



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NUMBER 130 OF 2020**

**DANIEL KAKUTA KAVOI.....APPELLANT/APPLICANT**

**VERSUS**

**TRI-CLOVER INDUSTRIES (9K) LIMITED.....RESPONDENT**

**RULING**

1. The applicant vide an application dated 27<sup>th</sup> August, 2020 brought under **Section 79G and 95 of the Civil Procedure Act and Order 50 Rule 5 of the Civil Procedure Rules** sought for the following orders;

*i. THAT leave be granted to the Applicant to file an appeal out of time with respect to **Molo Principal Magistrate's Civil Case Number 144 of 2019, Daniel Kakuta Kavoi vs Tri-Clover Limited.***

*ii. THAT the annexed Memorandum of Appeal be deemed duly filed and served upon payment of the requisite fees.*

*iii. THAT the costs of this application be provided for.*

2. The application is supported by an affidavit of Daniel Kakuta Kavoi sworn on 27<sup>th</sup> August 2020. He deponed that he is the applicant and the plaintiff in **Molo Senior Resident Magistrate's Civil Case Number 144 of 2019 Daniel Kakuta Kavoi Vs. Tri-Clover Industries Limited** wherein judgment was delivered on 4<sup>th</sup> June 2020. That when both parties confirmed to have filed their Written Submissions on 13<sup>th</sup> March 2020 the judgment was slated for delivery on 14<sup>th</sup> May 2020. That following the global outbreak of the COVID 19 pandemic, the Judiciary on 15<sup>th</sup> March 2020 announced that it was scaling down its operations and his advocate closed their offices in line with the Ministry of Health recommendation to work from home. That by the time he received a copy of the certified typed judgment, the time within which to appeal had lapsed. That there is no prejudice that will be occasioned upon the respondent and it is only just and fair that he be granted leave to appeal out of time. That he has a strong and arguable appeal as can be gleaned from the annexed copy of the draft Memorandum of Appeal, the thrust of appeal being that;

*a. The learned trial magistrate erred in law and in fact in taking into account irrelevant issues and arriving at a wrong conclusion.*

*b. That the learned trial magistrate erred in law and in fact in canvassing issues not before court and arriving at a wrong conclusion.*

*c. That the learned trial magistrate erred in law and in fact in dismissing the appellants claim on account of legal technicality.*

3. That the applicant being grossly dissatisfied with the judgment of the subordinate court desires to appeal against the said judgment but was not able to file appeal within time.

4. The application was opposed vide Replying Affidavit sworn on 14<sup>th</sup> October 2020, where it was deponed that the application together with the Memorandum of Appeal were incompetent and ought to be struck out for the following reasons;

*a. The appellant had lodged memorandum of appeal on 27<sup>th</sup> August 2020 without procuring the requisite leave of court.*

*b. The appeal as presented was filed out of time and without leave of court.*

*c. The appellant ought to have moved the court by way of miscellaneous application and only file a civil appeal if orders were granted in his favour.*

d. The grounds set out do not support the prayers sought.

e. That the jurisdiction of this court was not properly invoked.

5. The respondent further deponed that the application was made in bad faith and the delay of close to four months was inordinate, unexplainable and inexcusable. That pursuant to the administrative directives on court's operation during the temporary scaled down operations of the courts in Nakuru and Molo Courts dated 1<sup>st</sup> April 2020; parties to the suit were required to send their consent to have the judgement delivered electronically in writing and the same to be sent to the court administrator. That the appellant on 14<sup>th</sup> May 2020, was at liberty to reach out to Molo Court via the email addresses shared, to inquire whether judgment was delivered on the said date and to have the same sent to him electronically but he failed to do so. That the judgment was delivered on 4<sup>th</sup> June 2020 and the application was filed on 27<sup>th</sup> August 2020, eighty four (84) days late from the date of judgment delivery. That the appellant was indolent as he had not demonstrated the efforts/steps he had undertaken to obtain copies of the judgment as it was upon him to follow up on the same. That the application herein was an afterthought, abuse of the court process and should not be allowed to see the light of the day. That the appellant had further not demonstrated how intent he was on appealing within time, by showing any proof of request for certified trial court proceedings or the compliance of any preliminary steps within statutory timelines expected therein.

