



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HC. MISC. APPLICATION NO. 50 OF 2019

TIMOTHY WAMBUA MUTISO alias TIMOTHY GIDEON WAMBUA MUTISO

(sued as the legal rep. to the estate of

CONSOLATA MUENI WAMBUA..... APPLICANT

-VERSUS-

ANN NYHENYA MUMO alias HANNAH NTHENYA MUMO.....RESPONDENT

RULING

1. The application for determination is dated 06/02/2019 and was filed under certificate of urgency. It is brought under Sections 1A, 1B, 3, 3A 79G and 95 of the Civil Procedure Act, Order 42 Rule 6 (1) Order 50 Rule 6 & Order 52 Rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of the law. It seeks the following orders: -

a) **THAT** leave be granted to the applicant to appeal out of time against the whole judgment and decree in Tawa SRMCC No. 164 of 2017.

b) **THAT** there be a stay of execution of the said judgment and the decree in Tawa SRMCC No. 164 of 2017 pending the hearing and determination of the intended appeal.

c) **THAT** costs be in the cause.

2. The application is supported by the grounds on the face of it, the supporting affidavit of Kiminza Charles Zakayo sworn on 06/02/2018 and his further affidavit sworn on 21/03/2019.

3. The principal grounds are that:-

a) The judgment was delivered in the absence of and without notice to the Applicant's advocates on record.

b) The Respondent's advocates failed to inform the Applicant's advocates about the judgment in good time despite being directed by the Court to do so.

c) The Applicant's advocates only learnt of the judgment on or about January 14, 2019 when they opened their offices after the festive holidays.

d) The intended appeal has overwhelming chances of success.

e) The Respondent has started the process of execution.

f) If stay of execution is not granted, the Applicant will suffer substantial loss as the decretal sum of kshs 630,634.50/= awarded by the trial Court is substantial.

4. Both parties filed written submissions in respect of the application.

5. The Applicant submits that the court has unfettered discretion in determining whether an Applicant is entitled to leave to file appeal out of time and that it can take into account any factor in exercising that discretion. He relies *inter alia* on **Stanley Kahoro Mwangi & 2 others – vs- Kanyamwi Trading Co. Ltd (2015) eKLR**. According to him, the issue revolves around two factors *to wit*; the reason for failing to file

an appeal within the prescribed time and the period of the delay.

6. He submits that he could not file the appeal within the prescribed time because judgment was delivered in his absence and without notice.

7. With regard to the stay of execution, he submits that the principal sum of Ksh 630,634.50/= plus costs and interest is substantial and will cause difficulties in his life. He also submits that if the appeal succeeds, the Respondent will not be able to pay back because her testimony in the trial court was that she is a destitute. He relies on **Masisi Mwita –vs- Damaris Wanjiku Njeri (2016) eKLR** where it was held that;

“..to show that the appellant stands to suffer substantial loss, it must be demonstrated that the respondent will not pay the money back if the appellant succeeds in his appeal.”

8. He also relies on **Stanley Karanja Wainaina & Anor –vs- Ridon Anyangu Mutubwa (2016) eKLR** where it was held that once a party who has filed an application for stay pending appeal pleads that the Respondent will be unable to pay back the decretal sum if the appeal succeeds, the burden of proving ability to pay back shifts to the Respondent. It is therefore his submission that the Respondent has not contradicted his assertion about her inability to pay back.

9. He submits that the application was filed 19 days after lapse of the statutory period and as such, the delay was not inordinate.

10. As for security, the Applicant has proposed to deposit kshs 300,000/= in Court or a joint interest earning account in the names of the parties advocates. Further, he has proposed to secure the balance by way of a bank guarantee or insurance bond.

11. The application is opposed through a replying affidavit sworn on 18/02/2019 by counsel S.M Makau and his further affidavit sworn on 21/03/2019. The gist of the opposition is that the Respondent’s advocate is not to blame for the Applicant’s failure to learn about the judgment in good time.

12. With regard to stay of execution, the Respondent submits that judgment was delivered over three months before the application was brought and that such kind of delay is not excusable.

13. She also submits that **Timothy Wambua** the Applicant has not sworn any affidavit to demonstrate that he has an arguable appeal.

14. Further, she submits that the Applicant has not sworn an affidavit to demonstrate the substantial loss that he will suffer if the application is disallowed. It is also her submission that she is a nurse with the ability to refund the decretal sum if the appeal is successful.

15. Further, she submits that the Applicant has failed to demonstrate that no prejudice will be occasioned to her if stay is granted. That she suffered severe injuries and is not enjoying her lawfully obtained judgment.

16. On the issue of leave to file appeal out of time, she submits that the Applicant’s counsel was aware of the judgment since 11/01/2019 but only informed the client on 23/01/2019. She contends that no good reason has been given for the delay.

17. She submits that the application is brought under the wrong procedure because Section 79G does not provide for filing an application to seek leave out of time. That according to the proviso thereof, the appeal should be filed and then leave sought to have it admitted.

18. On a without prejudice basis, she submits that since the appeal is only on quantum and the Applicant had suggested a sum of Kshs 500,000/=, that amount should be released to her and then the balance be deposited in court pending the hearing of the appeal.

