REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. APPLICATION NO. 65 OF 2018

1. HUSSEIN SAMIR FARAH

2. ALI ANAM ZAINAB……..……..APPLICANTS

VERSUS

1. EVERLYNE ANYANGO

2. CHARLES AJIKI OBAMA……..……..RESPONDENTS

RULING

1. The Applicants filed a notice of motion application dated 8th February, 2018 seeking leave to appeal out of time against the judgment by Hon. L. Kassan (SPM) on 31st October, 2017 in Mavoko Civil Case No. 609 of 2014. The 1st Applicant swore an affidavit on behalf of the 2nd Applicant and on his own behalf in support of the motion. He stated that the parties were directed to file their respective submissions by 12th April, 2017 and appear in court on the same day to confirm filing of submissions. On 12th April, 2017, the Applicants had filed their submissions but the Respondents had not filed theirs. The Respondents then sought more time to file and serve the same and a further mention was slated for 18th May, 2017. The Respondents filed their submissions but did not serve the Applicant. The Applicant thereby asked court for more time to put supplementary submissions if need be upon being served with the Respondents' submissions. A mention date was then slated for 14th September, 2017. He alleged that they were never served with a judgment notice and their advocate learnt of the judgment when he perused the court file. That it is surprising that the proceedings of 14th September, 2017 indicate that Kassim who was their advocate on record held brief for Mungai who was appearing for the Respondents and that it is on the said date a judgment date was given. That judgment was in this case delivered on 31st October, 2017 without notice and not 24th October, 2017 as had earlier been slated. That they instructed their advocate to appeal against the said judgment but time had lapsed and they are apprehensive that the Respondents are likely to execute the decree at any time.

2. The Respondents opposed the application. By a replying affidavit filed on 29th March, 2018, Antony Njogu Mungai, counsel on record for the Respondents stated as follows. That the Applicants were served with a hearing notice dated 13th January, 2017 for hearing on 9th March, 2017. The Applicants advocates did not however attend court and the magistrate gave a mention date for 10th July, 2017 and instructed that the parties do file respective submissions before then. The Respondents filed their submissions on 18th May, 2017 but the Applicants had not filed theirs by 10th July, 2017. They asked for more time within which to file their submissions but again failed to file submissions. The Applicants were then served with a mention notice dated 1st August, 2017 for purposes of taking a judgment date and acknowledged receipt of the notice. The Applicant's advocate once again failed to appear on 14th September, 2017 and a judgment date was issued. He stated that due to the Applicants' advocates ignorance and lack of interest in pursuing their client's matter, judgment was entered and delivered on 31st October, 2017. That they perused the court file after execution notice was served upon them on 16th February, 2018. He stated that it has been over five months since the delivery of the judgment and the Applicants did not bother to follow up on the position of their matter. That the Respondents were served with a hearing notice for this application on 26th February, 2018 for them to appear on 27th February, 2018 which he termed as short notice according to the Civil Procedure Rules and stated that the Applicants only want to delay this matter.

3. It was the Applicants' submissions that errors or lapses should not debar litigants from pursuit of their rights under the law and that the Respondents will not be prejudiced in any way if this application is allowed. In that regard, the Applicants relied on **Nicholas Kiptoo Korir Salat v. Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR** and **Hassan Charo v. Khatib Mwashetani & 3 Others [2014] eKLR**. It was further submitted that the motion was brought within reasonable time barely a fortnight after obtaining the certified copies of proceedings and judgment. On substantial loss, it was argued that the impugned judgment is bound to be executed any time to the detriment of the Applicants and that will render the appeal nugatory. It was argued that the appeal has high chances of success for the reason that the trial magistrate introduced in the judgment, a witness who never testified and cited **Paul Gitonga Wangari v. Gathithi Tea Factory Company Ltd & 2 Others [2016] e KLR** and **Mrao Ltd v. First American Bank of Kenya & 2 Others [2003] KLR 125** and that the trial magistrate apportioned liability at 100% against the Applicants in total disregard of the fact that Respondent was walking on a non-designated pedestrian walk. That the trial magistrate failed to give reasons for granting the awards as he did.

