REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL MISCELLANEOUS APPLICATION NO. 31 OF 2018

ESTHER KATUMBI NDIKU & ANOR.....APPLICANT

VERSUS

MWIRIGI TITUS ALIAS TITUS MWIRIGI KIRIGIA.....RESPONDENT

RULING

The notice of motion filed in court on 30/5/2018 brought pursuant to section 79(1) and 95 of the Civil Procedure Act, order 42 Rule 6 (1) and order 43 of the Civil Procedure Rules and Article 159 of the constitution. seeks the following:

1. That the applicant be granted leave to file an appeal out of time against the whole judgement delivered by Hon. Shitubi on 7th December 2017

2. That the memorandum of appeal; annexed hereto be deemed as duly filed and served

3. That there be an interim stay of execution and/or enforcement of the judgement dated 7th December 2017 pending the hearing and determination of this application

4. That there be a stay of execution and or enforcement of the judgement dated 7th December 2017 appeal pending the hearing and determination of the proposed appeal.

5. That the costs of this application be in the cause

The applicant is supported with an affidavit sworn by Mwirigi Titus and also the grounds on the face of the motion.

In opposing the applicant, the respondent sworn by Carolyne Bisko stating that the applicant lack merit and ought to be struck out for failure to comply with the rules and the statute.

Historical Background

The applicant who was the defendant in the Civil Suit No. 549 of 2015 in the court below was sued by the plaintiff/respondent to this application for a claim arising from a motor-vehicle accident. The claim was based on the tort of negligence in which the impugned motor vehicle Registration KBU 838H hit one Zachariah Musyoka Nduku suffered fatal injuries. As a result of the accident the estate of the deceased suffered loss under the Law Reform Act and Fatal Accidents from the alleged negligence acts of the defendant, agent or servant the respondent/plaintiff sought general and special damages and cost of the suit together with interest at court rates.

The trial court heard the case in earnest by taking evidence and submissions from both parties on issues framed within the claim on liability and quantum. On 21/12/2017 the learned trial magistrate delivered and signed the judgement in absence of the parties or their representatives. The defendant/applicant vide a letter dated 30/5/2018 wrote to the executive Officer applying for certified copies of the proceedings and judgement for further action. There is no evidence on record whether the Executive Officer of the court granted the request by the defendant/applicant. The application to seek leave to file an appeal was therefore filed on 30/5/2018. In the summary of the grounds in the affidavit the applicant deposes that he was dissatisfied with the entire judgement of the trial court and has a desire to file an appeal to the applicant involves the discretion of the court under section 79G of the Civil Procedure Act to be allowed leave to prosecute the appeal out of time. In the said supporting affidavit, he has annexed the intended proposed memorandum of appeal.

The applicant's submission to the application

Mr. Mogusu learned counsel for the applicant filed written submissions dated 7/6/2018 which manifest the arguments and contentions why

this court should exercise discretion in his favour by granting leave to file the appeal out of time. On the part of learned counsel, the applicant has a meritorious appeal as espoused from the draft memorandum that the application has been filed timeously by the applicant and delivery of judgement. That the impugned judgment was delivered without notice and presence of the defendant. That in the event leave is not granted the appellant is likely to suffer substantial prejudicial and injustice. In view of the issues he wants the appellate court to hear and determine. In support of the submissions learned counsel relied on the following authorities: **Elena Korir Versus Kenyatta University 2014 EKLR, Esther Wanjiru Versus Jacline Arege 2014 EKLR.** He prayed for the orders in the motion.

The respondents' submissions learned counsel Ms. Anne Kiusya objected to the notice of motion seeking extension of time under section 79G to file an appeal out of time. Counsel contended that there was no notice for the delivery of judgement by the learned trial magistrate to the parties as stated by the applicant. She however challenges the applicant for not being vigilant to making the efforts to peruse the court file to appraise himself of the judgement. Learned counsel further argued that there is evidence that the applicant alleges to have been aware of the judgement on 3/4/2014 and yet he did nothing until the 30/5/2018. Learned counsel similarly contended that the application has been brought with inordinate delay and the same could be dismissed. In support of the objection learned counsel relied on the following authorities: **Nicholas Kiptoo Arap Korir Salat Versus IEBC & 7 Others SC 16 of 2014.**

Analysis

I have considered the notice of motion, the respondent affidavit evidence by both parties and the brief submissions advanced by legal counsels on their behalf. There are two pertinent issues to be considered in this application.

