REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL NO. 130 OF 2009

FAUZI SAID ALI.....1ST APELLANT

KHALID SAID AHMED ALI.....2ND APPELLANT

FAIRUS SAID AHMED ALI.....3RD APPELLANT

HAWA SAID AHMED ALI.....4TH APPELLANTS

VERSUS

SAID AHMED ALI.....1ST RESPONDENT

ILHAM ABDALLAH MOHAMMED.....2ND RESPONDENT

RULING

There are 2 applications coming up for determination. One is the application dated 6th may 2016 and another dated 16th August 2018. The application dated 6th may 2016 seeks leave to appeal out of time, stay of execution and that the leave operates as a stay on proceedings in High Court Appeal no. 130 of 2009. The second application seeks leave to file the appeal out of time. The appeal is against the decision of the Kadhi's court in Nakuru Kadhi Court Case no. 3 of 2016 that was delivered on 31st October 2014.

APPLICANTS' CASE

The applicant contended that she was not aware of the delivery of judgement in the matter but when she got wind of the same she proceeded to file the application to seek leave to file the appeal out of time on 6th may 2016. She sought solace in the principle that the mistake of an advocate should not be visited upon an innocent litigant. She further submitted that the failure to include a prayer to file a notice of appeal out of time was a mistake of the advocate. She relied on the cases of ***Patrick Maina Mwangi v Waweru Peter [2015] eKLR*** *and* ***Mwai v Murai No. 4 (1982) KLR.*** The applicant further relied on Article 159(2)(d) of the constitution the crux of which is that justice should be administered without undue regard to procedural technicalities.

The applicant submitted that under Order 42 rule 2 of the Civil Procedure rules courts will not grant stay unless they are satisfied that substantial loss may result to the applicant and that the application has been made without unreasonable delay. She further submitted that the impugned damage is bound to be executed and that would render the appeal nugatory.

The applicants submitted that they have an arguable appeal as there was a procedural error in not inviting the Chief Kadhi or 2 Kadhis as per section 65 of the civil procedure act and the same may have led the honourable judge to arrive at a wrong decision not supported in Sharia Law.

RESPONDENTS' CASE

The respondents filed a replying affidavit in opposition of the application dated 16th August 2018. They also filed submissions in opposition of the applications. They submitted that the delay in filing the appeal arose from the applicants' indolence and that the court should not reward this based on the fact that the application for stay was filed 1 year and six months after the delivery of judgement. The aforesaid indolence is further seen by the applicants' wait for 3 years and 9 months from the judgment to file a further application seeking leave to file the appeal out of time. The respondent relied on ***Rukenya Buuri v M'arimi Minyora & 2 others [2018] eKLR*** where the court was of the view that a litigant must be diligent enough to follow up how his case is being handled by an advocate.

The respondent submits that a diligent litigant would have queried her

advocate when she did not receive regular updates on the progress of her matter and that she remained indifferent about the errors and omissions made by her advocates thus she is bound by the errors and omissions of her advocates.

The respondents maintained that the delay was inordinate and the explanations given were not plausible. They cited ***Aviation Cargo Support Ltd. Vs St mark Freight Services Limited [2014] eKL*R** where the court of appeal held that a 6-months delay was inordinate where the same was not satisfactorily explained.

The respondents contend that the applications should be dismissed with costs.

ISSUES FOR DETERMINATION

a) Whether the delay to file the appeal was inordinate

b)Whether the court should grant the prayers sought

WHETHER THE DELAY TO FILE THE APPEAL WAS INORDINATE

In ***Teresiah Wangari Ndungu v Paul Kamau Mwaniki [2014] eKLR*** the court observed;

The principles regarding applications for extension of time have followed a well beaten path.

In ***Leo Sila Mutiso v Rose Hellen Wangari Mwangi, Civil Application No. Nai. 255 of 1997*** the Court set out those principles in the following manner:

> ***"It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well-settled that in general, the matters which this Court takes into account on deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly, (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted."***

In ***Stanley Kahoro Mwangi & 2 others v Kanyamwi Trading Company Limited [2015] eKLR*** the court held;

> **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:
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> ***"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 favour. There must be a just cause for depriving the Plaintiff of that right."***
>
> **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.**

In ***Patrick Maina Mwangi v Waweru Peter [2015] eKLR*** the court cited ***Mwai V Murai No. 4 (1982) KLR*** where **Madan JA said**;

> ***"A mistake is a mistake; it is no less a mistake because it is an unfortunate slip. It is no less pardonable because it was 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 person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate."***

The applicant has been a victim of advocates whose lapses could cost her the appeal. I agree that the mistakes of the advocate should not be visited upon the litigant. The main delay worth consideration in my opinion is the 1 year and 6 months from the date of the judgment to when the application to file the appeal out of time was made. The delay in having that application heard appears to be administrative and not entirely the applicants' fault. In my view, the delay is not inordinate.

WHETHER THE COURT SHOULD GRANT THE PRAYERS SOUGHT

The judgment in the lower court is yet to be executed and therefore I believe the appeal is arguable and has chances of success. I find that the delay is not inordinate and the applicant is granted leave to file the appeal and the notice of appeal out of time. Further the leave does operate as stay in the proceedings in Nakuru Kadhis Court Miscellaneous Application No. 3 of 2016.

Cost be in the cause.

S. M GITHINJI

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this **4th** day of **June, 2019**

In the presence of:

Mr. Abiero holding brief for Mr. Kamau for the respondent

And absence of Mr. Ali for the appellants

Ms. Sarah – Court assistant