REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISCELLANEOUS CIVIL APPLICATION NO. 342 OF 2015

WILSON NJOROGE WAIRIMU................................APPELLANT

VERSUS

AERO MARINE CARGO SERVICE...............1ST RESPONDENT

BERYL MUGANDA..2ND RESPONDENT

RULING

1. By a notice motion dated 15th October 2015, the applicant seeks enlargement of time within which to file an appeal against the judgment in **Eldoret CMCC NO. 952 OF 2009**.

2. The applicant also prays that the attached proposed Memorandum of appeal be deemed duly filed and served.

3. The application is based on grounds that;

i) Counsel for the plaintiff was unable to communicate the judgment to the Applicant on time owing to loss of contact after losing his phone.

ii) The applicant was advised of the judgment of **13th October 2015** after the lapse of the period for filing appeal.

iii) The applicant resides in **Mombasa** while his advocate practices in **Eldoret Town** hence the difficulty of communication in a timely fashion.

iv) The delay to file the application is excusable and not inordinate or deliberate.

v) The applicant is entitled to appeal as a right and ought to not be unduly denied the opportunity

vi) Under Article 159 of the constitution this court should determine matters on merit rather than on technicalities.

vii) The applicant stands to suffer substantial prejudice, injury, loss and damage as he has an arguable appeal with high chances of success as enunciated in the draft Memo of Appeal.

viii) The court has un-fettered discretion to enlarge time as prayed.

4. The application was supported by the affidavit of James Njuguna the advocate acting on behalf of the applicant who deposed that when judgment was delivered on **25th August 2015**, he could not contact his client as he did not have his mobile number. His firm sent a letter to the applicant on **15th September 2015** informing him of the judgment through his last known address. Later, on **13th October 2015** the applicant called him inquiring about the outcome of the case including the letter sent by his firm confirming that he had not received any communication on the outcome of his case.

5. Counsel informed the applicant of the fact that his case had been dismissed with costs. It is at this point that he received instructions to appeal from which he proceeded to draft and file a memorandum of appeal. He explains that the delay in filing the appeal was occasioned by factors beyond the applicant's control, adding that the omission of counsel ought not to be visited upon the litigant.

6. The applicant in a supplementary affidavit dated 11th July 2016, added that his appeal has great chances of success and he stands to suffer great loss unless the instant application is allowed. The applicant sought that the court use its discretion to allow the application.

7. The application was canvassed by written submissions where the applicant's counsel pointed out the factors which aid the courts in exercising the discretion whether to extend time to file an appeal out of time as ;

- The period of delay
- The reason for the delay
- The arguability of the appeal
- The degree of prejudice which could be suffered by the Respondent if the extension is granted
- The importance of compliance with time limits to the particular litigation or issue; and
- The effect if any on the administration of justice or public interest if any is involved.

8. As regards the period of delay counsel submitted that the judgment was delivered by the trial court on 25th August, 2015 and the instant application was filed in court on 16th October, 2015. He stated that the period for filing an appeal from the lower court to the High Court is thirty (30) days and computation of time is governed by the provisions of **Section 57 of the Interpretation and General Provisions Act, Cap 2, Laws of Kenya and Order 50 Rule 1, 2, 3 and 4 of the Civil Procedure Rules.**

9. The contention is that reading of the provisions of the law stated hereinabove shows that that there was no inordinate delay on the part of the Applicant as this application was filed a few days after time had run out-he cited the case of **Jennifer Njuguna & Anor –vs- Robert Kamiti Gichuhi which stated as follows;**

> ***"....while statutory times are certainly important to ensure the due and efficient administration of justice, they are not, in themselves a core substantive value in the same sense, for example, that the Constitution and the Elections Act place on the timelines for filing Election Petitions".***

10. **Reason for the delay:** It was counsel's submission that the delay has been duly explained and that both the Applicant and his advocates on record are not guilty of indolence or laches as the advocate took all reasonable and viable measures to communicate to the Applicant about the outcome of the judgment keeping in mind that the Applicant's advocates could not file an appeal without instructions to do so, and once the Applicant instructed his advocates to file an appeal and or an application for extension of time within which to file an appeal, the same was done expeditiously and timeously.

11. The application is opposed by the Respondents on the grounds inter alia that it is bad in law, it lacks merit and it should be struck out. Reference is made to section 79 of the Civil Procedure Act which provides that;

> **Every appeal from a Section 79G of the Civil Procedure Act Cap 21 Laws of Kenya 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:**
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> **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.**

12. Further, that **Order 50 Rule 6 of the Civil Procure Rules, 2010** provides that;

> **Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:**
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> **Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.**

13. The respondent's counsel points out that despite the attempt to explain the delay, a casual look at all the documents annexed to the application, demonstrates that there is no iota of evidence that the letter question was ever sent as alleged-this could have been easily confirmed by annexing a copy of the certificate of postage which was not done. He thus urged the court to find that that there isn't sufficient reason advanced by the Applicant or material placed before court to warrant an exercise of discretion and enlarge time.

14. In support of this position he cited the decision of the Privy Council in the case of **Ratnam v. Cumarasamy [1964] 3 All ER 933 where it was held that;**

> **"The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of**

the rules which is to provide a time table for the conduct of litigation." (Cited with approval by the Court of Appeal in Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR)

15. Further that it is also trite law that equity aids the vigilant and not the indolent and he who comes to equity must come with clean hands yet from the supplementary affidavit sworn by the applicant, he failed to mention at all when he became aware that the judgment had been delivered.

16. It is respondents insistence that since the judgment was delivered on 25th August, 2015, the appeal ought to have been filed by 24th September, 2015 as per Section 79G of the Civil Procedure Act, Cap 21 Laws of Kenya; no sufficient reason has been proffered for failure to do so and the instant application is thus bereft of merit and should be dismissed with costs to the Respondent.

