REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

MISC. CIVIL APPLICATION NO. 95 OF 2018

1. RICHARD MUINDE MUSYOKI

2. SUSAN NDUNGE MUSYOKI (Suing as next of kin to and on behalf of the estate of

BONIFACE MUSYOKI MUINDE – DECEASED)..................................APPLICANTS

-VERSUS-

1. PATEL JITENDRAKUMAR

2. GODFREY MUMO MALENGE

3. BENARD MUSYOKI MUNYAO...RESPONDENTS

RULING

1. By a Motion on Notice dated 23rd February, 2018, the applicant herein seeks this Honourable Court be pleased to extend time and grant leave to the Applicants to lodge a Memorandum of Appeal against the Judgement of **Honourable C. Ocharo**, Principal Magistrate in Machakos CMCC No. 24 of 2013 delivered on 13/7/2017. There was also the usual prayer for costs.

2. In support of the application, the applicant averred that they instituted civil suit No. 24 of 2013 – Machakos in which they were pursuing compensation for the Estate of **Boniface Musyoki Muinde** who died on 20th July, 2010 following a road traffic accident. According to the applicants, the said suit has come up before different magistrates some of whom were transferred and the applicants were always patient. The hearing of the case was finally concluded by **Honourable C. Ocharo P.M**, who slated the same for judgement on 14th March, 2017 but who by that time had proceeded on leave. Finally, the same was finally delivered on **13th July, 2017** without notice.

3. According to the applicants, in around October 2017, their Advocates followed up on the matters only to realize that Judgement had been delivered. According to the applicants, **they were** informed by their Advocates, which information they believed to be correct that it was their representative who perused the Court file and misconstrued the same to have been delivered in the applicants' favour and they even instituted a declaratory suit against the Insurance company. It has now dawned on them that their suit had been dismissed.

4. It was deposed that the applicants are aggrieved with the terms of the said Judgement and are desirous of lodging an Appeal which appeal in their view, has high chances of success. In their view, this Application has been brought without delay and the Respondents will not be prejudiced should the Application be granted.

5. It was therefore their case that it is in the interest of justice for this Application to be allowed.

6. In opposing the application the Respondents averred that whereas the judgement was delivered on 13th July, 2017, this application was filed on 8th March, 2018, about 9 months after the delivery of the judgement. Due to the inordinate delay, it was averred that the application ought not to succeed.

7. Since the applicants herein were the plaintiffs in the trial court, it was contended that they were under a duty and should have been diligent

in following up with the court for judgement date.

8. According to the Respondents, the applicants' advocates wrote to the on 4th August 2017 seeking payment of Kshs 955,300/= as an alleged award to them as well as Kshs 146,212.50 being costs. By a letter dated 9th January, 208 they responded that the matter had been dismissed hence the plaintiffs were aware of the fact of the dismissal of the suit and ought to have brought the application within the shortest time.

Determination

9. I have considered the application, the affidavits in support of and in opposition to both applications, the submissions filed as well as the authorities relied upon.

10. 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.***

11. It is clear therefore that the decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion and just like any other exercise of discretion. This being an exercise of judicial discretion, like any other judicial discretion must on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. One of those judicial principles expressly provided for in the above provision is that the applicant must satisfy the Court that he has a good cause for doing so, since as was held in **Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633**, there is no difference between the words "sufficient cause" and "good cause". It was therefore held in **Daphne Parry vs. Murray Alexander Carson [1963] EA 546** that though the provision for extension of time requiring "sufficient reason" should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of *bona fides,* is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.

12. As to the principles to be considered in exercising the discretion whether or not to enlarge time in **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65** the Court set out the factors to be considered in deciding whether or not to grant such an application and these are (i). the explanation if any for the delay; (ii). the merits of the contemplated action, whether the matter is 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 for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant. This was the position reiterated in **Edith Gichugu Koine vs. Stephen Njagi Thoithi [2014] eKLR**, where the Court of Appeal set out the principles undergirding an Application for leave to file an appeal out of as follows:

> **"Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others..."**

13. Similarly, in **Leo Sila Mutiso vs. Helen Wangari Mwangi Civil Application No. Nai. 255 of 1997 [1999] 2 EA 231** the Court of Appeal set out the factors to be considered in deciding whether or not to grant such an application and these are first, the length of the delay; secondly the reason for the explanation if any for the delay; thirdly, (possibly), the chances of the appeal succeeding if the application is granted i.e. the merits of the contemplated action, whether the matter is 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; and fourthly, the degree of prejudice to the respondent if the application is granted and whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant. However, in the case of **Thuita Mwangi vs. Kenya Airways Ltd [2003] eKLR,** the Court explained that follows:

> **"The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered."**

14. However, as was held in **Kenya Commercial Bank Limited vs. Nicholas Ombija [2009] eKLR:**

> **"An "arguable" appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court."**

15. That was the position in **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] eKLR** where the court held that:

> **"...On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised...An arguable**

appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous..."