6. Further that the appellant's Supporting Affidavit and the Memorandum of Appeal failed to adequately demonstrate the likelihood of success of their appeal should this court be inclined to grant him leave to appeal out of time.

7. That it was trite that litigation must come to an end. The court was urged to act judiciously in this matter and find that the purported Grounds of Appeal set out in the Memorandum of Appeal and the application to be without merit and amount to an abuse of the court process and dismiss the same *in limine*.

8. The applicant swore a Supplementary Affidavit on 29<sup>th</sup> January 2021 and deponed that respondent's Replying Affidavit was a misapprehension of the **Civil Procedure Rules and procedures as section 79G of the Civil Procedure Rules** talks of "admission of an appeal out of time" and as held by Justice Emukule in **Gerald M'limbine vs Joseph Kangangi (2009) eKLR** a party ought to file an appeal first before seeking leave for Memorandum of Appeal to be admitted out of time. That even before filing the said application his advocate had requested and obtained a copy of the said judgment and applied and paid for certified and typed proceedings of the lower court case and he annexed a copy of the said request for typed proceedings and receipt of payment. That the economic, physiological and social side effects of the pandemic that is Covid 19 could not be gainsaid as the legal field particularly private practice was negatively affected especially before the use of technology was embraced and adopted by the courts. That the case appealed from was dismissed on account of a legal technicality and issues not canvassed before the court and the chances of the intended appeal succeeding were quite high.

9. The appellant submitted that in **Edward Kamau & Another vs Hannah Mukui Gichuki & Another [2015] eKLR** Justice Aburili in allowing a similar application held (page 7 paragraph 7 )

*"The right to appeal, it has been held time and again, is a constitutional right which is the connerstone of the rule of law. To deny a party that right, would in essence be denying them access to justice which is guaranteed under Article 50(1) of the Constitution which latter right cannot be limited under Article 25 of the said Constitution. In my view, it has not been shown that the intended appeal is frivolous or a sham and therefore it is only fair and just that the applicants be accorded an opportunity to ventilate their grievances where they are aggrieved by a decision of the lower court, to challenge before a superior court."*

10. That the relevant provision is section 79 G of the Civil Procedure Act states;

*"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 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"*

11. That the above section contemplates a situation where a party has already filed an appeal out of time and will need the leave of the court to regularize the position as was held in the case of **Gerald M'limbine vs Joseph Kangangi (2009) eKLR** where the court held;(page 2 paragraph 8)

*"My understanding of the proviso to section 79G is that the applicant is seeking "an appeal to be admitted out of time" this must in effect file such an appeal and at the same time seek the court's leave to have such an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the court's permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the court process...it seems to me therefore, it is not open to the court to exercise its discretion under the proviso to section 79G of the civil procedure act except upon the existence and perusal of the appeal to be "admitted" not to be "filed out of time "Admission presupposes that the appeal has been filed, and will be "admitted "for hearing after a judge has established under section 79B, that there is "sufficient ground for interfering with the decree, part of the decree or order appealed against."*

12. They submitted that the Memorandum of Appeal herein dated 27<sup>th</sup> August 2020 was therefore properly before the court which has the requisite jurisdiction to grant the orders sought, admitting the said appeal out of time.

13. Further, that the power of this Honorable court to admit the appeal out of time was discretionary as was held in **Stanley Kahoro Mwangi & 2 Others vs Kanyamwi Trading Company Ltd (2015) eKLR**; (page 3 paragraph 8)

*"A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour."*

14. The applicant relied on the case of **Kenya Power & Lighting Company Ltd vs Rose Anyango & Another (2020) eKLR** where the court held that;

*“This court takes judicial notice that between 16<sup>th</sup> march 2020 to the date of filing of this application, there has been downscaling of court services owing to Covid 19 pandemic and which threw all persons in a spin of uncertainty as to how services were to be rendered”.*

15. And in **Susan Leyatoro & Another vs Gladys Jepkosgei (Suing As The Legal Representative Of The Estate Of Cherop Koech (Deceased) [2020] eKLR** the court held; (at page 5 paragraph 12)

*“The Memorandum was filed on 27<sup>th</sup> May 2020. The delay of two months from the date of expiry of the thirty (30) days period limited for filing of an appeal is, in the social context of Covid - 2019 disruption, not inordinate”*

16. That the subordinate court’s judgment having been delivered on 4<sup>th</sup> June 2020, the delay period therefore started running on 5<sup>th</sup> July 2020.