> **1. Whether this court can grant leave and extend time for the applicant to file his appeal out of time.**
>
> **2. Whether if time is so extended it should follow with orders of stay of execution pending the hearing and determination of the appeal**

On the first issue the discussion begins with reference to section 79G of the Civil Procedure Act which donates power to the court to exercise discretion to admit an appeal out of time. If the appellant has good and sufficient cause to be considered to file, the intended appeal. Under order 50 Rule 6 of the Civil Procedure Rules provides:

> **"Where a limited time has been fixed for doing any act or taking any proceeding under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.**

In the case of **Nicholas Kiptoo Arap Korir Salat (Supra)** the supreme court considered what would constitute the test to be applied in the applications of this nature where the court held as follows:

> 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;
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> 2. The party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
>
> 3. As to whether the court should exercise the discretion to extend time, is a consideration to be made on a case bass
>
> 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court
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> 5. Whether there will be any prejudice to be suffered by the respondents if the extension is granted
>
> 6. The application should have been brought without undue delay; and
>
> 7. In certain cases, like election petitions, public interest should be a consideration for extending time.

In the case of **Mwangi Versus Kenya Airways Ltd 2003 KLR 486 Fakir Mohammed Versus Joseph Mugambi & 2 Others Civil Application No. 332 of 2004 Versus Republic** addressed the issue of discretion which remains unfettered in the following realm:

> **"The exercise of discretion to extend time is unfettered and there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, possibly the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted the effect of the delay on public administration, the importance of compliance with time limits the resources of the parties whether the matter raises issues of public importance are all relevant but not extension factors."**

It is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for the delay in making the application for extension of time and whether there are any other extenuating circumstances that can enable the court to exercise such a discretion in the interest of justice.

What the provisions of section 79G of the Civil Procedure Act require is for the applicant to provide good and sufficient cause to be permitted an enlargement of time beyond the set limit of 30 days.

Turning to the facts of this case I make this observation: it is not disputed that both parties had no notice for the delivery of judgement as stated in their respective submissions. Under order 21(1) of the Civil Procedure Rules a judgement of the court is the one which determines the dispute and rights of the parties with finality until and unless it is overturned by an appellate court. At the time of delivery of judgement, the presiding officer shall date, sign and present it in open court. The term open court has the effect that in deciding the substantive issues of the dispute the parties have to be present at the time of the delivery of judgement.

In this case the trial magistrate dated and signed the judgement allegedly in open court on 21/12/2017 in absence of the parties. From the record there is no order that the judgement be served upon the parties immediately or soon thereafter it was delivered.

It is essentially a matter of fairness to both sides that they get to know the outcome of the dispute from the judgement or ruling of the trial court. That is what the rules of court are designed to accomplish as the judgement is one of the cornerstone in any litigation. It was not correct for the trial magistrate to rule on the dispute without giving a chance to the parties who prosecuted the claim not to be in attendance.

The applicant has deposed that he came to learn of the decision when the judgement creditor legal representative apparently pursued demand for settlement of the decree. This according to the applicant was followed by a letter dated 30/5/2018 to the Executive Officer of the court to be supplied with certified copy of the proceedings and judgement. As evidenced from the record no such action has been taken by the Executive Officer nor response communicated to the applicant as to the exact time when the record and judgement is to be served upon the parties.

The Executive Officer is mandated under Article 47 of the Constitution and Section 4 of the Fair Administrative Act to supply any such information held in his custody for purposes of an appeal or to any person with a stake in the dispute.

There is no cogent evidence that the trial court has complied with the request for supplying of the typed proceedings or judgement. In order to comply with section 79G as read with order 42 of the Civil Procedure Rules the appeal ought to be filed together with the judgement or order of the court appealed against. A copy of the record of the court below and annexures will also be relevant.

Where the appellant is unable to file his appeal within the relevant time the extensions of time is allowed upon establishing sufficient cause. In this case the applicant failure to file his appeal within 30 days under section 79G has been stated to be absence of notice of the delivery of judgement. It hardly needs to be overemphasized that the right to a copy of the record of the proceedings within a reasonable period after the conclusion of the case is a constitutional dictate.

In my conceded view this ground alone is a sufficient cause for court to exercise discretion to enlarge time for an applicant to file his or her appeal out of time.

To the above authorities I would add to the principles by the **Superior Court in Mudave Versus Southern Industries Co. Ltd SA 531** where the court held on what constitutes sufficient cause in an application similar to the one before me as stated in the passage below:

> **"In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion to be exercised judiciously *upon a consideration of all the facts and in essence it is a matter of fairness to both sides. Among the facts usually relevant are* the degree of lateness, the explanation therefor the principles of success and the importance of the case. ordinarily these facts are interrelated: they are not individually decisive for that would be a piece meal approach in compatible with a trial discretion, save of course that if there are principles of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed an object conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong or the importance of the issue and strong prospects of success may lead to compensate for a long delay. And the respondent's interest in finality must not be overlooked".**

To these principles the discretion to be exercised under the provision of section 79G of the Act could only be exercised if sufficient reason has been shown for delay and subsequent application for enlargement of time.