4. The Respondents on the other hand referred to **Kulwant Singh Roopra v. James Nzili Maswili [2014] eKLR** and submitted that it is incumbent upon an applicant who intends to file an appeal under that section to apply for an order or a decree which he will file together with a memorandum of appeal. that apart from the memorandum of appeal and the decree, an applicant must obtain and file a certificate of delay certify the time taken to prepare and deliver the order or the decree should his appeal be filed outside 30 days period. It was submitted that the laxity in handling the matter shows that the Applicants' advocates had no interest in pursuing their client's matter and that the Respondents should not suffer due to the said laxity. It was the Respondents' submission that the Applicants have not explained the delay in filing this application. In this regard the cases of **Jaber Mohsen Ali & another v. Priscillah Boit & another [2014] eKLR** and **Winfred Nyawira Maina v. Peterson Onyiego Gichana [2015] eKLR** to demonstrate the effects of delay.

5. I have given due consideration to this motion. Two issues fall for this court's determination. First, whether or not sufficient cause has been given and secondly, whether or not such an applicant must file a certificate of delay. From the Applicants' averments, an inference can be made that there was laxity on the part of their counsel in prosecuting their case and it is the said reason that has been put out as the cause for delay in filing the appeal. It is as a result of the delay that they got to know of the existence of the judgment late in the day. The question is whether or not their advocates' error is excusable. In this regard, I am guided by ***Philip Chemwolo & Another v. Augustine Kubende (1982-1988) KAR 103*** *and* ***Patrick Mutunga Mwilu & 10 Others v. Mary Katua & 2 Others (2012) eKLR*** *which are for the proposition that an advocate's mistakes should not be visited on a litigant since the advocate only losses costs unlike a litigant who has a higher stake in the suit; and further that courts must guard such a litigant from such losses. I acknowledge that the Applicants had a duty to make a follow up on their case's progress, however, it is apparent that the blunders in this case were occasioned by the advocate who despite being given mention dates to file submissions never filed the same and failed to attend court as required. I find that such a blunder should not be visited on the Applicants. This is coupled with the duty of the court to sustain matters and determine them on merit.*

6. Turning to the second issue, the substantive law on appeal out of time is Section 79G of the Civil Procedure Act, CAP 21 which 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 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."***

7. The Court of Appeal in **Kyuma v. Kyema (1988) KLR 185** where an applicant delayed in filing his appeal had this to say:

> ***"The appellant was entitled to appeal to the High Court against these orders if he felt aggrieved by them. Section 65(1) of the Civil Procedure Act confers a right of appeal on him. But in order to set on foot a competent appeal, the appellant must have filed his appeal within thirty days from the date of the order…This period may be extended provided he obtained from the magistrates court a certificate of delay within the meaning of section 79G of Act 21. The section allows the thirty days to be extended by such period as was required to make a copy of the "decree or order of the court". As the appeal was to be filed beyond the 30 days prescribed by the rules, the appellant ought to apply and file with the memorandum of appeal, not only the order of the court, but also a certificate of delay…"***

8. From the above provision and the test in Kyuma case (supra), it follows that an applicant who intends to file an appeal under section 79G of the Civil Procedure Act; must, considering that the proviso is in mandatory terms, obtain and file a certificate of delay certifying the time taken to prepare and deliver the order or the decree in the event his/her appeal will be filed outside the prescribed 30 days limit. The Applicants herein have not demonstrated that they applied for or obtained a certificate of delay as required. In view of the foregoing, the motion is found to have no merit and is hereby dismissed with costs.

Dated, Signed and Delivered at Machakos this 20th day of September 2018.

D. K. KEMEI

JUDGE

In the presence of:-

Nagwere for Kasini - for the Applicant

N/A Njogu - for the Respondent

Josephine - Court Assistant