



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

MISC. CIVIL APPLICATION NO. 33 OF 2020

MARTIN CHIGAMBA.....APPLICANT

VERSUS

FRANCIS KITUU KASSIM

DAMA FRANCIS KITUU (Suing as the Administrators of the Estate of

DAVID MUSYA FRANCIS (DECEASED).....RESPONDENTS

CORAM: Hon. Justice R. Nyakundi

Kimondo, Gachoka Advocates for the Applicant

Michael Ngure Advocates for the Respondent

RULING

On 29.1.2020 the applicant **Martin Chigamba** acknowledges the delivery of Judgment on the claim for assessment of damages totaling Kshs.3,094,845/= plus costs and interest, arising out of a suit filed by the respondents **Francis Kituu Kassim** and **Dama Francis Kituu**. The claim served and litigated against the applicant was based under the Fatal Accidents Act and Law Reform Act, following the death of **David Musya** in a road traffic accident that occurred on 4.8.2018; along Mombasa-Voi Road. The collusion involved tricycle KTWA 693Z and motor vehicle registration number KCN 482N.

The applicant's notice of motion dated 26.5.2020 seeks the following orders:

- 1. That this application be certified as urgent and be heard ex parte in the first instance.***
- 2. That this Honourable Court be pleased to grant leave to the applicant's to appeal out of time against the Judgment of the Honourable Magistrate S. K. Ngii Senior Resident Magistrate in Mariakani Senior Resident Magistrate Court Civil Suit No. 15 of 2019 and Judgment delivered on 29th January, 2020.***
- 3. That this Honourable Court be pleased to stay execution of the Judgment and decree in Mariakani Senior Resident Magistrate Court Civil Suit No. 15 of 2019 pending the hearing and determination of this application herein.***
- 4. That this Honourable Court be pleased to stay execution of the Judgment and decree in Mariakani Senior Resident Magistrate Court Civil Suit No. 15 of 2019 pending the hearing and determination of the intended appeal herein.***
- 5. That upon the grant of Order 2 above, the Honourable Court to direct the Executive Officer, Mariakani Senior Resident Magistrate Court to deliver the entirety of the Court file, interalia, for Mariakani Senior Resident Magistrate Court Civil Suit No. 15 of 2019 for appeal.***

In support of the application are grounds on the face of it and an affidavit sworn by **Isabella Nyambura** Legal counsel at Directline Assurance Co. Ltd, Insurers of Tricycle Number KTWA 693Z Piaggio.

The plaintiff/respondent to the motion opposed any relief applied for and sought by the applicant to enlarge time to prefer an appeal. The plaintiff's grounds of objection are all laid bare in the replying affidavit dated 3.7.2020. He went on to support that the applicant has not shown good cause or sufficient reason why this Court should exercise discretion four months down the line since delivery of Judgment. The second scenario explained by the respondent was on the demerits of the intended appeal which he deposed presents no serious issues capable

of disentitling the award made by the trial Court.

The respondent also relied upon the following judicial authority **Leo Sila Mutiso v Rose Hellen Wangare Mwangi CA No. 255 of 1997 (UR)** which endeavors to outline the well settled principles which would guide this Court in deciding whether to grant an extension of time or not. On this it was stated that factors like the length of the delay, the reason for the delay, the chances of the appeal succeeding and finally the degree of prejudice likely to be occasioned to the opposing party if the application is granted. From that premise the respondent submitted that the application on the enlargement of time to lodge the intended appeal lacks merit.

The applicant who was represented by counsel put forward submissions accompanied with the provisions of the Civil Procedure Act and the applied principles for purposes of extension of time for appealing the authorities lined up and cited by the applicant counsel do emphasize that the discretion is however, a judicial one and not an arbitrary exercise of the power. The circumstances under which the prayer for extension of time to be allowed or denied has been extensively summarized. The aforesaid cases herein under:

Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission & 7 others {2015} eKLR, Joseph Ouma Onditi v Jane Kisaka Mung'au {2018} eKLR, Utalii Transport Company Ltd & 3 Others v NIC Bank Ltd & Another {20-14} eKLR. Gahir Engineering Works Ltd v Rapid Kate Services & Another {2015} eKLR.

It is apparent from the reading of the laid down principles in the decided cases extension of time is in the unfettered discretion of the Court and the object of it is enable any dispute between parties to be tried on the merits.

Further, in the case of **Copper v Smith {1883} 26 CLD 700:**

“it is a well established principle that the object of the Court is to decide the rights of the parties and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their right.” (See Odunga’s Digest on Civil Case Law and Procedure Vol -2 pg 423)

Determination

With this brief facts and submissions by both counsels, I have singular duty to answer the question whether the notice of motion meets the threshold requiring leave to appeal the Judgment of the trial Court.

