



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

MISC. CIVIL APPLICATION NO. 536 OF 2020

CHARLES NYAMBURA.....1ST APPLICANT

DAVID KAMAU.....2ND APPLICANT

VERSUS

JOSEPHINE NTHENYA MBULU.....RESPONDENT

RULING

1. By a Motion on Notice dated 8th November, 2019, the applicant herein seeks an order for leave to file an appeal out of time and an order for stay of execution of the judgement delivered by the trial court on 12th July, 2019 pending the hearing and determination of the intended appeal.
2. The application was supported by an affidavit sworn by **Isabellah Nyambura**, the legal counsel at Directline Assurance Company Limited, the insurers of the vehicle the subject of the suit in the lower court
3. According to the deponent, they instructed the firm of Messrs Kairu and McCourt Advocates to defend the suit before the trial court. However, by a judgement delivered on 12th July, 2019, the trial court awarded the Respondent Kshs 500,000/- as general damages and Kshs 13,000/- as special damages after which a stay of 30 days was granted.
4. According to the deponent, the time within which an appeal is required to be filed has since lapsed by 60 days and the reason for failure to file the same is because the Applicants have just given them instructions to file an appeal. It was however deposed that the intended appeal raises issues and has a high chance of success. It was the applicant's case that the application has been brought promptly and without unreasonable delay and that the applicant is willing to abide by any conditions that the court sets. It was the applicant's case that unless the stay is granted the Respondent will proceed to execute against the applicant thus rendering the application and the intended appeal nugatory.
5. The application was however opposed by the Respondent by way of a replying affidavit sworn by the Respondents' counsel. According to the said affidavit, the Applicants have not shown any justifiable reasons for failing to file the intended appeal on time and she has not demonstrated that the intended appeal has any chances of success. It was deposed that the Applicant had previously been granted stay of execution within which time they had time to lodge the appeal but failed to do so hence the instant application is an afterthought only intended to frustrate the Respondents.
6. It was averred that the judgement the subject of the intended appeal of the evidence.
7. It was however the Respondent's case that should the court be inclined to grant the stay, it should do so on condition that half the decretal sum be released to the Respondents while the other half be deposited in a joint interest earning account.

Determination

8. I have considered the application, the supporting affidavit, the grounds of opposition and the submissions filed as well as the authorities relied upon.

9. Section 79G of the *Civil Procedure Act* provides that:

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 from 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:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

10. It is clear therefore that the decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion and just like any other exercise of discretion. This being an exercise of judicial discretion, like any other judicial discretion must on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. One of those judicial principles expressly provided for in the above provision is that the applicant must satisfy the Court that he has a good cause for doing so, since as was held in **Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633**, there is no difference between the words "sufficient cause" and "good cause". It was therefore held in **Daphne Parry vs. Murray Alexander Carson [1963] EA 546** 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. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.

11. As to the principles to be considered in exercising the discretion whether or not to enlarge time in **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65** the Court set out the factors to be considered in deciding whether or not to grant such an application and these are (i). the explanation if any for the delay; (ii). the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; (iii). 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. This was the position reiterated in **Edith Gichugu Koine vs. Stephen Njagi Thoithi [2014] eKLR**, where the Court of Appeal set out the principles undergirding an Application for leave to file an appeal out of as follows:

"Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others..."

12. Similarly, in **Leo Sila Mutiso vs. Helen Wangari Mwangi Civil Application No. Nai. 255 of 1997 [1999] 2 EA 231** the Court of Appeal set out the factors to be considered in deciding whether or not to grant such an application and these are first, the length of the delay; secondly the reason for the explanation if any for the delay; thirdly, (possibly), the chances of the appeal succeeding if the application is granted i.e. the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; and fourthly, the degree of prejudice to the respondent if the application is granted and 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. However, in the case of **Thuita Mwangi vs. Kenya Airways Ltd [2003] eKLR**, the Court explained that follows:

"The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered."

13. However, as was held in **Kenya Commercial Bank Limited vs. Nicholas Ombija [2009] eKLR**:

"An "arguable" appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court."

14. That was the position in **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR** where the court held that:

"...On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised...An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous..."

15. I also associate myself with the decision of the Supreme Court in **Civil Application No. 3 of 2016 - County Executive of Kisumu -vs- County Government of Kisumu & 7 Others** at page 5 where the said Court said:-

"... 23) It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the court. Further, this court has settled the principles that are to guide it in the exercise of its discretion to extend time in the NICHOLAS SALAT case to which all the parties herein have relied upon. The court delineated the following as:-

"the underlying principles that a court should consider in exercise of such discretion:

- 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a 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. ...”**

16. In this case, it is contended that the Applicant gave instructions to appeal when the time limited for doing so had already lapsed. Regrettably, there is no affidavit sworn by the Applicant herself explaining the reasons why she did not give instructions in good time. The affidavit in support of the application was sworn by an officer of the insurance company concerned and in that affidavit, the deponent did not even attempt to state the reason, if any, advanced by the Applicant as to why the instructions to file the appeal within time were not given.

17. The replying affidavit states that the Applicant was given stay by the trial court and had ample time within which to lodge the appeal but did not do so.

18. All in all, there is completely no reason advanced by the Applicant why the appeal was not lodged within time. In the absence of that explanation, this Court has no material on the basis of which it can exercise its discretion in favour of the Applicant. Without granting an extension of time to file the appeal, the limb for stay must necessarily fall by the wayside.

19. In the premises, the Motion dated 8th November, 2019 fails and is dismissed with costs.

20. It is so ordered.

Ruling read, signed and delivered in open court at Machakos this 15th day of July, 2020.

G. V. ODUNGA

JUDGE

In the absence of the parties

CA Geoffrey