



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**MISC. CIVIL APPLICATION NO. 16 OF 2019**

**DIOCESE OF MOMBASA.....APPELLANT**

**VERSUS**

**PAULINE MUMBA CHOME.....RESPONDENT**

(Being an appeal against the Judgment in the Senior Resident Magistrate's Court at Kilifi delivered by Hon. L.N. Juma (SRM) on the 5<sup>th</sup> Day of April 2019 in (SMCC No. 66 of 2013).

**CORAM: Hon. Justice R. Nyakundi**

**Ms. Wambui for Mwanyale for the Applicant**

**Ms. Aoko for Kedeki for the Respondent**

**RULING**

The issue raised in this Notice of Motion dated 29.5.2019 expressed in terms of Section 1A, 1B, 3A, Order 22 Rule 25, Order 50 Rule 6 of the Civil Procedure Rules is whether this court can grant leave and admit the applicant's appeal notwithstanding the lapse of limitation of time in the Law.

That further, the court be pleased to stay execution of the decree issued on 5.4.2019 pending the hearing and determination of the appeal.

For this Notice of Motion, the Applicant Counsel filed a Supporting Affidavit providing various grounds justifying the grant of extension of time and stay of execution namely:-

- (i) That the previous suit has been the subject of litigation before Senior Resident Magistrate Kilifi in CMCC No. 66 of 2013.***
- (ii) That the counter claim was heard and Judgment was to be delivered on notice.***
- (iii) That the notice for the delivery of Judgment by the trial court was never served upon the 2nd Appellant/Applicant.***
- (iv) That the appellant/Applicant learnt of the Judgment on 14.5.2019 through the Plaintiff's Advocate in a letter dated 13.5.2019.***
- (v) That on 28.5.2019 counsel applied for certified copies of the proceedings and Judgment for purposes of appeal but the same were never supplied in time.***
- (vi) That the failure to file the appeal in time has been caused by the fact that the Applicant was never made aware of the Judgment and also the inability to obtain the said copies of proceedings and Judgment within a reasonable time. The proposed appeal has high chances of success as per the amended draft Memorandum of Appeal.***
- (vii) That unless the orders to file the application out of time and stay of execution of the decree are granted, the appeal will be rendered nugatory.***

On behalf of the Plaintiff/respondent, Learned Counsel opposed the application by filing a replying affidavit and also written submissions. **Mr. Kadenge** submitted that the applicant has not provided any tangible explanation for the failure to file the appeal within the stipulated

period of 30 days.

Learned counsel argued that the threshold set out in the case of **Murugi –vs- Kenya Airways Ltd (2003) KLR** has not been satisfied by the applicant. Learned counsel submitted that the application by the Defendant/Applicant is aimed at delaying the plaintiff/respondent to access the fruits of the Judgment at the conclusion of a meritorious litigation. He raised the issue whether indeed there is a prima facie case to be considered on appeal, given the nature of the evidence adduced before the trial court.

On the issue of stay of execution of the decree, counsel further contended that the provisions of Order 42 Rule 6 of the Civil Procedure Rules which require a party to show substantial loss to be suffered has not been demonstrated by the applicant.

He referred the court at length to the amount of time the plaintiff has litigated before the trial court to be awarded general damages arising out of total of negligence.

As such, counsel argued and submitted that there are no grounds upon which the court can exercise discretion to grant extension of time and or stay of execution of the decree.

### **The Law**

The law governing time frames on appeal is as outlined under Section 79 (g) of the Civil Procedure Act. This section 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 any such period the lower court has set for pronouncement and delivery of Judgment or decree.

The proviso enjoins the court to admit an appeal out of time if the applicant satisfies the court that he had good and sufficient cause for not filing the appeal within time. There is therefore discretion to extend time to the applicant to file an appeal out of time under the proviso of Section 79(g) of the Act. The difference is that the applicant ought to sufficiently provide reasons for the delay in filing the appeal within 30 days as expressly provided for under Section 79(g).

