT** it is the interest of justice that the period for filing an appeal be enlarged and the applicant be granted leave to file appeal out of time.

In opposition to the applicant learned counsel **Mr. Kishore Nanji** filed a replying affidavit which apparently emphasized the following

reasons to persuade the court not to grant the application;

b. **THAT** with regard to paragraph 5 of the said affidavit, considering that the said ruling was delivered on 30th April 2020, I verily believe that the application which was filed on 22nd February 2021 is brought with a delay of more than 9½ months, which delay is extremely unreasonable. The applicant's explanation that due to covid-19 travel restrictions, his advocates were unable to get in touch with him immediately for further instructions is hearsay and a mere say on his part, particularly when his advocates also practice from.

c. **THAT** with regard to paragraph 6 of the said affidavit, I say that in the court's ruling in the said Mariakani SRMCC 24 of 2014, the court observed that the Application had the chance to exercise his right to be heard on many occasions but he had shown himself to be indolent and bent o delaying the course of justice yet the Respondent was also entitled to its fair share of the same, justice being edged sword that cuts both ways

Determination

The crux of the matter is whether the application meets the set threshold to grant enlargement of time as provided under the law. to that extent Section 79 (G) of the civil procedure Act provides that a person who intends to appeal the high court shall file it within 30 days from the date of the ruling or judgment, whereas in its proviso indeed the court has unfettered discretion to extend time in which an applicant can be permitted to file an appeal out of time in the event he demonstrates existence of sufficient good course.

In terms of Section 79 (G) of the Act the applicant must demonstrate in his or her affidavit the reasons why the deadline of thirty days was not met. Essentially, the evidence must lean towards a submission on sufficient cause of the failure not to comply with the rules to appeal on time. These principles are clearly illustrated in **Auto selection (K) Ltd & 2 Others v John Namasaka Fumba (2016) EKLR**. The Court may grant relief for an extension of time only if it is satisfied that;

a. The failure to comply was inadvertent.

b. There is a good explanation for the failure and the party in default generally complied with other relevant rules, practice directions, orders or directions,

c. the effect which the granting of relief would have on each party,

d. the interests of the administration of justice,

e.whether the failure to comply has been or can be remedied with a reasonable time,

f. whether the failure to comply was due to the party or the party's counsel and whether the trial date or any likely date can still be met if relief is granted"

while in the case of case of Salat v Independent Electoral & Boundaries Commission & 7 Others (2014 EKLR require the court to exercise an inherent jurisdiction to grant extension of time with the underlying principles in record

g. Extension of time is not a right of a party. It is an equitable remedy that is only available to the deserving party at the discretion of the court.

h. A party who seeks for extension time has the burden of laying a basis to the satisfaction of the court.

i. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.

j. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.

k. Whether there will be any prejudice suffered by the respondents if the extension is granted

l. Whether the application has ben brought without undue delay; and

m. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

I am also guided in support of this application by the principles elucidated in the cited cases of Paul Wanjohi Mathenge v Duncan Gichane Mathenge (2013), EKLR, Leo Sila Mutiso v Rose Hellen Wangari Mwangi CA No. 255 OF 1997 where their lordships opined thus;

The discretion under rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in the previous decisions of this court including but not limited to, the period of delay, the reasons for delay, the degree of prejudice to the respondent and interested parties if the application is granted and whether the matter raises issues of public importance. In *Henry Mukora v Charles Gichina Mwangi-* civil application No.26 of 2004, this court held: - ''it has been stated time and again that in an application under rule 4 of the Rules the learned single judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize this principle by referring to the decision in *Mwangi v Kenya Airways ltd. (2003) KLR 486* in which this court stated:- ''over the years, the court has, of course set out guidelins on what a single judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi-* Civil Application No. Nai 255 of 1997 (unreported), the court expressed itself thus: -

> **''It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether or not to grant an extension of time are; first, the length of the delay; secondly/ the reason for the delay; thirdly (possibly, the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted''.**

The general effect of these relevant principles is the problem they pose to where to draw the line between the appeal-ability and non appeal-ability of the intended appeal which has equally long constituted a difficult problem in cases of this nature. That, as I see it, is a matter ever and always open to consideration. It is clear that according to the criteria laid down in the cases cited above, that the reasons for delay, length of time and the prospects of the intended appeal succeeding entitles the court to exercise its discretion in one way or another.

It is also pertinent for the court to consider whether it has the power to cure the defects arising out of breach of the procedural timelines likely to impact on fair administrational of justice. As early as the 18th Century the Maxim justice delayed is justice denied was articulated by William Gladstone which provision is also found in our Article 159 (2)(d) of the constitution 2010. Generally, time standards are measures of efficiency and effectiveness set by courts to support performance standards and indicators. As the author in exploring civil pre-action Requirements Resolving Disputes outside courts (2012) by Sourden stated that ''**Delay in litigation impacts on people's lives including personal stress, physical exhaustion increased legal costs, inconvenience and extra work load dependent upon the time the dispute took to be resolved.''**

In the instant case the applicant seems to lay blame on the Covid 19 pandemic, but fails to give evidence to what extent did the pandemic affect access to virtual courts as a means and enabler of hearing and determination of cases in Kenya

The decision being challenged was delivered on to last on 30.4.2020 and dispatched to the last known email address of the applicant legal counsel. To some extent that approach begs the question as to why the applicant had to wait for a period of over 9 months to realize he needed to lodge an appeal.

