REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 393 OF 2019

RASMIYYAH KHALIFA ISSA.....APPLICANT

VERSUS

1. KENYA PORTS AUTHORITY

2. RARIGA TRADERS AUCTIONEERS....RESPONDENTS

R U L I N G

1. By a Notice of Motion dated 2/10/2019 but filed later on 8/10/2019 under a Certificate of Urgency dated 18th October 2019 the Applicant sought from court orders of extension of time to file an appeal, stay of execution pending appeal and strangely an order that the judgment by the lower court be set aside. I consider the Application to ask in the main that I do extend time for filing an appeal.

2. The grounds advanced to premise the application for extension of time are that even though the judgment was entered and pronounced on the 16/5/2019, the Applicant was not clear how the judgment was entered without it calling a witness and that the decision by its former advocate not to call a witness had denied it the chance to be heard. For those reasons the applicant considered itself to have established a sufficient ground to have the time enlarged for it takes the view that it had an arguable appeal with reasonable prospects of success. Those grounds were amplified in the Affidavit in support sworn by one Rukiya Aziz Ibrahim the advocate for the Applicant who then exhibited a draft of Memorandum of Appeal setting out some three grounds and largely faulting the trial court for having failed to take the applicants witness, for failing to hold its right to be heard and therefore being biased against the applicant.

3. Equally exhibited were handwritten proceeding which unfortunately were not legible at all, as well as a witness statement by the applicants potential witness, motor accident report form, a certificate of insurance, a ruling by the court ordering interim liquidation of Standard Assurance Company Ltd and appointing the official receiver as the Provisional Liquidators of the company and a proclamation dated 26/9/2019. At paragraph 14 -18 the applicant takes the position that having been insured, any enforcement should not be against it but against the insurer and that the previous advocate had failed to notify the Applicant of the delivered judgment until the period for filling the appeal had lapsed.

4. The respondent opposed the Application pursuant to the Grounds of Opposition dated 16/10/2019 whose gist was that the application was utterly defective for having been filed by counsel not on record, was a vexation to the extent that it was blaming the court of denial of a hearing when the case was closed voluntarily by a counsel duly instructed. It was then contended that there was inordinate and unexplained delay and that the placing of an insurer under liquidation had no bearing in the matter as the applicant was at all times represented by counsel and lastly that there being no appeal there was no pedestal to grant stay.

5. At the hearing both counsels were very modest in their argument largely relying on the record of application and the Affidavit filed in a related Application. For the Applicant the points taken was that it remained unclear why its witness was not called and that the delay was largely on the previous advocate it being added that the respondent was already holding a motor vehicle which could act as security pending appeal.

6. For the respondent, there was a preliminary objection taken to the effect that the counsel who had filed the applications was a stranger having not been on record before the trial court and therefore the application did not lie.

7. On the merits, the counsel contended that the applicant's case before the trial was voluntarily closed without calling a witness with no attempt to reopen it and that even in the submissions filed there was that acknowledgement. It was then asserted that the occurrence of the accident was admitted and that there was want of clarity on what part of the judgment was being contested.

8. On the authority to bring this application the counsel referred court to a letter dated 22/7/2019 and annexed to the Application 19/11/2019, addressed to the Applicants advocates by an insurance broker which merely said that they had been informed of a judgment without being

given a copy thereof and tasking the counsel to set the judgement aside for having been entered in default of appearance. On that letter counsel contended that ther was no authority to seek extension of time and that having been aware of the judgment way back in July 2019 there was no explanation for the delay between the date of the letter and the date when the application was lodged about three months later. Lastly, counsel contended that the notice of entry of judgment was received on the 27/5/2019 but no steps taken till October. It was lastly contended that there was no justification to seek extension which is discretionary power of the court and intended to advance cause of justice and the law.

9. Having need the papers filed and the submissions offered by counsel, I do find that I need to determine the following questions for the parties:-

a. Whether it was necessary for Ms. Hassan Alawi & Co. Advocates to first seek and obtain leave before filing the application?

b. Whether the threshold of grant of extension of time have been met?

c. What order should be made as to costs.