17. The applicant filed his Memorandum of Appeal on 27<sup>th</sup> August 2020; which was fifty three (53) days delay from when the time to file an appeal lapsed and not eighty four (84) days as the respondent wrongly states in its response. That the applicant had shown due diligence given the extenuating circumstances and therefore the delay of less than two months is not inordinate.

18. That the main reason for the dismissal of the applicant’s suit in the subordinate court was that;

*“.....the defendant sued is a company, a juridical person and not a natural person and thus the particulars of negligence as couched cannot appertain to it”*

that they intend to vehemently dispute that position which is wrong in law and in fact and therefore the intended appeal has high chances of success.

19. It was the applicant submissions that it had not been shown that the respondent would suffer any loss or prejudice should the application be granted, and in any event the respondent could be compensated by way of costs.

20. The respondent filed their submissions on 9<sup>th</sup> February 2021 and they framed three (3) issues for determination.

**1. On whether the applicant should be granted leave to appeal out of time** they referred the court to the provisions of section 79G of the Civil Procedure Act and submitted that it had taken the applicant eighty four (84) days to file an application to appeal out of time before this Honourable court. The application was made in bad faith and the delay for close to four (4) months was inordinate, unexplainable and inexcusable. That further, no order instructions to appeal out of time were annexed to the application. That applicant’s failure to attach a copy of the judgment or decree is a reason for this court to find that the instant application; lacked merit, an abuse of the court process and an afterthought meant to deny the respondent the enjoyment of the fruits of her judgment.

- They relied on the case of **First American Bank of Kenya Ltd vs Gulap P. Shah & 2 Others Nairobi (Milimani) HCCC No.2255 of 2000 (2002) 1EA 65 and Mwangi vs Kenya Airways Ltd (2003) KLR**; where it was held that for a court exercising its discretion on whether or not to grant extension of time to file an appeal out of time, it must consider; *inter alia* the length of delay, the reason for the delay, the chances of appeal succeeding; and the degree of prejudice to the respondent, That the applicant had not attached the notice announcing the scaling down of judiciary operations to support the said claim.
- That the parties were required to send via email, their consent to having the judgment delivered electronically; that though the Applicant knew this matter had been slated for judgment on 8<sup>th</sup> April,2020 he failed to demonstrate steps taken to finding out whether judgment was delivered or not on the said date. To this end the applicant was not vigilant and was therefore undeserving of the orders sought.
- That litigation must come to an end and the applicant had not advanced any plausible reason for delay in filing the appeal and was only woken orders of payment of the costs. That the applicant was guilty of laches, had come to court with unclean hands and his application ought to be dismissed with costs.

**2. On whether the Memorandum of Appeal dated 27<sup>th</sup> August 2020 was properly on record** respondent submitted that Applicant was required to first seek leave as an appeal does not lie as of right as espoused by **Section 75 (1) of the Civil Procedure Act. That order 43 rule 1(2) (3) stipulates that;**

*“An application for leave to appeal under section 75 of the act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made or within 14days from the date of such order”*

they submitted that since the Memorandum of Appeal was filed outside the stipulated period then leave must be sought first pursuant to **order 40 rule 1(3)** which in this case was not done and they prayed that the same be struck out. They relied on the case of **George Odhiambo Umidha vs Co-operative Bank of Kenya Limited & Another (2018) eKLR** where *Aburili J* held that;

***“The application herein as filed is incompetent. It was filed without leave of the court that made the order which is sought to be challenged, which order is not appealable as a matter of right. The application is dismissed with costs to the Respondent.”***

**3. On who is entitled to costs the respondent submitted that costs are discretionary and it follows the event.** That the instant application is devoid of merit and it should be dismissed and respondent granted costs pursuant to **Section 27 of the Civil Procedure Act.**

#### **ANALYSIS AND DETERMINATION**

21. I have considered the Application, the Supporting Affidavit, Replying Affidavit, Supplementary Affidavit and Parties’ Submissions together with the cited authorities.