The failure to explain the delay is usually considered fatal for discretion to be exercised to extend time. Though the discretion by the court is unfettered to ensure the ends of justice are met. However, such discretion must be exercised guided by the well-known principles in the case of **Nicholas Salat –vs- Independent Electoral & Boundaries Commission & 7 others, Supreme Court Appeal No. 14 of 2014.**

- 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;***
- 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;***
- 3. Whether the court ought to exercise the discretion to extend time, is a consideration to be made on a case to case basis;***
- 4. Whether there is a reasonable reason for the delay, which ought to be explained to the satisfaction of the court;***
- 5. Whether there would be any prejudice suffered by the respondents if the extension was granted;***
- 6. Whether the application had been brought without undue delay; and***
- 7. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.***

From the above principles the power to extend time is discretionary and case is specific for the applicant to bring himself or herself within the ambit of the guidelines. The latitude of this discretion was also discussed in the case of **Mwangi –vs- Kenya Airways Ltd 2003 KLR**, an applicant seeking to leave to extend time has to sufficiently explain the following factors:-

- (1) The period of delay.***
- (2) The reason for the delay.***
- (3) The arguability of the appeal.***
- (4) The degree of prejudice which would be suffered by the respondent if the extension is granted.***
- (5) The importance of compliance with the time limit to the particular litigation or issue and***
- (6) The effect if any on the administration of justice or public interest if any is involved.***

On account of this, if the applicant does not discharge the evidential burden the court should therefore decline to exercise discretion on such an application if it is just and equitable to do so with a view to doing more perfect and complete justice.

The court has emphasized again and again that the time provided in the statute and other directions given by the court are not merely targets to be performed but to be strictly followed. If there is no basis for non-compliance of time limit set a breach of such an essential element

should attract sanctions from the court.

In an apparent reference with regard to Section 1A and B of the Civil Procedure Act on the overriding objective conversely known as the Oxygen rule, the English case of the **Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and others (2001) EWK Chancery 456** on dealing with similar situation, the Learned Judge stated that:-

*“The position, however, it seems to me, has been fundamentally changed, in this regard, as it has in so many areas, by the new rules laid down in the CPR which are a new procedural code. The overriding objective of the new rules is now set out in Pt 1, namely to enable the court to deal with cases justly, and there are set out thereafter a series of factors which are to be borne in mind in construing the rules, and exercising any power given by the rules. It seems to me that it is no longer sufficient to apply some rigid formula in deciding whether an extension is to be granted. The position today is that each application must be viewed by reference to the criterion of justice and in applying that criterion there a number of other factors (some specified in the rules and some not) which must be taken into account. In particular, regard must be given, firstly, to the length of the delay; secondly, the explanation for the delay; thirdly, the prejudice occasioned by the delay to the other party; fourthly, the merits of the appeal; fifthly, the effect of the delay on public administration; sixthly, the importance of compliance with time limits, bearing in mind that they are there to be observed; seventhly, (in particular when prejudice is alleged) the resources of the parties.”*

The one thing that emerges from the above principles is that time is of essence in the fair administration of justice. Whether the court extends or declines exercise of discretion is a matter to be construed within the facts of the case and the underlying principles so as to avoid a miscarriage of justice to either party to the claim.

It is evident from the notice of motion and affidavit evidence that the applicant was the 2<sup>nd</sup> defendant in **SRMCC No. 66 of 2013 at Kilifi Court**. The Plaintiff/Respondent had sued **Bayusuf Freighters** and the applicant appeared as defendant in a suit seeking general and special damage based on a road traffic accident which occurred on 23.5.2011. The trial court determined the case on the merits on the alleged occurred accident caused by negligence on the part of the defendants. The learned trial Magistrate accepted the evidence and held the defendants 100% jointly liable for the accident. She made an award of Kshs.1,000,000/- as general damages and Kshs.2,000 for special damages.

It is the contention by the Applicant that this Judgment was to be delivered on notice which was never served upon the appellant by the court. The other matter raised in the affidavit is that the applicant is aggrieved with the entire Judgment as stated in the draft memorandum of appeal. Further the applicant counsel submitted that they would not take any step to comply with the time limit in absence of a copy of the proceedings and the decree.

It was at that juncture that the time of 30 days stipulated in the Act lapsed without lodging an appeal. There is evidence on record that the trial court delivered its Judgment on notice without notifying the applicant who had a stake and interest on the outcome of the Judgment.