19. She relies *inter alia* on **Wasike –vs- Swala 1984 KLR 591-594 and Ruithibo –vs- Nyingi 1984 KLR 505-510.**

Determination

20. I have considered the application, affidavits in support replying affidavits as well as the written submissions. I propose to first deal with the Respondent’s complaint that the application was brought under the wrong procedure. Section 79G of the Civil Procedure Act provides as follows;

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.

21. The import of the proviso, in my view, is to safeguard the right of appeal even for the late comers as long as they can persuade the Court to exercise its discretion in their favour. Any contrary interpretation is rigid and does not advance the interests of justice. I agree with the sentiments of Justice Joel Ngugi in **Samuel Mwaura Muthumbi –vs- Josephine Wanjiru Ngugi & another [2018] eKLR** where he expressed himself as follows;

“I am aware of this line of cases by the High Court on this question. I have, however, taken a different view of the provision. I do not take the phrase “an appeal may be admitted out of time” to mandatorily require that a party who is late to file an appeal must

first file it and then approach the Court for the filed appeal to be admitted out of time. At best I find such a constrained reading of the statute to be an impermissible raising of a procedural technicality above substance. At worst, that reading of the statute is not in accord with our practice and may be out of place with the “mischief rule” of statutory interpretation in this case. It appears obvious that the intention of the statute was to provide a mechanism for a party who did not, for good cause, file an appeal on time, to approach the Court to be allowed to file such an appeal. To deny such a party leave to file the appeal merely because they did not, first, file the appeal which would have been, in the first place, out of time as a way of preserving their right to approach the Court seems a touch too formalistic for our jurisprudence in this day and age.”

22. I will next consider whether the Applicant deserves the orders sought.

23. In **Leo Sila Mutiso –vs- Rose Hellen Wangari Mwangi, (Civil Application No. Nai. 255 of 1997) (unreported)**; the Court of Appeal stated as follows with regard to how such discretion should be exercised.

“It is now well 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 in deciding whether to grant an extension of time are: first, the length of the 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”.

24. The judgment was delivered on 27/11/2018 and the statutory period for appealing lapsed on 19/01/2019 due to the Christmas vacation. This application was filed on 07/02/2019. The length of delay was therefore 19 days.

25. The Applicant has exhibited a court attendance sheet showing that the judgment was initially scheduled to be delivered on 18/09/2018 and there was a representative in court ready to take it. They were however advised that it would be delivered on notice. This assertion was not rebutted by the Respondent. When the judgment was eventually delivered, there was no attendance from the Applicant or his counsel and there is nothing to show that they were aware of the date. The letter dated 28/11/2018 from the Respondent’s counsel was clearly served on 11/01/2019 and I am convinced that he learnt about the judgment on that date.

26. There was still some time left to lodge the appeal when the Applicant’s counsel learnt about the judgment. He however explained that failure to do so was due to the fact that he needed to ascertain the particulars but the court file was missing and was only made available on 22/01/2019. The letter dated 23/01/2019 addressed to the Applicant’s insurer buttresses this disposition.

27. The insurer eventually gave instructions to appeal on 04/02/2019 as evidenced by the email extracts. The intervening period was attributed to the approvals involved at different management levels of the insurer. From the foregoing, my view is that the delay has been sufficiently explained.

28. On whether the appeal has chances of success, I have looked at the memorandum of appeal and the Applicant’s main grievance is that the quantum of damages awarded is inordinately high compared to the injuries suffered. That is an arguable issue and at this stage, arguability of the appeal is all that an Applicant is required to demonstrate. As for the prejudice to be suffered, the Respondent deposed that she is being denied the enjoyment of her lawfully obtained judgment.

29. While it is true that the Respondent has a lawfully obtained judgment, it is also true that the Applicant has demonstrated that he deserves a chance to challenge that judgment and all this is geared towards ensuring that the interests of justice are served. I do not think the Respondent will suffer any adverse effects if the orders are granted.

30. The totality of the foregoing is that the applicant has demonstrated that he deserves leave to appeal out of time.

31. Having opined that the Applicant should be granted leave to appeal out of time and after looking at all the materials placed before the court *vis-à-vis* the conditions for grant of stay, I am satisfied that the application has been brought without unreasonable delay and the Applicant has deposed that he is ready and willing to furnish security for the due performance of the decree.

32. It is also noted that the Applicant is only contesting quantum and not liability. In light of the Applicant’s counsel’s opinion that Kshs. 500,000/= would have been adequate compensation I find that the grant of stay should be conditional. **I therefore grant leave to appeal out of time and stay of execution of the decree on the following conditions: -**

i. Appeal to be filed within 20 days of today’s ruling.

ii. The Applicant to pay the Respondent Kshs. 300,000/= through her advocate within 30 days.

iii. The balance to be secured through a bank guarantee to be filed with the Applicant’s counsel within 30 days.

iv. Costs shall be in the cause.

33. The circumstances prevailing in this case are similar to those in **Makueni Hcc. Misc. Application No. 51/2019 (Timothy Wambua Mutiso –vs- Ian Steve alias Ian Musyoki Munyao)**. The claim arose from the same accident and the Applicant in both cases is the same. The counsel appearing are also the same. I therefore direct that the ruling herein applies to Misc. No. 51 of 2019, *mutatis mutandis*.

Orders accordingly.

DELIVERED SIGNED AND DATED THIS 6TH DAY OF JUNE 2019, IN OPEN COURT AT MAKUENI.

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H. I ONG'UDI

JUDGE