



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HC.MIS.CIVIL APPEAL CASE. NO. 47 OF 2019

EUNICE MUMBUA MUTUKU.....APPLICANT

-VERSUS-

BERNARD KILONZO JOHN.....1ST RESPONDENT

KEITH OWINO OGANDA.....2ND RESPONDENT

TERCEZ LOGISTICS.....3RD RESPONDENT

RULING

1. The Applicant and intended Appellant filed the Notice of Motion dated 14th January, 2019 seeking leave to file appeal out of time against the whole judgment of the Senior Resident Magistrate's court in Kilungu SRMCC No. 97 of 2014 delivered on 22nd June, 2018.
 2. The main grounds are that the Applicant fell ill after delivery of the judgment and was not able to give instructions to her advocate. Secondly, she is aggrieved that liability was only found by the court to fall on the 1st Respondent. Further that she was not awarded any general damages for loss of earning capacity.
 3. She filed a supporting affidavit sworn on 14th January, 2019 expanding of the grounds raised. She claims to be unable to resume duty as an ECD teacher due to the injuries suffered. She annexed her draft memorandum of appeal "EMM2". She also annexed a copy of an appointment card from A.I.C Kijabe Hospital to show she had been unwell.
 4. In her further affidavit, she stressed the fact that the accident left her incapacitated hence her inability to appeal in good time. She deponed that even the trial court had appreciated her being disabled on the lower limbs as a result of the accident.
 5. The firm of O.N Makau and Mulei filed written submissions in support of the application. Counsel cited the cases of **Factory Guards Ltd –vs- Abel Vundi Kitungi (2014) eKLR**; **Nicholas Kiptoo Arap Korir Salat –vs- IEBC & 7 Others (2014) eKLR**, and **Edward Njane Nganga & Anor –vs- Damaris Wanjiku Kamau & Anor (2016) eKLR**. Based on this he submitted that extension of time is an equitable remedy and it's only a deserving party that benefits from it.
 6. He further submitted that the Applicant had laid down sufficient material to enable the court exercise its discretion in her favour. On whether she had come to court with clean hands, he contended that she had done so as was found in the case of **CMC Holdings Ltd –vs- Nzioki (2004) 1KLR 173**.
 7. It was counsel's submission that the delay had been satisfactorily explained by the Applicant. On whether there will be any prejudice to be suffered by the Respondents if the extension is granted he submitted that the Respondents had not made mention of any prejudice to be suffered.
 8. The application was opposed by the Respondents who filed a replying affidavit by Agnes Wangari Gichohi an advocate for the 1st and 2nd Respondents having been instructed by their insurers. She deponed that the Applicant had not satisfactorily explained the delay.
- That there was no medical evidence to show any disability on the part of the Applicant. Finally, the appeal has no chances of success.
9. Submissions were filed by the firm of Wangari Muchemi and Co. advocates. It was counsel's submission that the Applicant had failed to meet the minimum legal threshold of the requirements and provisions she had sought to rely on. She argued that annexure "EMM3" did not in any way prove any medical disability that would have prevented her from filing her appeal in good time. In spite of it having been in the replying affidavit the Applicant did not deem it to rectify the situation.

10. It was also contended that the 1st Respondent who was found to be 100% was the driver to the 2nd Respondent and was the only one who could appeal. She dismissed the draft memorandum of appeal as raising no serious grounds that would make it successful. She referred the court to the cases of

i. Annah Mwhaki Wairuru –vs- Hannah Wanja Wairuru (2017) eKLR.

ii. DISPLACK Kenya Ltd William Muthama Kitonyi (2018) eKLR.

11. It was further argued that the Applicant had not offered any security for costs in the event that the intended appeal is not successful. She prayed for the application to be dismissed.

Determination

12. I have considered the application, the affidavits and the rival submissions. This is an application for leave to file an appeal out of time. A draft memorandum of appeal has been annexed. The grant of an order of extension of time to file an appeal is a discretionary order. The court must be satisfied that the Applicant is deserving of the order.