From the record in as much as the ruling was a simple interlocutory it had a final and definitive effect on the main cause of action. It happens that the applicant was the plaintiff in the primary suit which gave rise to a declaratory suit being the subject matter of the dismissal order by the learned trial magistrate. I place particular importance of the fact that the progression of civil cases in which an advocate is involved sometimes the actual litigant is never informed of the day to day happenings in the court room. Considering the extent of legal counsel involvement in the prosecution of this case, I cannot but see that objectively speaking the trial court would entertain a reasonable apprehension that lack of due diligence and professional care on part of counsel might result to prejudice to the applicant's case. As matters stand the applicant has won round one in being awarded general and special damages for pain and suffering and loss of amenities in that accident. The basis of the declaratory suit was meant to yield the fruits of the judgement against the insurance company which insured the offending motor vehicle.

While clearly the court has power to impose any of those sanctions I consider it that the adopted approach drove the applicant out of the seat of justice. Speaking for myself there are in the words of the court in ***Leo Sila Mutiso vs Rose Hellen Wangari Mwangi, Paul Wanjohi Mathenge and Salat.*** Inordinate delay which on the face of it simply looks unacceptable. Nevertheless, notwithstanding that primafacie factual position it is observed that advocates are officers of the court and are required to be sensitive to matters affecting instructing clients so as to instill public confidence in our judicial procedures. I fail altogether to appreciate how an advocate negligence and breach of duty of care can be visited upon his client. I can see the frustration the trial court was confronted with in scheduling various sessions to adjudicate and determine the issues but all were a letdown for nonattendance of counsel for the applicant. The court proceeded on the basis of the difficulty it experienced in the matter being concluded within a reasonable time. I also consider that courts are on the run to meet the performance management understanding targets on case clearance and backlog reduction. In that case the court should not lose sight to consider the public interests and the need for public confidence in the administration of justice. In the context of the broader public implications part of the greater distress in the pending proceedings could not be blamed on the grossest breach of the prosecuting counsel. The reading of the record mirrors a case management deficiency by the trial court in compliance of order 11 of the civil procedural rules. In sum since the suit was filed in 2014 and in the textual dimension on public policy implications for courts to hear and resolve cases expeditiously there was lack of candor on case-flow management. The requirement was re-echoed by chief justice Warren of the United States of America who once remarked as follows; '' **a sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people and three things could destroy the confidence and do incalculable damage to society; that people come to believe that inefficiency and delay will drain a just judgement of its value, that people who have long been exploited in the smaller transactions of daily life come to believe that courts cannot vindicate their legal rights from fraud and overreaching, that people come to believe the law in the larger sense cannot fulfill its primary function to protect them and their families, in their homes, at their work and on public streets.'' (address to ABA meeting Aug 10th 1970)**

Therefore, when an application is made for enlargement of time, it should not be granted as a matter of course. Though discretionally it

depends on prove of good cause showing the justice of the matter warrants such an extension. The court is required to carefully scrutinize the application to determine whether it presents proper grounds justifying a grant of such enlargement. It is trite that courts have held that the sufficient reason must relate to inability or failure to take a particular step in time. In essence as reiterated elsewhere in this ruling a mistake by an advocate though negligent is accepted as sufficient cause or ignorance or procedure by self-presented litigant. I am persuaded by the principles of **Andrew Bamanya v Shamsherali** ***Zaver, C.A Civil Application No. 70 of 2001*** **''That mistakes, faults, lapses and dilatory conduct of counsel should not be visited on the litigant; and further that where there are serious issues to be tried, the court ought to grant the application.''**

It is generally accepted that there is no case with identical characteristics. Therefore, notwithstanding the definition and elements on sufficient cause each case must be decided on facts. In that trajectory of balancing the competing interest of parties to a litigation against the scales of justice, the court's constitutional obligation is to administer justice without undue regard to technicalities (Article 159 (2)(d) of the constitution.

Where will that leave the applicant? He should be given more time to take a particular step to entitle him exercise his constitutional right of appeal for the nature of the matter discloses a prospect of an arguable triable issues with high chances of success. There is need in the first instance the appeal to be canvassed on the merits.

For the foregoing reasons the application is therefore allowed with the following orders to abide; -

> **a. leave for extension of time to the applicant to file an appeal out of time is hereby granted.**
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> **b. the draft memorandum of appeal be deemed as duly filed within time. The same be served upon the respondent within 14 days from now and fix that appeal for hearing on a priority basis**
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> **c. the applicant be condemned to throw away cost assessed at twenty-five thousand (Ksh 25,000/-) payable within the same period to the respondent**
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> **d. the cost of this application be conditioned to the outcome of the appeal.**

DATED, DELIVERED AND SIGNED AT MALINDI ON 3RD OF MAY 2021

HON. R. NYAKUNDI

JUDGE **NB** In the view of the Public Order No.2 of 2021 and subsequent circular dated 28th March ,2021 by her Ladyship, The Acting Chief Justice on the declaration of measures restricting court operations due to the third wave of Covid -19 pandemic this ruling has been delivered online to the last known email address thereby waiving order 21(1) of the Civil Procedure Rules (kmburuadvocates@yahoo.com for the applicant/plaintiff nanji@africaonline.co.ke for the defendant/respondent