



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**MISC.CIVIL APPLICATION NO. 152 OF 2018**

**LUKE KIPKOSGEL.....APPLICANT**

**VERSUS**

**DOUGLAS MMATSI.....RESPONDENT**

**RULING**

[1] Before the Court for determination is the Applicant's Notice of Motion dated **14 December 2018**. It was filed herein pursuant to **Order 50** of the **Civil Procedure Rule, 2010** for orders that:

[a] Spent

[b] That time for filing an appeal against the decision of the Honourable Principal Magistrate in **Eldoret Chief Magistrate's Civil Case No. 362 of 2016** be extended;

[c] That pending the hearing and determination of this application, the enforcement of the Orders made in **Eldoret Chief Magistrate's Civil Case No. 362 of 2016** be stayed or suspended by the Court;

[d] That the costs of the application be borne by the Applicant.

[2] The application was premised on the grounds that the Applicant was not informed of the Judgment that was delivered by the lower court on **31 August 2018**; and that he only learned of it on **10 December 2018**, by which time, the appeal window had already been closed. It was further the contention of the applicant that he is dissatisfied with the said Judgment and is desirous of lodging an appeal; and that the Respondent will not in any way be prejudiced if the appeal is filed outside the requisite time. Thus, the Applicant posited that the ends of justice necessitate that time be extended as prayed.

[3] The application was supported by the averments in the Applicant's Supporting Affidavit sworn on 14 December **2018**. Annexed to that affidavit is a Draft Memorandum of Appeal impugning the decision of the lower court on liability and quantum.

[4] The application was resisted by the Respondent, **Douglas MMaiti**, vide his Replying Affidavit sworn and filed on **27 December 2018**. According to him, there is no proof by way of documentary evidence to corroborate the applicant's allegation that he only came to know of the lower court's Judgment on **10 December 2018**; and that to the contrary, the Applicant was represented by the firm of **Omwenga & Company Advocates** when the Judgment was delivered. The Respondent further asserted that, since the Applicant swore an affidavit before **Isaac Kipkosgei Bungei Advocate** dated **3 December 2018** indicating that he was served with a Proclamation Notice on **3 December 2018**, the present application can only be an afterthought, filed with the sole intention of frustrating the execution of the Decree by the subordinate court. A copy of the affidavit in question was annexed to the Respondent's Replying Affidavit and marked **Annexure A**.

[5] It was further the averment of the Respondent that no useful purpose would be served by allowing the instant application, as the proposed Memorandum of Appeal consists merely of generalities which do not raise any issue. Moreover, no demonstration of seriousness was exhibited by the Applicant to show that he had requested the subordinate court for typed and certified copies of proceedings and Judgment. He therefore was of the view that the instant application is a blatant abuse of the due process of court and should be declined to let him, as a successful litigant, enjoy the fruits of his Judgment.

[6] The application was argued on the **16 January 2019** and in the submission of **Mr. Momanyi** for the Applicant, no prejudice will be suffered by the Respondent if leave to appeal out of time granted, as the Respondent will be given an opportunity to respond to the appeal. Regarding the Applicant's averment that the Applicant acknowledge his awareness of the lower court Judgment as of **3 December 2018**, **Mr. Momanyi** argued that even then, there was nothing the Applicant could do, in terms of filing the appeal, without leave of the Court. It was

further reiterated by **Mr. Momanyi** that there will be no prejudice to the Respondent if leave to appeal out of time is given; and that the person who stands to suffer prejudice if the application is declined is the Applicant. He further submitted that the appeal is arguable, since the law allows payment of only **Kshs. 3 million** as compensation for such loss and damage as was the subject of the lower court suit.