The Law

The discretion is wide and expressly donated under Section 79 (G), Order 50 Rule 6 of the Civil Procedure Act and Rules, 2010. The proviso does prescribe matters of good and sufficient cause the Court should bear in mind when dealing with extension of time to file an appeal abide the 30 days period. In so far as the well established principles are concerned the Supreme Court in **Nicholas Kiptoo Korir Salat (supra)** adopted post the Civil Procedure Act and Rules made it very clear and set out to guide the Courts as follows:

“(i). Granting the extension of time is a discretionary power of the Court which will be exercised in favor of the applicant for good and substantial reasons

(ii). 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.

(iii). A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court.

(iv). Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.

(v). Whether there is a reasonable reason for the delay, the delay should be explained to the satisfaction of the Court.

(vi). Whether there will be any prejudice suffered by the respondents if the extension is granted.

(vii). Whether the application has been brought without undue delay.

Those words of the Supreme Court appear to mirror the notice of motion before me. I wish to make it clear that there is now a long time of authorities which have held more than once that the Court has wide and unfettered discretion under the proviso of Section 79 (G) of the Civil Procedure Act to extend time within which to serve the memorandum of appeal and even the appeal itself. **(See Leo Sila Mutiso v Rose Hellen Wangari Mwangi (supra), Paul Wanjohi v Duncan Gichane Mathenge Civil Application No. 50 of 2010, Gahrae Peter Munya v Dickson Mwenda Kithinji Civil Application No. 2 of 2014).**

In applying the above principles, I will begin by first considering the ground on the length of delay and the reason for the delay prima facie evidence shows that the trial Court delivered Judgment on 29.1.2020 awarding both general and special damages at Kshs.3,094,875/= plus costs and interest. The applicant and intended appellant had to his advantage 30 days to file an appeal as provided for in Section 79 (G). That did not happen until the 30.5.2020 when he labored under the belief that there was need to file an appeal and with that he had to apply to this Court for an extension of time for leave to appeal the Judgment.

By his explanation, the delay was occasioned by mistake of counsel who had firm instructions to challenge the award on appeal.

The respondent in response faulted this argument by the applicant and said that it was not in keeping with the proviso under Section 79 (G) of the Act on good and sufficient cause to extend time in favour of the applicant.

As can be seen there is no dispute that Section 79 (G) places a duty upon a party who is aggrieved by any order or Judgment of an inferior Court to file his appeal within 30 days after pronouncement and receipt of copy of the impugned Judgment. The affidavit by the applicant conclusively confirms that the applicant was dissatisfied with the assessment of damages, but as the time instructions was being sought and issued the 30 day period had already expired. I would like to add my observations that is to say that in the month of March – May 2020 occurrence and events of Covid-19 pandemic set asunder provision of judicial services. It's a primary importance to state that the Court system was on lockdown except for limited litigation through the digital platform. In my view, such extenuating and compelling circumstances are to be taken judicial notice of in one way or another when discretion provided for is exercised on applications to extend time.

There is no denying that the respondent is in possession of a valid regular Court Judgment which should not be delayed by processes of appeals by an applicant who fails to exercise due diligent to commence any right of appeal as provided for in the statute. Turning to this case, in the event motion to admit the appeal is granted as argued by the respondent obviously the process to schedule the appeal would occasion delay and interim stay to access the fruits of the Judgment.

It is the view of this Court that despite objection raised by the respondent, the applicant counsel has submitted that in the intended appeal material tendered provides a good case likely to succeed on appeal.

It is perhaps best to cite the comparative precedent in **United Arab Emirates v Abdelgna far & others {1995} IRLR** where test in exercising the discretion to extend time was stated in the following passage thus:

“In the light of the guidance combined in these authorities, it is possible to state with reasonable precession, the principles, which govern the exercise of the Appeal Tribunals discretion to extend time and to identify those factors regarded as relevant:

(i). The grant or refusal of an extension of time is a matter of judicial discretion to be exercised not subjectively or at whim or by rigid rule of themes, but in a principled manner in accordance with reason and justice. The exercise of the discretion is a matter of weighing and balancing all the relevant factors which appear from the material before the appeal tribunal. The result of an exercise of a discretion is not dictated to any set factor. Discretions are not packaged programmed responses.”

In the context of this application however, I acknowledge that the appeal was not filed within time. Applying test that the Court ought not to prevent the applicant from proceeding to canvass his appeal because the appeal was not filed promptly within 30 days would occasion prejudice assuming the intended appeal succeeds at a full hearing. This being the direction I take that there has been appreciable delay but the act or conduct of a party or his counsel not to act with particular promptitude after delivery of Judgment or order to be appealed against should not be used as a ground to fetter exercise of judicial discretion.

The liability of the applicant not to give instructions to his legal counsel at Law in a timely manner unless proved to be intentional should not be used to defeat good administration of justice and adversely affect a party's right to be heard on appeal. I therefore find that there is need for an extension of time to enable the applicant file an appeal against the Judgment of the trial Court.

The second crux of the matter as identified in the notice of motion is whether the application for a stay of execution is to be granted to maintain the status quo pending the outcome of the intended appeal. In this case having decided to grant leave for extension of time the applicants are desirous to obtain stay pending the determination of the intended appeal. The general statement of principle inferred from the relief on extension of time is that without stay there would be fear that the respondent is likely to forge ahead with execution proceedings. This by itself will render the intended appeal nugatory.