I have reviewed the record and the affidavit evidence and the judgement of the trial court dated and signed on 7/12/2017 but handed down on 21/12/2017 to the date the notice of motion was filed has been explained adequately in the circumstances of this case. I hold that the delay though appears to be unreasonable has been sufficiently explained. It is essential in my view that this court exercises discretion to the applicant for extension of time under section 79G to enable him file and serve the memorandum of appeal upon the respondent.

Having endeavored to set out the history of the case so far as it's relevant I observe that granting this extension of time would not cause prejudice or occasion injustice to the respondent which is not likely to be compensated by way of costs at the end of it all.

The second issue arises out of the order sought for grant of extension of time to file an appeal against the impugned judgement of the trial court. The applicant's counsel contended that pending the application for certified copy of the record and judgement of the lower court and consequent determination of the appeal there is need to preserve the subject matter of the appeal by granting stay of execution under section 42 rule 1(6) of the Civil Procedure Rules. Both counsels moved together on this issue by filing the relevant submissions.

What is a stay of execution contemplated under order 42 Rule (6) of the Rules?

> **"A stay of execution is a temporary delay to enable a party who has some right under the law to carry out the order. What stay does to a successful application in the trial court is to have his rights suspended of enjoying the fruits of the judgment pending the hearing and determination of the appeal."**

The application for stay under order 42 rule 96) set out general factors to guide the court in granting or refusing a stay of execution. The question to be resolved from the facts discussed in the affidavits of the applicant is whether substantial loss may result unless the stay order is made.

Secondly, is whether the application has been filed timeously since the verdict of the dispute by the trial court. Thirdly, that security has been given by the applicant for the due performance of the decree that may ultimately be issued and binding upon him or her pending the outcome of the appeal.

I have carefully considered the submissions by the applicant and a corresponding rejoinder by the respondent counsel. The application has also been evaluated on the issues raised by the applicant seeking exercise of discretion of this court.

It is settled law that an appeal by itself does not operate as a stay of execution of the judgement of the court. The gist of the principles to be appreciated has been described in the various decisions. In this regard I rely on the case of **Butt V Rent Restriction Tribunal [1982] KLR 417** where the court held further as follows:

> **"1. The power of the court to grant or refuse an application for a stay of execution is a discretionally power. The discretion should be exercised in such a way as not to prevent an appeal.**
>
> **2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.**
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> **3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.**
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> **4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.**
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> **5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."**

These principles were also stated by the Court of Appeal in the case of **Carter & Sons Ltd Versus Deposit Protection Fund Board & 2 Others Civil Appeal No. 29 of 1997.** They are:

> **"The mere fact that there're are strong grounds of appeal would not in itself, justify an order for stay the applicant must establish a sufficient cause secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly, the applicant must promise security and the applicant must of course be made without unreasonable delay".**

In the present case, the proceedings before the Chief Magistrate and the judgement being appealed has been put into question requiring the intervention of this first appellate court. It is clear that an award of damages totaling Ksh. 946,800 was allowed in favour of the respondent plus costs and interest at court rates. It appears from the draft memorandum of appeal that the applicant is aggrieved with the entire judgment on both liability and quantum. On the other hand, at this stage I have no jurisdiction to delve into merits or demerits of the intended appeal. What should be the concern of this court is whether or not in the respondent's reply to the application for stay he has shown that in the event the appeal succeeds he will satisfy the condition of repaying back the decretal amount.

It is evident from the affidavit that the respondent has not demonstrated that if the decree is enforced and in the final end the appellant succeeds he will be in a position to pay back the liquidated amount. The ground upon which the intended appeal is anchored is essentially on the nature of general damages awarded by the trial court following a claim based on tort of negligence. I have not been shown by way of any credible or cogent material that the respondent would be in a position to repay the appellant the colossal sum in the event this appeal is allowed.

I have considered the arguments submitted on behalf of the parties to this application. I am persuaded that substantial loss may result to the applicant if grant of stay is declined at this stage and the appeal may be rendered nugatory. In the premises I allow the notice of motion with the following orders to abide:

> **1. That the applicant does furnish security of the entire decretal amount of Ksh. 946,800 to be deposited in the joint interest earning account of both parties or their respective counsels in a bank or financial institution of their choice within 30 days until further orders of this court.**
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> **2. That the applicant does obtain the certified copy of the record and judgement and have it served upon the respondent within 30 days from today's date.**
>
> **3. That the respective parties do appear before the Deputy Registrar on 30TH October, 2018 to confirm compliance with the order.**
>
> **4. Costs of this application to abide the outcome of the appeal.**

Dated, delivered and signed at Kajiado in open court on this 3rd Day of October, 2018.

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R. NYAKUNDI

JUDGE

Representation:

- Mr. Ondieki for Mrs. Wambua for the Respondent - Present
- Mr. Mosire & Mogusu for the Applicant