According to the undisputed averments in the affidavit, the Judgment and ensuing decree was never brought to the attention of the applicant timeously to enable him comply with the provisions of Section 79(g) of the Civil Procedure Act. The impugned Judgment was delivered on 5.4.2019 in favor of the plaintiff/respondent. The applicant in the event had to exercise his right of appeal was expected to have filed the appeal on the 5.5.2019 to be within the 30 days set in the Act.

In my interpretation on the statutory bar in terms of Section 79(g) of the Act, time begins to run from the date of delivery and service of the Judgment and the decree upon the applicant. It can be seen straight away from the records as pleaded and canvassed by the applicant that no such Judgment entered on 5.4.2019 was duly served in his presence or soon thereafter within reasonable time.

The time so fixed under Section 79(g) must in that regard in the state of things and computation run from the pronouncement and timely issuance of the copy of the Judgment and decree or order to be appealed from by the intended/appellant.

In this case, the applicant default in complying with time limit in essence was contributed to by the court's failure to perform its duty to give notice on the delivery of judgment and subsequent provision of a copy and decree to the applicant. It cannot be denied that the efficiency and expeditious administration of justice is founded on an equal arms maxim under Article 50 of the constitution.

It is my humble view that the ability in this connection for the litigants or appellants for this matter to be entitled to the full statutory period the court administration must perform its part of the bargain.

It must be clear by now that according to Article 50 5(a) of the Constitution that the right to a copy of the record of the proceedings within a reasonable period after conclusion of proceedings is a minimum right guaranteed to the parties in a litigation.

It is therefore imperative to conclude that any limitation act which purports to limit access to a copy of proceedings in disputes adjudicated under Civil law within a reasonable time would be considered a violation of Article 50(b) of the Constitution.

In my assessment, the consequences of the delay should not be wholly visited on the applicant. Thus, I agree in a matter anchored in our Constitution that the court in dealing with the interest of justice has consistently to guarantee observance of the fundamental rights.

The effect of this import to the instant application is that there is no inordinate delay on the part of the applicant to deny him exercise of discretion to extend time. The applicant has sufficiently explained reasons for the failure to file the appeal within time. The court in exercising of its discretion to grant leave to extend time is not meant to delay the enjoyment of the successfully obtained Judgment by the plaintiff nor is it to dismiss the execution of the decree but to meet the end of justice. In the result, I would allow the relief for extension of time to the application to file an application out of time.

Secondly, the nature of the appeal and the surrounding circumstances must be equitable to grant the prayer on order of stay of execution pending the hearing and determination of the appeal. The issues raised in the draft memorandum of appeal are set out in the trial court Judgment of 5.4.2019.

The main provisions of Order 42 Rule 6 of the Civil Procedure Rules provides for the following conditions: -

- (1) That the application has been made without undue delay.**
- (2) That substantial loss will result to the applicant unless such orders made.**
- (3) Security for the due performance of the decree has been given by the applicant.**

The conditions by which the provisions of order 42 Rule 6 of the Civil Procedure Rules and the discretion to be exercised has been discussed in the following cases: **Alfred Wekesa –vs- Nick Wafula Wafula 2007 eKLR, Kiambu Transporters –vs- Kenya Breweries 2000 eKLR, Reliance Bank –vs- Norlake Investment Ltd 2000 AE 227**

I have considered the notice of motion by the applicant and submissions by the respondent clearly, the respondent which this court has to exercise discretion for stay of execution for the decree following the impending appeal.

It is for these reasons that I allow the notice of motion pursuant to the following orders: -

- (i) That the applicant has leave of this court to file his application out of time.**
- (ii) That the draft memorandum be deemed as duly filed within time.**
- (iii) That the record of appeal be supplied by the trial court within 14 days from today's date.**
- (iv) That the stay of the execution of the decree be and is hereby granted on condition that the applicant do deposit Kshs 500,000/- as security for due performance of the decree within 45 days from today's date in the joint account of both counsels to the appeal.**

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 15<sup>TH</sup> DAY OF OCTOBER 2019**

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**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

Mr. Ngoya for Mwanyale for the applicant