



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**MISC APPLICATION NO. E051 OF 2021**

**FREDRICK MWENDA NDURUHU.....DEFENDANT/APPLICANT**

**VERSUS**

**PAUL MUTINDA SIMON .....RESPONDENT/PLAINTIFF**

**CORAM: Hon. Justice R. Nyakundi**

**Kimondo Gachoka & Company Advocates for**

**the Applicant/Proposed Appellants**

**Wambua Kilonzo Advocates for the Respondent**

**RULING**

At the heart of the Notice of Motion dated 12<sup>th</sup> July, 2021 by the applicant lies a prayer for two reliefs; -

- a) That this Honorable Court be pleased to extend time and grant leave to the applicant to lodge a Memorandum of Appeal out of time against the judgement and decree entered against the Applicants by Honourable Dr Julie Oseko – Chief Magistrate in Malindi Cmcc No. 244 of 2019 given on 19<sup>th</sup> May, 2021.***
- b) That this honourable Court be pleased to Stay Execution of the judgement and decree in Malindi Cmcc No. 244 of 2019 pending the hearing and determination of the intended appeal.***

The motion is supported by an affidavit sworn by **Nyabero Bokoo** in his capacity as Legal Counsel for the applicant in a replying affidavit by the respondent all those issues raised in the motion and affidavit in support do not qualify for exercise of discretion in favor of the applicant. Besides the affidavit evidence, both counsels relied on their brief submissions as the correct pathway for the Court to do justice in the matter. My first consideration is whether the applicant prayer on extension of time merits the Court's judicial discretion.

It must be pointed out from the outset that a Right of Appeal is basically statutory in that it is a creature of either of the Constitution or other statutory enabling provisions. Therefore, ordinarily no Court has the jurisdiction to extend the time bound of appealing provided for in the statute, unless on very clear sufficient good cause. Accordingly, the Court seized of that jurisdiction to extend time has to be governed by the principles in *Seal V IEBC & 7 Others [2014] eKLR*, *Paul Wanjohi Mathenge V Duncan Gichane Mathenge*, *Leo Sila Mutiso V Rose Hellen Wangari Mwangi CA No.255 of 1997*.

***“Generally, 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 the matters which this Court takes into account in deciding whether 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.”***

Essentially what the principles in these authorities agitate is that the Court may enlarge the time for a litigant to appeal provided there is evidence to proof the reasons for the delay to comply with the timelines. With specific reference to this application, the Court is being told that the Judgement was delivered in absence of the parties. In a rejoinder by the Respondent's affidavit, the applicant was in possession of the judgement vide email dispatch on 21<sup>st</sup> May, 2021. Further, the Respondent Counsel served the applicant with Certificate of Costs on 27<sup>th</sup> May, 2021. Those facts remain uncontroverted by the Applicant. In other words, the applicant or their legal representative had a glance of the impugned judgement within the thirty day (30) stipulated period under section 79 (G), of the Civil Procedure Act. There was therefore an overreach as to timely filing of the appeal of about twenty-two days. In my view given the reason by the applicant that was inordinate delay in obtaining instructions to lodge an appeal. Further, a perusal of the Respondent's affidavit controverts that averment on non-notice and delivery of judgement in absence of the parties. The depositions relating to the explanation of the delay contained in the affidavit in support

of the application for extension of time did not show or indicate any cogent reasons for the applicant's failure to appeal within time or to wait until the expiry of twenty-two days after the statutory 30 days limit. It is clear all what the applicant was required to do was to lodge a Notice of Appeal immediately on learning of the existence of the impugned judgement. Being an equitable relief, the applicant loses on this ground.

On the other hand, the applicant has at their disposal, the remaining grounds on the existence of an arguable appeal with high chances of the intended appeal succeeding if the application is granted, further whether the appeal would be rendered nugatory accompanied with the degree of prejudice to the Respondent, if the relief sought is granted. The touchstone of the intended appeal as set out in the Memorandum of Appeal is on award of damages for pain and suffering assessed at Kshs.200,000/=. An appeal is basically, a complaint against the reasons for the decision of the trial court, based either on the applicable law or the evidence adduced during the trial. Through the appeal process, the applicant, invites the Court to review the decision of the lower Court, which he or she challenges as wrong either on grounds of law, facts or mixed law and facts.

Thus, in the intended appeal an invitation has been made to this Court to review at an opportune time the decision of the Court on assessment of damages based on the applicable precedents and principles. The threshold of interference is as stated in the case of **Charles K.Mukua V Judy Wairimu Mirango CA No. 182 of 1995**. Turning to the Memorandum of Appeal, without going into the deeper inquiry of the merits it would be very unlikely that at the end of the appeal the award so computed is so high and wholly erroneous estimate and in error of the settled principles in this field. The whole trouble in this case appears to me is strictly to challenge an award relying on the facts or circumstances of a victim in the past awards. The discretionary character of the power vested in the trial court is one which various factors are looked at in deciding the best fair and proportionate award. It should not be assumed that because x in a particular case suffered soft tissue injuries an award of Kshs.100,000/- was made by the Court, the same ought to apply **Mutatis-Mutandis** to the present case. The damages trilogy cases acknowledges that it is not always possible to reflect accurately what a reasonable amount of general damages should be especially in pain and suffering, quadriplegic or in fatal accidents claims. This is because of what is referred as incommensurability of different kinds of injuries which are difficult to measure accurately in terms of pain and suffering, or catastrophic injuries as they affect and impact different persons. There is simply no mathematical formula or equation to perfectly provide a fair compensation to the injured person.

It is not enough in the Memorandum of Appeal to simply aver that the damages assessed were too high and hence an erroneous estimate for the claim of general damages. I do not think that Court's discretion are changed or governed strictly by previous decisions perse, but they act as a reference point to exercise its judicial discretion in a particular way. Although, this is a tricky issue to delve into details, however, in the absence of evidence showing that there are factors to influence the appeal succeeding it should be made clear from the onset that the evidence to be advanced before the appeals Court is below the probative value whose weight might not overturn the damages awarded by the trial court. My reading of the Notice of Motion and Memorandum of Appeal which co-exist conjunctively lack good and substantial reasons why the discretion should be exercised in favor of the applicant and secondly, that the grounds of appeal sought to be introduced are arguable.

Needless, to say, that to grant indulgence to the applicant, he has not shown something of a material character sufficiently decisive which moves this Court to entitle him the relief on extension of time. Those factors on mistake, notice of judgement or accident or inadvertence remains wishful list thrown at the face of the Court without prove on the part of the applicant.

From these conclusions, the Notice of Motion dated **12<sup>th</sup> July, 2021** on Extension of Time and Stay of Execution is disallowed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED via Email AT MALINDI THIS 19<sup>th</sup> DAY OF JULY, 2021**

.....

**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 has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

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