



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISC.CIVIL APPLICATION NO. 49 OF 2021

ARCHIPAS MWAKIDOIAPPLICANT/APPELLANT

VERSUS

ISSAC CHIKUNYIO MWAMUYE.....RESPONDENT

CORAM: Hon. Justice Reuben Nyakundi

Kimondo Gachoka & Co. Advocates for the Applicant/Intended Appellants

Njoroge Mwangi & Co. Advocates for the Respondent

R U L I N G

This was an application dated 29.6.2021 for an extension of time for leave to appeal against the judgement of the trial court on damages of Kshs.172,000/- for pain and suffering awarded to the Respondent. In the same motion, the applicant also seeks a stay of execution against the said trial judgement. In support of the motion is an affidavit by **Castro Momanyi** filed in Court on 30th June, 2021.

In opposition to the application is a replying affidavit of one **Issac Chikunyio Mwamuye** dated 6th July, 2021. Besides the affidavit evidence both Counsels filed their respective skeletal submissions for and against the grant of the reliefs sought in the motion. In my ruling I would be guided by all those materials and legal perspectives by both Counsels.

Determination

a. Principles for an extension of time to appeal

It is now settled that the principles for granting an extension of time are not in dispute as stated by the Supreme Court in **Nicholas Kiptoo Arap Korir Salat V IEBC & 7 Others [2014] eKLR** and further exposition in **Paul Wanjohi Mathenge V Duncan Gichane Matunge[2013]eKLR**, **Leo Sila Mutiso V Rose Hellen Wangari Mwangi CA No. 255 of 1997**.

There are four key factors to be considered; -

- i. The length of the delay.
- ii. The reasons for the delay
- iii. The chances of the appeal succeeding if the extension of time was granted.
- iv. The prejudice caused to the would-be respondent if an extension of time was granted.

That it's incumbent for the Court to consider under the overriding objective, expediency of bringing finality to a litigation. In the instant application it is not in dispute that the parties litigated on the merits and the final judgement was pronounced on the merits, in the presence of Counsels seized of the matter. Nevertheless, the applicant who was aggrieved with the decision on damages failed to lodge an appeal within the stipulated thirty (30) days period under section 79 (G) of the Civil Procedure Act for filing a Memorandum of Appeal against the trial court judgement and decree.

In view of the procedural history as detailed in the record of the trial court I am unable to agree with the applicant that the length of the delay

is excusable. The length of the delay in this case from the countdown of 29.3.2021 and the day for filing the Notice of Motion for execution has not been sufficiently explained in the affidavit evidence. It should be noted that a delay of two months should be considered by any standards. Very substantial to deny a litigant exercise of discretion in his or her favor. It is also intriguing that the delay was due to the conduct of the Counsel instructed to file an appeal. There weren't any other noble explanations availed for this dilatory conduct on the part of the applicant.

It has become a norm and acceptable practice for Courts to be sympathetic to applicants on extension of time for the sole reason that a mistake of Counsel should not be visited upon a diligent litigant. There is an argument that the intended appellant should not be locked out of the appeal process being a right granted by the Constitution. In my view whether the Court exercises jurisdiction to extend time under the auspices of the Constitution as of right it ought to be underpinned and construed within the framework of Article 259 of the Constitution. On the other hand, extension of time being a creature of equity, one can only enjoy it, if he acts equitably. Hence the reason that he who seeks equity must do equity. The litigant therefore has a duty and obligations to promote the purposes, values and principles of good governance encapsulated in that same constitution he hinges his right of appeal.

It is a matter of public and judicial notoriety that the sluggish nature of litigants has immensely contributed to justice delay and expeditious determination of their cases. It has become quite necessary to reconsider the phrase commonly applied to in our Courts ***“that the sins of Counsel will not be visited on a party”*** it is a latitude I am not prepared to accord the applicant in this case.

I note in this matter the deliberation upon the issues at stake were on liability and damages. In this respect the trial court pronounced and conclusively decided on liability at 100%. Whereas discretion was exercised to assess damages on the facts and evidence as some of the strongest factors weighted against the measure of damages the Memorandum fails precisely to state errors of facts and law misapprehended by the trial Court. I am aware from the litigation history the applicant submitted and canvassed proposals on the assessment of damages in which subsequently the trial court made the impugned findings. From the legal lens of the applicant the quantum on damages may appear punitive and excessive but that is the power of judicial discretion.

The respondent herein was a victim of the tort of negligence and breach of duty of care. The resultant effect to that accident were the injuries suffered. On that basis he sought compensation as a requirement of the law. The further arguments are that the applicant is aggrieved with the entire assessment is inconsistent with the position taken at the trial court. I am unable to agree that in cases of this nature the entire award should be subjected to an appeal. For the dimension of prejudice test the respondent will suffer due to the delay in accessing the fruits of his judgement. The evidence and interventions sought on appeal are inconsistent with the trial court judgement rooted more in favor of the Respondent.

The Court inevitably in considering the question on prejudice, the scale does tilt more towards in favor of the respondent. In my view there are no good reasons for this Court to exercise discretion for extension of time. Sometimes one wonders what is the purpose of the Rules which provide a timetable for conduct of litigation which is never strictly complied with on flimsy grounds. To my mind where the Applicant fails to place before the Court good and sufficient evidence to extend time, then there is no need for this Court to expend its energy in considering other grounds under the rubric of the interest of justice. The same is denied.

The second limb of the application is on stay of execution provided for and purposed under Order 42 Rule 6 (1) of the Civil Procedure Rule. The consideration for granting a stay of execution include; -

- a. Sufficient cause.**
- b. No unreasonable delay**
- c. The appeal is an arguable one at the hearing and on the merits.**
- d. The proposed appeal should not be rendered nugatory.**

(See ***Stephen Wanjohi V Central Glass Industries Ltd Nairobi High Court Civil Case No. 6726 of 1991, Africa Express Airways & another V Noble Viajees CA No. 128 of 1993.***) I have taken time to evaluate the material placed before me for consideration. I find that the apparent unreasonable delay in filing the application for delay made is impossible for the Court to exercise discretion to grant this order to stay execution.

Further being guided with the traditional principles on assessment of damages which is the touchstone of the intended appeal the apparent grounds in the Memorandum of Appeal are unfounded in both law and the facts of the case. The principles guiding the Court's discretion weighed on the scale of balance of convenience and compelling rights of the parties tilt more to the execution of the judgement of the trial Court. The Court will not act merely because a party has to exercise a right of appeal. It has to be convinced whether in that intended appeal there would be high chances of succeeding likely to cause an interference with the order of the trial court.

In the circumstances the application for stay of execution is also dismissed. I would therefore dismiss the entire motion dated **29th June, 2021** with Costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 19TH DAY OF JULY, 2021.

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R. NYAKUNDI

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling/judgement has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

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