



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**MISCELLANEOUS APPLICATION No. 157 OF 2018**

**SALIM MOHAMED YUGA AND SAWADI ABDALLA SINAGO**

**(Suing as the legal representative of the estate of**

**MWACHOMBO ABDALLA SINAGO.....APPELLANTS**

**VERSUS**

**GEORGE MUNGAI KAMAU.....RESPONDENT**

**RULING**

1. By a notice of motion application dated 22<sup>nd</sup> May, 2018, the applicants herein are seeking for;

- (a) Spent
- (b) leave to appeal out of time;
- (c) spent;
- (d) costs of the application be provided.

2. The application arises from the decision made in KWALE RMCC NO. 75 of 2015, SALIM MOHAMED YUGA AND ZAWADI ABDALLA SINAGO (Suing as legal representative of the Estate of MWACHOMBO ABDALLA SINAGO, deceased) versus GEORGE MUNGAI KAMAU.

3. The application is premised on the ground on its face and the supporting affidavit of SALIM MOHAMED YUGA, the 1<sup>st</sup> Applicant herein sworn on 22<sup>nd</sup> May, 2018 and a further affidavit sworn on 31<sup>st</sup> October, 2018;

- (a) Judgment herein was delivered on 8<sup>th</sup> November, 2017, and the plaintiff was awarded Ksh 565,600/- plus costs and interest at 100% liability;
- (b) That the plaintiff's advocates did not get a copy of the judgment to appreciate the finding and advise the plaintiff on the issues of appeal.
- (c) The Applicants/ Plaintiffs being dissatisfied with the trial court's decision went to appeal to the High court, Mombasa in which the appellant will contest the award as issued by the Honourable court.
- (d) It will be in the best interest of justice to grant the application.

4. The application is opposed by the respondent's replying affidavit sworn by KISHORE NANJI, ADVOCATE on the ground that;

- (a) the judgment of 8<sup>th</sup> November, 2018 was delivered in the presence of the Appellant's advocate's and the court ordered for copies of the same to be supplied to the parties, he claims to have obtained a handwritten copy of the judgment from the court registry and that the appellant's advocate too could have obtained a handwritten judgment.
- (b) the application has been filed with unreasonable delay of 6 months after the delivery of the judgment which is extremely unreasonable.

(c) the appellant's advocates were fully aware of the terms of the judgment of 8<sup>th</sup> November, 2017 because the same was delivered in their presence and content of the same communicated to them through various communications so then by the respondent's advocates.

5. On 25<sup>th</sup> September, 2018, parties agreed to dispose of the application written submissions and they both complied with the appellant's counsel filing theirs on 27<sup>th</sup> September, 2018 and the respondents filing theirs on 11<sup>th</sup> April, 2019.

#### **APPLICANT'S/APPELLANT'S SUBMISSIONS**

6. In their submissions, the Applicants' contended that their advocates were not supplied with a copy of the judgment on time to enable them the Applicants. It was submitted that the court's power to entertain an application to file an intended appeal out of time are discretionary and unfettered. He made reference to the case of **MWANGI & 2 OTHERS VRS KANYAMWI TRADING COMPANY LIMITED (2015) e KLR**, as regards the conditions for grant of such application

7. According to the applicants' there had been 6 months delay in filing the appeal and the explanation was that their advocates were unable to obtain a copy of judgment on time and therefore the delay was not intentional. According to the appellants' counsel, there is reasonable explanation for the delay. He relied on the case of **JOSEPH NJOROGE VRS REUBEN WAWERU MBERIA (2017) e KLR**, where the court granted leave to the applicant to appeal out of time for the sole reason that a copy of judgment was not supplied on time.

8. It is further submitted that natural justice demands that every person be given an opportunity to be heard and therefore in the interest of justice, the application should be allowed. Finally, time limit is a procedural technicality and should be overlooked in the interest of justice by virtue of Article 159 of the Constitution.

#### **RESPONDENT'S SUBMISSIONS.**

9. The Respondent's counsel averred that the grounds advanced by the applicant to explain the 6 months delay do not meet the legal threshold but are a mere after thought. He reiterated what was averred in the replying affidavit.

10. He submitted that the applicant, like themselves, could have obtained the handwritten copy of judgment and hence no plausible reason has been given delay. At is a mere statement without evidence to back it. He submitted that the applicant did not show when they were supplied with certified copy of the said judgment as alleged and when their advocate was instructed to launch an appeal. According to the Respondents, the reason for delay must be specific and not based on mere statements.

11. In response to these applicants' averments that the court invokes the provisions of Article 159 of the Constitution the respondent replied filing that the time frame for filling an appeal is targeted to be a timetable to litigation, for there must be an end to litigation. And on whether the appeal is arguable, the Respondent submitted that the trial court gave reason on applying a multiplicand of 1/3 to determine dependency ratio since the defendants were uncles to the deceased.

12. Finally, the Respondent also submits that no prejudicial harm will be caused to him that will not be payable by damages should the application be allowed. However, the Respondent seeks this court to consider that the respondent had already made a cheque of payment of the decretal sum in favour of the Applicants and thus according to the Respondent, this matter was fully settled then.

