REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

MISCELLANEOUS APPLICATION NO. 300 OF 2018

(CORAM: ODUNGA, J)

NICODEMUS MULWA MULI.....................PLAINTIFF/RESPONDENT

VERSUS

JOSEPH GACHURU..............................1ST DEFENDANT/APPLICANT

COMPLAINANT INTERNATIONAL

SECURITY LIMITED..........................2ND DEFENDANT/APPLICANT

RULING

1. In these proceedings, the applicants herein, **Joseph Gachuru** and **Complainant International Security Limited**, seek in substance, that this Court grants to them leave to file an appeal out of time.

2. The application was based on the grounds that judgement in this (sic) matter was delivered on 20th June, 2018 by the Honourable Principal Magistrate **D Orimba** and being dissatisfied with the said judgement they wish to appeal on the issue of quantum particularly the award of general damages in favour of the plaintiff/respondent herein.

3. In a rather incoherent supporting affidavit, the applicants averred through their learned counsel, **Daniel Mugun**, that on or about 7th August, 2018, the firm of Hannah Muriithi and Company Advocates was instructed by CIC Insurance Limited to file an appeal against the said judgement and that written instruction to file the necessary application was inadvertent due to consultations and necessary approvals.

4. It was contended that the subordinate court on 13th June, 2018 informed the applicants that judgement was not ready and would be delivered on notice. However upon being served with the Respondents' costs they discovered that judgement had been delivered on the said 20th June, 2018 in the sum of Kshs 2,600,000.00. Consequently they filed an application dated 11th July, 2018 for stay pending appeal which was heard on 18th July, 2018 and a ruling reserved for 19th September, 2018.

5. It was the applicants' case that by the time they got to know of the judgement the time within which to appeal had already lapsed hence this Court's leave to do so.

6. It was the applicants' position that while the applicants stand to suffer prejudice, loss and damages if this application is not granted, no such loss would be suffered by the Respondent if the application is granted.

7. The application was however opposed by the Respondents based on the following grounds of opposition:

1. That the Applicants/Defendants application is:

a) Frivolous, incompetent and vexatious.

b) Bad in law.

c) Incurably defective.

d) An abuse of the court process.

e) An afterthought and brought in bad faith.

f) Brought after inordinate delay.

g) Duplicity.

2. That judgment in this matter was delivered on 20th June, 2018 which is almost (3) three months ago and this application is brought after inordinate delay.

3. That the Defendants/Applicants have filed a similar application in Kangundo Law Courts dated 11th July, 2018 and the same is still pending before court.

4. That the Defendants/Applicants have not given any good reasons to warrant the granting of the orders sought.

5. That this application is not brought in good faith as it is only brought as an afterthought from its timing and is a duplicity due to a similar application pending before Kangundo Law Courts as stated in paragraph 3 above.

6. That the provisions of Section 79 G of the Civil Procedure Rules are clear on the time for lodging of appeal and the purported appeal is clearly an afterthought.

7. That the Defendants/Applicants were served with a breakdown of costs on 2nd July, 2018 which is only 12 days after the judgment was delivered and that was sufficient time to file an appeal which they never did yet they had a whole 30 days.

8. That the law cannot be bent to suit individuals due to their laxity.

9. That the Defendants/Applicants are vexatious litigants and that is why they are moving from one court to the other seeking the same orders.

10. That the Defendants/Applicants' application lacks merit and is an abuse of the court process.

Determination

8. I have considered the application, the supporting affidavit, the grounds of opposition and the submissions filed as well as the authorities relied upon.

9. 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.

10. Therefore an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show 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.

11. 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.

12. In this case the Respondent did not file a replying affidavit hence the factual averments by the applicants are not controverted, notwithstanding the fact that the applicants did not exhibit a copy of the proceedings in the lower court to prove their contention that judgement was due for delivery on notice. The delay herein was from 20th June, 2018 to 31st August, 2018, slightly over two months. The reasons for the delay are given firstly as due to the fact that the applicants were not aware of the date of the delivery of the judgement, they having not received the notification to that effect. 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.

13. 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. 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."

14. Since it is not controverted that the applicants were not notified of the date of the delivery of judgement, they have a sufficient reason for not appealing. It is further contended that the applicants' advocates did not receive instructions to appeal within the prescribed time. As to the length of the delay, in the circumstances of this case, it cannot be said that the period of delay which is slightly over a month from the date they ought to have appealed amounts to inordinate delay. It is only the period falling after the date when the action ought to have been taken that ought to be explained.

15. With respect to costs, I did not hear the Respondent contend if the application is allowed he 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.**

16. Whereas the Respondents contended that a similar application was pending before the subordinate court, no such evidence was adduced.

17. In the result I hereby extend the time limited for filing of the appeal. Let the applicants file and serve their appeal within 7 days from the date hereof, if the same has not been filed otherwise if the same has been filed it is hereby deemed as properly filed.

18. Only the Respondent complied with the directions of this Court to furnish soft copies of their response and submissions, though only the submissions were furnished but not the grounds of opposition. Section 1A(3) of the ***Civil Procedure Act*** provides as hereunder:

A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

19. One of the overriding objectives of the Civil Procedure Act is the facilitation of expeditious resolution of the civil disputes governed by the Act. A direction that Advocates and parties do furnish the Court with soft copies of their pleadings and submissions is geared towards that same objective and where they fail to comply therewith, it amounts to a failure to comply with a statutory mandate which may call for a penalty in costs or deprivation of costs even where the same would have been granted.

20. As there was a half-hearted effort by the Respondent to comply, half the costs of this application are awarded to the Plaintiff/Respondent.

21. It is so ordered.

Read, signed and delivered in open Court at Machakos this 9th day of October, 2018.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Muriuiki for Mrs Mureithi for the Applicant

CA Geoffrey