17. **Arguable Appeal:** The court is urged to consider the issues raised in the memorandum of appeal and find that the same is arguable. It is submitted that a reading of the draft Memorandum of Appeal shows that the Appellant has plausible and conceivably persuasive grounds of fact and law to overturn the trial court's finding and the degree of prejudice which could be suffered by the Respondent if extension is granted has not demonstrated to this.

18. The applicant's counsel argues that the instant application is meritorious, has been brought under the correct provisions of the law, and is made in good faith and in the interest of justice. He contends that the Applicant has a right to appeal, which right is enshrined in the constitution and in statute and it behooves this court to allow the Applicant to enjoy this fundamental right.

19. Furthermore, that even though Section 79G of the Civil Procedure Act provides that an Appeal form a subordinate court to the High Court shall be filed within a period of thirty (30) days from the decree or order appealed form, the Provision to Section 79G leaves no doubt that this Court has wide and unfettered discretion to extend the time within which to file or admit an appeal outside the prescribed time if the Applicant has satisfied the court that he had good and sufficient cause for not filing the appeal within time.

20. The matters to be considered in the exercise of discretion are not exhaustive and each case may very well raise matters that are not in other cases for consideration. In ***MWANGI V KENYA AIRWAYS LTD,*** *[supra]*, the court having set out matters which a single judge should take into account when exercising the discretion under *Rule 4*, held:

> ***"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."***

21. I am persuaded that it is upon the applicant to place sufficient material before the court which would explain why there was delay in filing the Memorandum and Record of Appeal. The Court has to balance the competing interests of the applicant with those of the respondent. This was well stated in the case ***M/S PORTREITZ MATERNITY V JAMES KARANGA KABIA, CIVIL APPEAL NO. 63 OF 1997*** where the Court stated:

> *"That right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment delivered in his favor. There must be a just cause for depriving the Plaintiff of that right."*

22. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercised. There have been numerous judicial pronouncements on this precise point. Aganyanya, JA *in* ***MONICA MALEL & ANOR V R, ELDORET CIVIL APPLICATION NO. NAI 246 OF 2008,*** stated:

> ***"When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show … the applicants are not quite sure of why the delay in filing the notice of appeal within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay."***

23. However it must not be assumed that the discretion is entirely unfettered as Lord Romilly MR explained in **HAYWOOD V COPE, (1858) 25 BEAV 140:**

> ***"… the discretion of the Court must be exercised according to fixed and settled rules; you cannot exercise a discretion by merely considering what, as between the parties, would be fair to be done; what one person may consider fair, another person may consider very unfair; you must have some settled rule and principle upon which to determine how that discretion is to be exercised. So the person who seeks an equitable remedy must be prepared to act equitably, and the court may oblige him to do so."***

24. Where the mistake was occasioned by the Advocate as is the case here, the appeal case of **RAJESH RUGHANI V FIFTY INVESTMENTS LIMITED & ANOTHER CIVIL APPEAL NO. 80 OF 2007** gave direction as per the case of **HABO AGENCIES LIMITED -V- WILFRED ODHIAMBO MUSINGO [2015] EKLR** follows;

It is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions in the conduct of litigation. Courts have always emphasized that the parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel*. In* ***Mwangi -v-Kariuki*** ***(199) LLR 2632 (CAK)*** *Shah, JA ruled that mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant's careless attitude.*

25. In the instant case, and in my view, the advocate and his client the applicant have not shown sufficient or plausible cause for the delay. Certainly I take cognizance of the position stated in the case of **BURHANI DECORATORS & CONTRACTORS V MORNING FOODS LTD & ANOTHER [2014] EKLR** where it was argued that any officer can make a mistake and this ought to be pardoned by the court.

26. **I am also aware of the remarks made in** **BELINDA MURAI & OTHERS – VS – AMOS WAINAINA [1978] KLR 278** per **Madan JA**(as he then), cited with approval in the **Nyeri CA 18/2013** (supra), where he described what constitutes a mistake in the following terms:

> ***"A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate."***

27. His Lordship went further to state that:

> ***"It is well known that courts of law themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of legal point of view which courts of appeal sometimes overrule…"***

28. However it would appear that the applicant and his counsel are being economical with the truth-of course mistakes and forgetfulness is part of human nature, but in this age of information technology, loss of a phone cannot render one to be totally paralyzed, and I take judicial notice that no evidence was presented that a report was made to police about such loss, further' today's technology is so advanced that the loss of a phone does not automatically translate into loss of all contact as some contacts are retained. There is no demonstration of diligence in this matter.

29. Although the Applicant sought to invoke the provisions of Article 159 of the Constitution, the shortfalls enumerated above cannot be cured even under the oxygen principles as they go to the root of the case as Kiage, JA **(in his dicta which was upheld by the Supreme Court) rightly observed in Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR that;**

> **2. "… I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned…"** cited with approval in **Wachiuri Wahome v Festus Gatheru Wahome & 6 others [2016] eKLR**
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> **3.** I concur with the respondent's counsel that It is also important to note that this application was filed in 2015 under certificate of urgency and has never been prosecuted, a clear sign of laxity and as such it is self-defeating in as far as it purports to be brought under Section 1A (1) of the Civil Procedure Act, Cap 21 Laws of Kenya which provides that;
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> **"The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act."**

30. Consequently I hold and find that the applicant has not persuaded this court that she is deserving of the discretion, and the application is dismissed with costs to be borne by the applicant.

DATED AND SIGNED at ELDORET this 20TH day of DECEMBER 2018

H. A. OMONDI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 13TH DAY OF FEBRUARY 2019

O. A SEWE

JUDGE