13. The issue falling for determination is whether the Applicant has placed before this court sufficient material to warrant the grant of such an order by this court.

14. 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 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”.

As provided by the Act one may be granted leave to file appeal out of time upon satisfying the court that he or she had good and sufficient cause for not filing the appeal in time.

15. The factors to be considered have been set out in a number of cases from various courts. In the case of **First American Bank of Kenya Ltd –vs- Gulab P Shah & 2 others NRB – (Milimani) HCCC NO. 2255 of 2000 (2002) 1EA 65**. The factors are: -

i. The explanation if any for the delay.

ii. The merits of the contemplated action, whether the matter is an arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice.

iii. Whether or not the Respondent can adequately be compensated in costs or for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the Applicant.

16. The Applicant has raised one major ground for her dissatisfaction with the judgment the basis of the intended appeal. She states that she is aggrieved by the court’s finding of liability against the 1st Respondent (driver) alone. She had desired that the liability shared between the 1st and 2nd Respondents who were the (driver and owner) of the vehicle respectively. Secondly, she claims that she was entitled to general damages for failure to work as a result of the injuries suffered. The said award was not given by the court.

17. The Respondents have argued that the intended appeal is frivolous and has no chances of success. I have perused the draft memorandum of appeal which raises four (4) grounds. I am satisfied that the grounds cannot just be wished away, though the burden would still be on the Applicant to prove them at the end of the day. I would therefore not find them to be frivolous.

18. The main reason advanced by the Applicant as being the cause of the delay in filing the appeal is a medical disability. The judgment in the lower court was delivered on 22nd June, 2018. The application seeking leave to file appeal out of time is dated 14th January, 2019 but was filed on 4th February, 2019, that is seven months later which means six months out of time.

19. It is true that no medical documents were filed in court to indeed show that the Applicant was not medically fit to do what was expected of her. It is not disputed that the claim before the lower court arose from a road accident. At paragraph 78 of her further affidavit she states as follows: -

Paragraph 7 – That the trial court in the judgment dated 22/6/2018 recognized that she had been medically disabled as a result of the accident in stating that it was evident that she had lower limb paralysis.

Paragraph 8 – That there is sufficient proof of her medical disability to warrant the exercise of this court’s discretion in my favour.

Unfortunately, no copy of the judgment was annexed to the application.

20. Given the above scenario would one say a delay of six months is inordinate delay? I would agree with my sister **Justice Aburili when in the case of Factory Guards Ltd –vs- Abel Vuudi Kitungi (2014) eKLR** she stated thus:

“The policy for this court is to apply the principle of the rule of law and exercise latitude in this interpretation of the rules so as to facilitate just determination of disputes on merit and thus facilitate access to justice for all by ensuring that deserving litigants are not shut out of the judgment seat. A party who wishes to challenge the decision of the subordinate court before this court should not be prohibited by a delay which delay is explained and is not unreasonable”.

21. In the case of **Esther Wanjiru –vs- Jackline Arege HCCA No. 169 of 2013** the court found a delay of 35 weeks in filing an appeal not to be inordinate. The delay in the present case is 24 weeks. I find that since the delay has been explained and the Applicant is keen on pursuing an appeal she should not be denied that opportunity.

22. On prejudice to the Respondents, I find none raised. It is however prudent that security for costs be deposited.

23. **I therefore find merit in the application which I hereby allow.**

i. The appeal to be filed and served within 14 days with no further excuses.

ii. The Applicant to deposit Kshs.50,000/= in court within 30 days upon filing the appeal for security, for costs.

iii. Costs of the application to be borne by the Applicant in any event and in the intended appeal.

Orders accordingly.

DELIVERED, SIGNED AND DATED THIS 11TH DAY OF JULY, 2019 IN OPEN COURT AT MAKUENI.

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H. I ONG’UDI

JUDGE