



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 78 OF 2019

CAR AND GENERAL (TRADING) LIMITED.....APPELLANT/RESPONDENT

-VERSUS-

PETER MAINA WAIRIRE.....1ST RESPONDENT/APPLICANT

FRANCIS OUMA MUGERE.....2ND RESPONDENT

RULING

1. The subject matter of this ruling is the Notice of Motion dated 3rd May, 2019 brought by the 1st respondent/applicant in this instance, wherein he sought for an order for leave to file a cross appeal out of time against the judgment entered on 16th January, 2019 in Chief Magistrate's Case No. 1198 of 2016.
2. The Motion is supported by the grounds set out on its face and the facts stated in the affidavit of the 1st respondent's/applicant's advocate, *Faith Mutio Mutuku*.
3. In opposing the said Motion, the appellant/respondent put in a replying affidavit sworn by its Logistics Co-ordinator, *Joseph Mulwa Mwambi* on 10th July, 2019.
4. When the Motion came up for inter-parties hearing, the parties' respective counsels presented brief oral arguments.
5. I have taken into consideration the grounds laid out on the body of the Motion; the facts deponed in the affidavits supporting and opposing the Motion; and the rival oral arguments in reiteration thereof as well as the authorities filed by the respective advocates.
6. I noted that the authorities relied upon by the parties essentially concern the procedure as relates to appeals lying either with the Court of Appeal or the Supreme Court hence they may not necessarily apply in the present instance.
7. The proviso of **Section 79G** of the **Civil Procedure Act** expresses that a party desiring to appeal against the decision of a subordinate court shall lodge an appeal within 30 days from the date of the decree or the order being appealed against.
8. That notwithstanding, under the provisions of **Section 95** of the **Civil Procedure Act** and **Order 50, Rule 6** of the **Civil Procedure Rules**, courts have power to enlarge the time required for the performance of any act under the Rules even where such time has expired.
9. The courts have developed various conditions to guide them in deciding whether to extend the period for filing an appeal out of time. In this regard, I draw from the case of **Thuita Mwangi v Kenya Airways Ltd [2003] eKLR** where the Court of Appeal illustrated the conditions to be met.
10. On the first condition on length of delay, the 1st respondent/applicant on the one hand maintained that the Motion has been timeously filed. On the other hand, it was the appellant's/respondent's position that there has been an inordinate and calculated delay in bringing the Motion, which position was reaffirmed by his counsel, *Mr. Kabiru*.
11. I have looked at the record and established that the impugned judgment was delivered on 16th January, 2019. It is therefore evident that there has been a delay of close to four (4) months in filing the Motion. However, I do not deem such delay to be inordinate.
12. As concerns the reason for the delay, the 1st respondent/applicant gave the explanation that the delay was occasioned by the time taken in

both replying to and availing an affidavit of means in regards to an application previously filed by the appellant/respondent seeking for an order for stay of execution.

13. The above position was clarified by his learned counsel, *Miss Mutuku* in admitting that the failure to file a cross appeal in good time was a mistake on their part.

14. Joseph Mulwa Mwambi in his replying affidavit asserted that no viable reasons have been given for the delay, further terming the intention to file the cross appeal a mere afterthought. His assertions were echoed in *Mr. Kabiru's* oral submissions.

15. The record confirms the 1st respondent's/applicant's averment that the appellant/respondent truly sought for and was granted an order for stay of execution by way of a consent entered into and executed by the parties on 8th May, 2019. I have also confirmed from the record that the 1st respondent/applicant had earlier on opposed the aforesaid application in the manner set out hereinabove.

16. The courts have stated and restated that a client should as a matter of general principle not be made to suffer for the inadvertence of his or her advocate. Upon considering the explanation given by the 1st respondent/applicant, I find the same to be reasonable in the circumstances.

17. On the question as to whether or not an arguable appeal exists, it was the 1st respondent's/applicant's view that the appeal is solely against the apportionment on liability made by the trial court, which apportionment the 1st respondent/applicant is dissatisfied with for the reason that he is convinced the trial court ought to have found the appellant/respondent and 2nd respondent jointly and severally liable as opposed to apportioning liability in the ratio of 50:50. He is persuaded that his intended cross appeal raises arguable issues and has reasonable chances of success.

18. In response, the appellant/respondent conveyed its view that the cross appeal is a mere attempt at settling the appeal already in place.

19. I have established from the record that the impugned judgment was entered in favour of the 1st respondent/applicant against the appellant/respondent and 2nd respondent in the manner hereinabove in addition to an award of general damages in the sum of Kshs.800,000/, Kshs.300,000/ for future medical expenses and special damages at Kshs.2,500/ being made.

20. I have in turn looked at the draft memorandum of appeal attached to the Motion and it is my opinion that the same raises arguable grounds of appeal in respect to the apportionment of liability.

21. In addressing the final condition on prejudice, the 1st respondent/applicant conveyed his apprehension that unless the order being sought is granted, there is a likelihood that he will be unable to recover the decretal sum from the 2nd respondent, thus rendering the cross appeal nugatory.

22. The appellant/respondent on its part did not address the subject on prejudice.

23. Upon my perusal of the record, I have not come across any evidence or disclosure of the 2nd respondent's financial capability to pay his portion of the decretal sum as ordered by the trial court or any substantial amount for that matter. It is therefore fair to opine that the 1st respondent's/applicant's apprehension of prejudice is valid.

24. Accordingly, I will allow the Motion and make the following orders:

a. The 1st respondent/applicant shall file and serve the memorandum of appeal to the cross appeal within 7 days from today and ensure to compile, file and serve the record of appeal within 60 days from today.

b. Costs of the application to abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this 13th day of December, 2019.

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J.K. SERGON

JUDGE

In the presence of:

..... for the Appellant/Respondent

..... for the 1st Respondent/Applicant

..... For the 2nd Respondent