[7] **Mr. Oduor** for the Respondent, on the other hand, opposed the application, contending that the reason given by the Applicant is not sufficient for purposes of the invocation of the Court's discretionary powers under **Order 50** of the **Civil Procedure Rules**. He pointed out that the Applicant was represented before the lower court; and that his Counsel even asked for temporary stay after the Judgment was delivered; which application was granted by the lower court. He therefore submitted that no justification was made for the delay; and that, in any case, the annexed Memorandum of Appeal raises no substantial grounds

[8] I have give due consideration to the application, the affidavits filed herein together with their annexures as well as the oral submissions made by the parties on **16 January 2019**. **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 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 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."**

[9] In the light of the aforesaid provision, **Order 50 Rule 6** of the **Civil Procedure Rules, 2010** stipulates that:

**"Where a limited time has been fixed for the doing of 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..."**

[10] Clearly therefore, the Court does have the discretion to enlarge time where necessary; the only consideration being whether sufficient cause has been shown for the exercise of the discretion under the aforementioned provisions. and it is now settled that some of the guiding principles are:

[a] That there be a good and reasonable explanation for the delay;

[b] That the application be brought without undue delay;

[c] That no prejudice will be suffered by Respondent.

[a] **On the Explanation for the Delay:**

[11] There is no controversy that the lower court Judgment was delivered on **31 August 2018**. There appears to be no dispute either that Counsel for the Applicant was present in Court and even applied for temporary stay of execution. The Applicant however contended that the said Advocate did not promptly inform him of the said Judgment until **10 December 2018**; by which time the appeal period allowed by **Section 79G** of the **Civil Procedure Rules** had expired. That, in my view is a plausible explanation, given the clarification given by the Applicant's Counsel that the Advocate before the lower court had been engaged by the insurance company concerned, who may have felt answerable not to the Applicant but to the insurance company.

[12] I note that in the Affidavit annexed to the Respondent's attributed to the Applicant, which shows that it was sworn on **3 December 2018**, the Applicant thereby expressly acknowledged that he had been served with a Proclamation as well as a Notification of Sale on **3 December 2018**; and was therefore alerted of the existence of a Judgment and Decree against the Applicant in respect of the accident that was the subject of the lower court case. However, and as was rightly pointed out by **Mr. Momanyi**, by that time the appeal period had already lapsed and the Applicant was therefore in no position to file his appeal without first seeking the leave of the Court. In any case a Proclamation and Notification of Sale hardly contain the specifics that are to be found in a Judgment. Thus, it is my finding that a good explanation has been made by the Applicant for his failure to appeal in time.

[b] **On whether the application was filed without delay:**

[13] Going by the date of **10 December 2018** as the date when the Applicant was informed of the Judgment, it is manifest that the instant application was filed with due dispatch. The instant application was filed on **14 December 2018**, within days of the Applicant's being informed of the Judgment. I am therefore satisfied that the second condition has also been met by the Applicant.

[c] **On whether the Respondent will be prejudiced:**

[14] It was the averment and submission of the Applicant that no prejudice would be suffered by the Respondent should his application be allowed. The Respondent took a contrary position contending that the Applicant is simply out to delay his enjoyment of the fruits of his litigation. Having weighed the parties' respective positions, I take the view that the party that would suffer the most prejudice would be the Applicant, should he be denied a chance to pursue his appeal. I say so because, the Respondent already has a Decree in his favour; and the delay in its enjoyment will be compensated for by costs as well as interest on the principal sum, should the appeal turn out to be frivolous. I would thus find instructive the position taken by the court in **Banco Arabe vs. Bank of Uganda [1999] 1 EA 22** that:

**"The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors, lapses should not necessarily debar a litigant from the pursuance of his rights and unless lack of adherence to rules renders the appeal process difficult and inoperative. It should seem that the main purpose of litigation, namely, the hearing and determination of disputes should be fostered rather than hindered."**

[15] In the result, I find merit in the application dated **14 December 2018** and would allow the same, but with an order that the costs thereof shall be borne by the Applicant.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 6<sup>TH</sup> DAY OF MARCH 2019**

**OLGA SEWE**

**JUDGE**