It is evident that Order 42 Rule 6 of the Civil Procedure Rule provides the set of conditions to be met by an applicant an order for a stay of execution.

First, the application has been filed without undue delay. Secondly, the applicant is required to show that if stay is denied he will suffer substantial loss. Thirdly, if there is no stay of execution or an order of injunction the intended appeal would be rendered nugatory. Fourth, that the order of stay given should grant a consequential order on security for due performance of the decree at the end of it all. What does the phrase stay of execution or proceedings mean in this context. **See the position in R (on the application of Ashworth Hospital v Mental Health Review Tribunal for West Midlands and Northwest Region {2003} (WLR 127):**

“The purpose of a stay is to suspend the proceedings that are under challenge pending the determination of the challenge. It preserves the status quo.”

In the case of **Global Tours & Trailys WC 43 of 2000 (UR)** three –prong tier test was outlined by the Court as follows:

“Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion, it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay the Court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case. The prima facie merits of the intended appeal in the sense of not whether, it will probably succeed or not but whether, it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously.”

In the submissions filed by both counsels, the leave to extend time has just been considered and granted by this Court in favour of the intended appellant it could not be said in either way that appeal proceedings were in being in the instant case which would enable the Court to compute the measure of delay from the date of the challenged Judgment. In some respect therefore, the underlying condition on time and without undue delay is to take the course highlighted in the first line of the notice of motion seeking leave to extend time to file an appeal out of time.

On the question of substantial loss the **Court of Appeal in Kenya Hotel Properties Ltd v Willesden Properties Ltd CA No. 322 of 2006** held as follows:

“The decree is a money decree and normally the Courts have felt that the success of the appeal would not be rendered nugatory. If the decree is a money decree so long as the Court asserts that the respondent is not in a man of straw, but is a person who, on the success of the appeal, would be able to repay the decretal amount, plus any interest to the applicant however, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree. The Court however was emphatic that in considering such matters as hardship, a third principle was not being established at all.”

In **National Industrial Credit Bank Ltd v Aquinas Francis Wasike Civil Appeal No. 238 of 2005** stated with regard to circumstances which make it difficult in money decrees for the applicant to assess the financial capability of the respondent which is crucial in determining substantial loss likely to cause irremediable prejudice in the event the appeal succeeds concerning the issue, the Court stated:

“that the legal duty is on an applicant to prove allegations that an appeal would be rendered nugatory because the respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by the respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back, the decretal sum, the evidential must then shift to the respondent to show what resources he has, since that is a matter which is peculiarly within his knowledge.” (See also **James Wangalwa & Another v Agnes Naliaka Cheseto Bam HC Misc App No. 42 of 2011**)

In the present case there was therefore no rebuttal evidence regarding the condition on substantial loss from the respondent. Admittedly, the assessment and final award was based on a traffic accident claim surrounding the existence and breach of a duty of care to render the claim against the applicant appropriate to compensate the respondent for the injuries suffered as specified in the Plaintiff. It is fair to say that the respondent might not be in a position to repay back the decretal sum of Kshs.3,094,875/= if on appeal the Court in intervening found the memorandum of appeal therein to be meritorious.

It follows from this that substantial loss test as applied in Order 42 Rule 6 of the Civil Procedure Rules and the decisions that affirms the relative importance that steers grant or denial of stay of execution pending an appeal. In addition, the respondent herein has failed to demonstrate that he is not a man of straw to prove that the applicant is guaranteed a refund of the decretal sum, if the same was to be released before the appeal is heard and determined. With this then it goes without saying that in instance, the intended appeal succeeds, it will automatically be rendered nugatory and the applicant to remain financially ruined.

In the result the notice of motion dated as filed in Court on 29.5.2020 succeeds to the extent of the following declarations:

- (a). That the applicant motion for the relief to extend time for filing an appeal is allowed.***
- (b). That the appeal and record constituting the appeal itself be filed and served upon the respondent within 30 days from today’s delivery of the ruling.***
- (c). That in the interim an order for stay of execution of the Senior Resident Magistrate Civil Suit No. 15 of 2019 do issue pending the hearing and determination of the appeal.***
- (d). That the decretal sum in SRMCC No. 15 of 2019 be deposited in the joint interest earning account opened by both counsels (Advocates) representing the parties in this appeal pending the hearing and determination of the appeal or any such further orders of the Court within 45 days, which period commences forthwith.***
- (e). The record of the trial Court has since been recalled and availed by the Deputy Registrar to facilitate expeditious case management scheduling of the appeal.***
- (f). The applicant to meet the costs of this application assessed at Kshs.15,000/= payable on or before the admission of the appeal.***

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 8TH DAY OF JULY 2020

.....

R. NYAKUNDI

JUDGE

This ruling has been delivered in terms of Article 48 and 159 (D) of the Constitution and practice directions on the general risks associated with COVID – 19 pandemic and the specific consents signed by both counsels dated **8.7.2020(See Gazette Notice No. 3137 of 17.4.2020)**