Propriety of the application on account

of representation

10. This objection to the application was to the court improperly taken and wholly out of context or merely misapprehension of the provisions of Order 9 Rule 9 Civil Procedure Rules. That position requires no novel interpretation on its plain and ordinary meaning. It provides:-

> **"When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court –**
>
> **a. Upon an application with notice to all the parties; or**
>
> **b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.**

11. I take the easy and straight forward position that it would be an over-stretch to invite the provision in this matter in which no determination has been made. I have held, more than once before[1] that, the provision had its historical background with a mischief intended to be avoided being to safeguard advocate's fees for representing client who may be hellbent on avoiding the obligation and not an available tool for a litigant against its adversary capable of defeating the right to an advocate of one's choice. That objection fails on account of lack of merit.

12. On the merits, it is now the settled law that extension of time to lodge an appeal out of time is a discretionary matter and a party seeking extension of time must explain the delay to the satisfaction of the court and give reasons thereto. In this matter, the reasons given is that the previous counsel did not inform the client of the judgment in time and when the existence of the judgment was learnt time had lapsed.

13. My starting point is that it has come to the point when in some instances the mistake of counsel must surely rest upon the shoulder of his client. This I view to follow straight from the litigant's right to an advocate of own choice. In making that choice his judgment must be respected by others and owned by him. It cannot be that a litigant has an unalienable right to choose counsel when it suits him and runs away from the choice when it is convenient to do so. This is what I get from my reading of the Court of Appeal decision in **Tana River Development Authority vs Jeremiah Kemigo Mwakio & 3 Others [2015] eKLR** where the Court of Appeal cited with approval the decision in ***Kehumen & Others vs Hausel Properties Ltd [1988]*** All ER 38 to the effect that there are circumstances demanding that the consequences of negligence by a lawyer falls on their own heads.

14. In coming to this finding I am well aware that there exist a safety net by which every advocate is by law obligated to take out a professional indemnity cover before taking out a practicing certificate for every year of practice. If indeed there was anything untoward in the manner the counsel handled the matter, the applicant is not left without a remedy. He may take counsel and weigh his remedies in damages.

15. However, I do not think that really should be a consideration here. I take the view that the applicant was aware of the judgment way back by July 2019 but took no steps to seek to lodge the appeal. That delay of some 3 months continue to beg for an explanation. Without a plausible explanation, this court's discretion has not been properly invited. A judicial discretion must be exercised upon reason and in the absence of reason the court has no discretion to exercise. It then becomes injudicious or just a whim.

16. The other consideration is the nature of the case to be pursued by allowing extension of time. Here in this file, it has been asserted without rebuttal that the Applicants case was closed voluntary by an advocate who was validly on record. It must be remembered that a duly instructed advocate has the ostensible to authority to handle the clients case and make decisions on the matter including the right to compromise the case. (See ***Flora Wasike vs Destrino Waboko's [1988] eKLR***).

17. The applicant himself has by his affidavit or support of the application under consideration exhibited a statement by the driver of the motor vehicle at the time of the accident subject matter of the suit before the trial court.

18. That statement by Charo Solomon Toya confirms occurrence of the accident. That to me is the kind of evidence that a well-meaning counsel need not present to court disguised as opposing a claimant's case. To me therefore it would add no value to the defence and cannot be the basis to find that an arguable appeal exists.

19. Lastly, the advocate having opted to close the case without calling a witness cannot be a fault on the court. If not a fault on the court, cannot be the basis of the intended appeal. It is in fact far-fetched to attribute bias upon the court on the facts revealed in this file.

20. On the basis of the foregoing findings, I find no merit in the application which I order dismissed with costs.

Dated and delivered at **Mombasa** this **17th** day of **January 2020**.

P.J.O. OTIENO

JUDGE

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[1] Jonathan Webukhulu t/a Gat Cleaning Agency Ltd vs Julius Odhiambo Oduor [2019]eKLR and Doshi Iron Mongers Ltd vs Kenya Revenue Authority [2019] eKLR