



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

MISC. CIVIL APPLICATION NO. 37 OF 2018

JANE KIRIGO GITUATHI.....APPLICANT

VERSUS

CHARLES MAINA KINYUA.....1ST RESPONDENT

PETER GATURA.....2ND RESPONDENT

RULING

1. The applicant prays for *extension of time* to lodge an appeal. The notice of motion is dated 1st March 2018. The intended appeal is against the judgment and decree of the lower court delivered on 15th September 2015 in Murang'a Chief Magistrates Civil Suit 107 of 2015.
2. The applicant's suit in the lower court sought general and special damages for the tort of *negligence*. General damages were assessed at Kshs 200,000 while special damages were allowed in the sum of Kshs 270,000. The amounts were subject to *contributory negligence* in the ratio of 85% to 15% in favour of the applicant.
3. The applicant is aggrieved by the decree. The gravamen of the motion is that unless leave is granted, the appeal will be lost. In the annexed *draft memorandum of appeal* the applicant pleads that the learned trial magistrate erred by awarding damages that were *inordinately low*.
4. Those matters are set out at length in the deposition of the applicant sworn on 1st March 2018; and, a further affidavit sworn on 19th June 2018.
5. The motion is contested by the respondent. There is a replying affidavit sworn on 18th May 2018.
6. On 28th June 2018, I heard brief submissions from the learned counsel for both parties. I have considered the application, depositions and the rival submissions.
7. The legal parameters in a matter of this nature are well settled. This court has wide and unfettered discretion to *extend time*. The discretion must however be exercised *judiciously*. Some of the factors to be considered include the length of delay, the reasons for the delay, the nature of the intended appeal and whether the respondent will suffer prejudice if the court extends the time. See generally *Leo Sila Mutiso v Rose Mwangi*, Court of Appeal, Nairobi, Civil Application 251 of 1997 (unreported), *Nicholas Salat v IEBC & 7 others*, Supreme Court, Application 16 of 2014 [2014] eKLR.
8. The Court must also pay heed to the overriding objective to do justice to the parties. See Article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act. See also *Harit Sheth v Shamas Charania*, Court of Appeal at Nairobi, Civil Application No 68 of 2008 [2010] eKLR.
9. There is no dispute that the impugned judgment was delivered way back on 15th September 2017. The present motion was filed *six months* later. There is no doubt that the applicant has *procrastinated*. But I have noted that the typed proceedings were *not* ready until 30th January 2018. I am prepared to excuse the delay up to that point.
10. But the *tardiness* persisted: the applicant took another *thirty days* to lodge the application for leave. In the further affidavit the applicant claims his counsel took the time to locate him to execute the necessary deposition. It is pitiable. A clear pattern of delays is self-evident.
11. It would be inappropriate to comment on the merits of the intended appeal at this stage. But I am *unable* to say that it is *not* arguable. I do not see serious prejudice to be suffered by the respondents. Certainly, there will be delayed closure of the litigation. But I am alive that it can

be abated by costs. And, I am prepared to grant the respondent *thrown away* costs.

12. Granted those circumstances, I will exercise my *discretion* under section 79G of the Civil Procedure Act in favour of the applicant. The applicant's notice of motion dated 1st March 2018 is allowed subject to two conditions: The intended appeal *shall* be filed and served within the next *seven days* of today's date. Secondly, the applicant shall pay the respondent *thrown away* costs of Kshs 5,000 within the next *thirty days*. If the applicant fails to meet any of the two conditions within the set time, the leave to appeal out of time shall be automatically *rescinded*.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 10th day of July 2018.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Mr. Mbuthia for the applicant instructed by J. N. Mbuthia & Company Advocates.

No appearance by counsel for the respondent.

Ms. Dorcas and Mr. Kiberenge, Court Clerks.