16. I also associate myself with the decision of the Supreme Court in **Civil Application No. 3 of 2016 - County Executive of Kisumu –vs- County Government of Kisumu & 7 Others** at page 5 where the said Court said:-

"… 23) It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the court. Further, this court has settled the principles that are to guide it in the exercise of its discretion to extend time in the NICHOLAS SALAT case to which all the parties herein have relied upon. The court delineated the following as:-

"the underlying principles that a court should consider in exercise of such discretion:

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 should 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. The delay should be explained to the satisfaction of the court.

5) …"

17. In this case the Applicant contended, a contention which the Respondents seems to agree with, that the decision intended to be appealed against was delivered without notice. Order 21 rule 1 of the ***Civil Procedure Rules*** provides that:

In suits where a hearing is necessary, the court, after the case has been heard, shall pronounce judgment in open court, either at once or within sixty days from the conclusion of the trial notice of which shall be given to the parties or their advocates.

Provided that where judgment is not given within sixty days the judge shall record reasons thereof copy of which shall be forwarded to the Chief Justice and shall immediately fix a date for judgment.

18. It therefore follows that parties are entitled to a notice of the date of delivery of judgement and where such notice is not given, that omission may well amount to a sufficient reason for the purposes of enlargement of time to appeal if the applicant moves the Court for regularisation of his position expeditiously. See **Kwach, JA** in **Zacky Hinga vs. Lawrence Nthiani Nzioki & Another Civil Application No. Nai. 359 of 1996**. In fact, the Court of Appeal held in **Ngoso General Contractors Ltd. vs. Jacob Gichunge Civil Appeal No. 248 of 2001 [2005] 1 KLR 737** that:

"The failure by the Superior Court Judge in an application for extension of time to file an appeal, to consider, as a matter of law, whether the Appellant, who was admittedly absent when the Judgement was delivered, was served with notice of delivery of the Judgement was a misdirection…The law under Order 20 r 1 is explicit in terms and mandatory in tone that a Judgement which is not delivered ex tempore must be delivered on a subsequent date only upon notice being given to all parties or their advocates and where only the successful party in the Judgement had prior knowledge of the delivery of the Judgement and no apparent reason was advanced for the failure to serve or to attempt to serve the Appellant or his advocate, the Appellant's right of appeal was grossly compromised…An order was made by the Magistrate granting a right of appeal within 28 days and directing the party in attendance to inform the other side does not cure the flagrant breach of the mandatory procedural rule which accords with fundamental rules of natural justice and the right to be heard which the Constitution safeguards."

19. Though the Respondent has taken issue with the delay in filing the application, the applicants have deposed that they were under the erroneous impression that they were the successful parties in the litigation and they in fact proceeded to file a declaratory suit. The Respondent admit that the applicants did in fact demand for payment of what they believed was the decretal sum due to them. In my view the actions of the applicants are inconsistent with those of a party who was in the contemplation of the Court of Appeal in **Shah vs. Mbogo & Another [1967] EA 116 as one who** has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. To the contrary the applicants seems to be parties who are seeking the court's discretion in order to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error. Blunders may have been committed by the applicants' legal representatives erroneously believing that the applicants were the successful parties but as the courts do recognise that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case heard on merits. The broad approach under the current constitutional dispensation is that unless there is fraud or intention to overreach, an error or default that can be put right by payment of costs ought not to be a ground for nullifying legal proceedings unless the conduct of the party in default can be said to be high handed, oppressive, insulting or contumelious. The court, as is often said, exists for the purpose of deciding the rights of the parties and not imposing discipline. See **Philip Chemwolo & Another vs. Augustine Kubende [1986] KLR 492; (1982-88) KAR 103.**

20. Where it is not shown that there is fraud or intention to overreach and an innocent party may adequately be compensated in costs, cases ought as far as possible be determined on their merits rather than on technicalities of procedure. In this case, I did not hear the Respondents contend that if the application is allowed they will suffer such prejudice that cannot be compensated by an award of costs. It has been said there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such advantage or that it cannot be cured by the application of that healing medicine. See

Waljee's (Uganda) Ltd vs. Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188.

21. In the premises, I find this application merited. Time is hereby extended to the applicants to lodge their appeal. Let the memorandum of appeal be filed and served within 10 days from the date of delivery of this ruling.

22. The costs of this application will be in the intended appeal.

23. It is so ordered.

Ruling read, signed and delivered in open Court at Machakos this 18th November, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kilonzo for Miss Kavita for the applicant

CA Geoffrey