22. The issues for determination are whether the applicant ought to be allowed to file the appeal out of time, whether the Memorandum of Appeal is properly on record, whether the appellant has established sufficient cause for the delay, whether he has an arguable appeal, whether the respondent will be prejudiced and whether the respondent can be compensated by way of costs.

23. These are the factors that were set out in the case of **First American Bank of Kenya Ltd vs Gulap P Shah & 2 Others Nairobi (Milimani) HCCC No. 2255 of 2000 [2002] 1 EA 65** as;

***a. The explanation if any for the delay***

***b. The merits of the contemplated action, whether the matter is arguable one deserving day in court or whether it is a frivolous one which would only result in the delay of the course of justice***

***c. Whether or not the respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.***

24. The appellant was expected to file his appeal within thirty (30) days of the judgment, he did not do so. However he gave an explanation why there was the delay. The question as to whether there was inordinate delay is answered through the Court of Appeal case of **Cecilia Wanja Wamwira Kerugoya Civil Appeal No.211 of 2013 (2018) eKLR** court held;

***“There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case. We are of the considered view that the learned judge in considering the application, should have looked at the appellant’s conduct from the time the appeal was field up to the date the application for reinstatement was filed..... we have to ask ourselves whether the failure by the appellant to prosecute the appeal in the High Court and/or delay in filling the application for reinstatement constitute an excusable mistake or was it meant to deliberately delay the cause of justice.”***

25. The explanation by the appellant is that the lower court judgment was slated for delivery on 14<sup>th</sup> March 2020 but due to challenges and risks caused by Covid 19, pandemic including the scaling down of the judiciary operations, the same was not delivered. The appellant’s position is that the court did not issue a judgment notice informing parties’ when the said judgment would be delivered. As a result of the challenges arising, the applicant’s advocates offices were thrown into understandable disarray. By the time things were getting back on track, the judgment had been delivered in the absence of all the parties despite no Judgment Notice having been served or parties having sent to the court a written consent allowing the court to deliver the judgment electronically. The fact that there was no notice has not been controverted. It stands that the appellant did not know when the judgment was delivered. The effect of the COVID 19 pandemic is not conjecture. Court processes as well as life as we have always known it were affected badly.

26. This is not a case seeking the court’s sympathy. It is a case where there is a believable explanation for the delay. Is this explanation sufficient in the circumstances of the case? This must be established to warrant the flow of the court’s discretion in favour of the applicant. The question is whether this explanation amounts to sufficient cause. In **Daphne Parry Vs. Murray Alexander Carson (1963) EA 546** court stated that;

***“Though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles.***

I am of the view that the appellant’s explanation is sufficient in the circumstances of this case.

27. Does the appellant have an arguable appeal? Clearly this is a question to be answered by the appellate court that will hear the appeal. However having perused the Memorandum of Appeal it raises some legal issues. In any event there is a right of appeal and it is upon the appellant to persuade the court of its merits. Suffice it to say that I do not consider the appeal to be frivolous.

28. Regarding the interpretation of **Section 75(G) of the Civil Procedure Act** I find the holding of *Emukule J* in **Gerald M’limbine** herein above to be persuasive.

29. In the upshot I find therefore that the application is merited. The following orders commend themselves.

a. Leave be and is hereby granted to the Applicant to file an appeal out of time with respect to Molo Principal Magistrate’s Civil

Case Number 144 of 2019, Daniel Kakuta Kavoi vs Tri-Clover Limited.

b. The annexed Memorandum of Appeal be and is hereby deemed duly filed and served upon payment of the requisite fees.

30. The respondent will have the costs of this application.

**DATED, SIGNED AND DELIVERED BY EMAIL THIS 16<sup>TH</sup> DAY OF JUNE, 2021.**

**MUMBUA T MATHEKA**

**JUDGE**

CA Edna

Ngigi Njuguna Advocates for the Appellant/Applicant

Kinyanjui Njuguna & Co Advocates for the Respondent