13. In considering the application that is before this court that the singular issue for determination is whether the applicant is entitled to an extension of time to lodge his appeal. The starting point is **Section 79 G of the Civil Procedure Act** which is the operative part in answering the question as to whether the prayer to enlarge time to file an appeal is merited. This section 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 maybe admitted out of time if the appellate satisfies the court that he had a good and sufficient cause for not filing the appeal in time”.**

14. In the case of **PAUL MUSILI WAMBUA VRS ATTORNEY GENERAL & 2 OTHERS (2015) e KLR**, the court of appeal in considering an application for extension of time and leave to file a notice of appeal out of time stated the following;

**“ ...It is now well settled by a long line of authorities by this court that the decision of whether or not to extend the time of filing an appeal the judge exercise unfettered discretion. However, in the exercise of such discretion, the court must act upon reasons (s) not based on whims or caprice. In general the matter which a court takes into account in deciding whether to grant an extension of time, are the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.....”**

The instant application for extension of time will be considered against the factors set out in the above cited case.

15. The first being the length of delay and reason thereof. Judgment in the case that is intended to be appealed against, was delivered on 8<sup>th</sup> November, 2017 and thereafter, the applicant's advocate applied for a copy of the judgment which allegedly took a long time to obtain. The respondent's advocate however asserted that he obtained a copy of the hand written judgment which he believed that the appellant could have obtained too. The application herein was filed on the 4<sup>th</sup> June, 2018.

16. It will be noted that the delay in filing the application was for about six (6) months which cannot be said not to be inordinate. However, the only explanation in not filing the appeal in time was that the appellants could not obtain a copy of the judgment in time either by the time the contents of judgment were explained to the appellants, the time for filing an appeal had already lapsed. The Respondent on the other hand contends that there are mere statements and not prove thereof.

Section 109 of the Evidence Act provides for proof of a particular fact and it is of relevance in the present instance. It proves that:

**“ The burden of proof as to any particular fact lies in the person who wishes the court to believe in its existence, unless it is produced by any law that the proof of fact shall be on any particular person”.**

17. The appellant only alleged that they applied for certified copy of judgment which was supplied to them when time to appeal had lapsed. There is no evidence produced in support thereof. No correspondence addressed to court registry in request of the judgment or any payment made to that effect or when the judgments was supplied to the appellant has been annexed to the application. This court can therefore not infer when the judgment was supplied to the appellant so as to invoke its discretion. It is a general rule of evidence, that he who alleges must prove and in this case the appellants have not discharged the burden of proof on this rule on a balance of probabilities. Therefore, the reason for the delay in this case is not persuasive. A delay of six (6) months was inordinate and the applicant has not satisfied the court that they had good and sufficient cause for not filing the appeal in time.

18. The second factor is whether the appeal has chances of succeeding .The decision from which an appeal is intended to be sought was a road traffic accident and the main contention of the Applicant is that the trial court erred in applying a ratio of 1/3 when determining loss of dependency despite the evidence on record. Both parties had submitted for dependency ratio of 2/3.

19. Upon perusing a copy of the judgment, the trial court observed the dependents were uncles to the deceased and applied a ratio of 1/3 .The appellants submitted that the deceased was a father and had a family which depended on him.

20. In my view, since the ratio was not contested by the parties in their submissions before the lower court, I find that the appeal is arguable. At this point, the applicant is not required to persuade the appellate court that the intended or filed appeal has a high probability of success. All one is required to demonstrate is the arguable of the appeal; a demonstration that the appellant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict. The applicants have easily met the standard. I believe that the applicant has discharged this burden and associate myself with the decision of the court of appeal (Kiage , J. A ) in the case of **NICHOLAS KIPTOO ARAP KORIR SALAT VRS INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 6 OTHERS (2013) e KLR** had this to say;

“I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both commend courts to seek to do substantial justice in an efficient, proportionate and cost effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free for all in the administration of justice. This court, indeed all courts, must never provide succour and cover to parties who exhibits scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just , certain and even handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal, posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainly and clarity where issues of rules and their application are concerned”

21. For the reasons advanced in the above cited case, decision of the court must be redolent of fairness and reflect the best interest of the people who the law is intended to serve. It is important to point that a court must balance between the right of a party to have his/her case heard expeditiously under the principle that justice must not be delayed as enshrined in Article 159 (2) (b) of the Constitution of Kenya, and the equally important fundamental right of the other party to have a fair hearing as guaranteed in Article 50 (1) of the Constitution of Kenya.

22. It therefore follows that a person ought not to be shut out from accessing court or having his day in court. This court does not see the prejudice the Respondent would suffer if this court first heard, the Applicants’ appeal since the point which lays basis to the intended appeal has not been contested, by the respondent, this court is hesitant to deny the Appellant a chance to prosecute their case.

23. The upshot of the foregoing is that the application dated 22<sup>nd</sup> May, 2018 succeeds with the following orders;

(a) the appellant shall file and serve an appeal within 21 days from the date hereof;

(b) the costs of the application shall be in the intended appeal.

**Dated, signed and delivered at Mombasa his 14<sup>th</sup> day of October, 2019.**

**D. O. CHEPKWONY**

**JUDGE**