



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

MISCELLANEOUS APPLICATION NO. 1 OF 2019

EVANS CHIVATSI JUBA.....APPLICANTS

VERSUS

YUSUF PASTA.....RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Ameli Inyangu Advocates for the Appellant

Wambua Kilonzo Advocates for the respondent

RULING

On 18.1.2019, the applicant filed a notice of motion for an extension of time to file an appeal against the Judgment of the Court delivered by **Hon. L. N. Juma** in **Kilifi SPMCC No. 272 of 2017**.

In support of the application are grounds on the face of the motion and further an affidavit sworn by **Evans Juba**. The application obviously was opposed by the respondent counsel **Mr. Geoffrey Kilonzo**.

Background

The plaintiff Evans Juba in a plaint filed in court on 6.10.2007 sued the defendant (herein the applicant) on the basis that on 23.1.2017 while he was a petition passenger in motor cycle KMDG 596J a collision occurred involving motor vehicle registration number KAV 153V. As a result, the plaintiff sustained injuries in which he blamed the defendant for negligence and breach of the duty of care. The particulars of negligence are as pleaded in paragraph 5 of the plaint.

In considering the merit of the claim in a one-page Judgment, the trial court ruled as follows:

(a). Liability apportioned by consent at 60% for the defendant and the plaintiff to bear shoulder 40%.

(b). General damages of Kshs.350,000/= for pain and suffering.

(c). Specials of Kshs.2,000/=

Costs of the suit.

In the application to extend time its indicated that the applicant is aggrieved with the assessment of damages. However, for reasons of not being supplied with the Judgment or notified of its existence timeline of thirty (30) days provided for under Section 79G of the Civil Procedure Act lapsed.

Determination

The Law

It is appropriate to restate that under Section 79G – “Every appeal from a Subordinate Court to the High Court will be filed within a period of thirty (30) days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the applicant a copy of the decree or order.” “provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for the filing the appeal in time.”

The fundamental principle for granting an extension of time are no longer in dispute. This is as stated by the Supreme Court in **Salat v Independent Electoral and Boundaries Commission and 7 others {2014} eKLR**.

In the court seven point guidelines to be considered in exercise of discretion it was held that:

- (1). Extension of time is not a right of a party. It is an equitable remedy that is only available to deserving party at the discretion of the court.*
- (2). A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.*
- (3). Whether, the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.*
- (4). Whether there is a reasonable reason for the delay, the delay should be explained to the satisfaction of the court.*
- (5). Whether there will be any prejudice suffered by the respondents if the extension is granted.*
- (6). Whether the application has been brought without undue delay and*
- (7). Whether in certain cases, like election petitions, public interest should be a consideration for extension of time. The underlying factor which is operative in the disposition of an application to extend time is the question whether there is a record an appeal with high chances of success.*

By the design of the general principles, the persuasive case by the Court in Singapore in **Aberdeen Asset Management Ltd v Fraiser & Neave Ltd {2001} 3 SLR 355 at 43** stated:

“As to the question of merits, it is not for the court at this stage to go into full scale examination of the issues involved. Neither is it necessary for the applicant to show that he will succeed in the appeal. The threshold is lower the test is, is the appeal hopeless? Unless one can say that there are no prospects of the applicant succeeding on this appeal, this is a factor which ought to be considered to be neutral rather than against him.”

Therefore, there are three primary considerations to applications of this nature:

- (1). The nature of the delay.*
- (2). The reasons for the delay.*
- (3). The prospects of an arguable appeal with prospects of success.*

In the present application, the trial Magistrate Judgment was pronounced and delivered on 19.9.2018 in absence of the parties. The Executive Officer of the Court was meant to serve the aforesaid Judgment to the respective parties. From the record, there is neither evidence nor any form of correspondence that the Executive Officer complied with the order for notice of Judgment as ordered by the Court.

In the meantime, apparently, the applicant became aware of existence of the Judgment as demonstrated from his Memorandum of Appeal dated 29.10.2018.

The formal application seeking extension of time against the Judgment was filed in court on 15.1.2019. Therefore, in computing time from the date of delivery of Judgment, the Judgment had exceeded the directory timeline under Section 79 (G) of the Act by a period of approximately three (3) months.

In view of the fact that the impugned Judgment was delivered in absence of the parties and without any evidence of post Judgment notice as ordered by the Court, there is good reason for the delay. As regards filing and tendering a Memorandum of Appeal, the fundamental right to be issued with the copy of the Judgment or order due for the process of appeal to be initiated is mandatory.

For avoidance of doubt Section 79(G) of the Act provides for certification of the requisite copy of the decree or order appealed from a conditional precedent in computation of time for the filing of the appellant's appeal.

In the case of **Manji v Arusha General Store {1970} EA 137** the court observed that:

“Rules of procedure are designed to give effect to the rights of the parties and once the parties are brought before court in such a way that no injustice is caused to either mere irregularity cannot result in vitiation of the proceedings.”

In the instant case, I find evidence which shows a nexus between the appellant's failure to file his appeal within the stipulated period and the right to be supplied with a copy of the decree or order soon after its delivery or pronouncement. It has been said in **Galaxy Paints Company Limited v Falcon Guards Ltd Court of Appeal No. 219 of 1993**:

“in pursuant of justice Rules are meant to facilitate justice and further its end and are not a thing assigned to trip people up.”

The issues which arise are these:

(1). Whether the nature of the delay was inordinate and the appellant has obliged by giving reasons.

In particular, to this issue I accept the affidavit evidence and the support corroborated by the trial court. That the time for making the application to have the appeal filed in the registry was lost due to non-compliance with the procedural rules on delivery of Judgment. The more fundamental is on the one ground specified in the application that the appellant is disputing the quantum of damages as being erroneous in relation with the evidence and facts of the claim. There is therefore prima facie evidence of legal contest on appeal between the intended appellant and the respondent in relation to the award of damages for pain and suffering.

Here in exercising discretion, it is important to emphasize that at this stage that expected appeal is only tested on the prospects of it succeeding.

Against that background, the notice of motion filed in court on 18.1.2019 is hereby allowed with the following accompanying conditions:

(a). The appellant draft Memorandum of Appeal be deemed as filed within time.

(b). The record of appeal be served upon the respondent within twenty (21) days from today's date.

(c). The appeal on quantum be disposed off by way of electronic based written submissions through the High Courts digital platform.

(d). In this regard the appellant would have twenty-one (21) days to file and serve the Written Submissions and in furtherance of the same order, the respondent correspondingly has the same fourteen (14) days period to file a rejoinder.

(e). Compliance be and other case management schedules be conducted in the main Appeal file pursuant to the above orders, this matter be marked as fully disposed off.

There are no orders as to costs at this interlocutory stage.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 21ST DAY OF APRIL, 2020

.....

R. NYAKUNDI

JUDGE

In the presence of:

1. Ms. Emukule holding brief for Adhock for the appellant
2. Mr. Otara holding brief for Wambua Kilonzo for the respondent