REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CIVIL MISC. APPLICATION NO. 55 OF 2018

COLLINS MUSYOKA MUTUKU.....APPLICANT

VERSUS

MIRIAM NZULA.....RESPONDENT

R U L I N G

1. By way of Notice of Motion dated the **13th** day of **July, 2018,** the Applicant, **Collins Musyoka** seeks orders as follows:

a) That this Honourable Court be pleased to set aside the Judgment of the **Honourable Murage** (Senior Resident Magistrate) delivered on **19th December, 2017** in **CMCC 88/17** and the subsequent Ruling delivered on **21st June, 2018.**

b) That this Honourable Court be pleased to grant leave to the Applicant to appeal out of time against the Judgment of the **Honourable Murage** (Senior Resident Magistrate) delivered on **19th December, 2017** in **CMCC 88/17** and the subsequent Ruling delivered on **21st June, 2018.**

c) That this Honourable Court be pleased to stay execution of the Decree issued pursuant to the Judgment of the **Honourable Murage** (Senior Resident Magistrate) delivered on **19th December, 2017** in **CMCC 88/17** pending the outcome of the intended Appeal.

d) That the costs of this application abide the outcome of the intended Appeal.

2. The application is premised on grounds that the Judgment that was delivered by the Honourable Magistrate on the **19th December, 2017** in **CMCC 88/17** was in favour of the Respondent herein; at the time the Respondent came to learn of the matter the Court had delivered Judgment therefore he lacked the opportunity to enter appearance and file defence; suit papers and hearing notices were never served on the Defendant; the delay was unintended on the part of the Advocates for the Applicant as they were not in a position to advise their clients without obtaining a copy of the said Judgment and properly analyzing it; an application to set aside the Judgment was preferred and filed by the Applicant but dismissed by **Honourable Murage** in a Ruling dated **21st June, 2018;** the Applicant has been served with warrants of attachment as well as a proclamation of attachment of his property dated **11th July, 2018** and the attachment is due.

3. That the Applicant is aggrieved by the Judgment therefore seeks leave to lodge an Appeal out of time;

the application is timely and without undue delay; the Applicant stands to suffer substantial and irreparable loss and damage as there is a likelihood of not being able to recover the decretal sum should the intended Appeal succeed; the Applicant is ready and willing to comply with reasonable conditions that the Court may grant including depositing reasonable costs to Court accounts pending the outcome of the intended Appeal; the Applicant has an arguable Appeal with a high chance of success and the Respondent shall not be prejudiced or suffer damage that cannot be compensated by way of costs.

4. **Kelvin Ngure** the Deputy Claims Manager at Directline Assurance Company Limited insurers of motor-vehicle **No. KCH 296C** owned by the Applicant swore an affidavit in support of the application where he deposed that by the time the application came to learn of the matter Judgment had been delivered therefore he lacked the opportunity to enter appearance and file defence. That suit papers and hearing notices in the matter were not served on him. That upon delivery of Judgment an inadvertent delay ensued in the process of obtaining a copy of the said Judgment and analyzing it, a delay that was unintended on the part of Advocates for the Applicants as they were not in a position to advise their clients without obtaining a copy of the same.

5. That an application to set aside the Judgment was dismissed and the Applicant has been served with a warrant of attachment. That the Applicant have made the application timeously and will suffer substantial and irreparable damage as there is a likelihood of the Applicants not being able to recover the decretal sum awarded in case the Appeal succeeds and he is willing and ready to comply with any reasonable conditions to be imposed by the Court including depositing reasonable costs in Court.

6. In a reply thereto the Respondent, **Miriam Nzula Mutuku** filed a replying affidavit where she deponed that: the application is frivolous, vexatious and a gross abuse of the Court and ought to be dismissed for being fatally and incurably defective for failure to attach the order appealed against; the application is unclear as to what is being appealed from, whether the Ruling or final Judgment; the Applicant did not seek setting aside of the interlocutory Judgment in its application dated **5th March, 2018** that remains unchallenged; the Applicant did not challenge the final Judgment in the trial Court and as such it cannot be a subject of this Appeal as it was not in issue before the Lower Court; the Applicant has been aware of the final Judgment in this matter since **March, 2018** when he filed the application dated **5th March, 2018** in the Lower Court but never challenged it.

7. Further, that failure to file the application in good time was deliberate as he had ignored service of summons, entry of Judgment and the draft Decree; the Applicant was duly served with a copy of summons and plaint but did not enter appearance or file defence; service of summons is not in dispute; was not challenged by the Process Server being cross examined; the draft Decree was served upon the Respondent but was ignored; no draft defence was attached such that the Lower Court did not have a clue of the alleged defence; That the affidavit in support of the application is sworn by a person who has no locus to swear it therefore is defective, incompetent and should be struck out.

8. The application was canvassed by way of written submissions. It was the argument of the Applicant that the matter should not have proceeded exparte in the absence of the defence as service of the process had not been effected. That the Plaintiff failed to discharge her burden of proof as required by **Section 107, 108** and **109** of the **Evidence Act** as her evidence was not put to scrutiny. In that regard he cited the case of **V.O.W. vs. Private Safari (EA) (2010) eKLR** where **Okwengu, J** stated that:

> ***"…. I have no reason to fault the trial Magistrate in that regard, I find that there was no evidence upon which a finding of negligence against the Appellant's driver could be arrived at. It was for the Respondent to prove that he was not negligent but the Appellant to discharge the burden. Indeed an accident can be caused by many factors. For the above reasons, I find no merit in this appeal and do therefore dismiss it. I make no orders as to costs."***

9. That the Applicant stands to suffer substantial loss if the Appeal succeeds especially so if the Respondent is a 'man' of straw. He relied on the case of **Tabro Transporters LTD vs. Absalom Dora Lumbasi (2012) eKLR.**

10. Further it was urged that the application was brought immediately after the Applicant was served with the draft Decree therefore there was no undue delay. Regarding the deponent to the affidavit in support of the application it was stated that the insurance company being the instructing party and seized of rights of subrogation, the legal officer is well conversant with issues relating to the suit and therefore entitled to apply to the Court to set aside the Judgment in an appropriate case.

11. In opposing the application, it was the Respondent's submission that principles of extending time within which to obtain leave to appeal out of time were set out by the Supreme Court and in the case of **Fahim Yasin Twaha vs. Timamy Issa Abdalla & 2 Others (2015) eKLR Civil Application No. 35 of 2014** where it stated thus:

> ***"[29] As regards extension of time, this Court has already laid down certain guiding principles. In the Nick Salat case, it was thus held:***
>
> ***"… it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.***
>
> ***"… we derive the following as the underlying principles that a Court should consider in exercising such discretion:***
>
> ***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;***
>
> ***2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;***
>
> ***3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;***
>
> ***4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;***
>
> ***5. whether there will be any prejudice suffered by the respondents, if extension is granted;***
>
> ***6. whether the application has been brought without undue delay; and***
>
> ***7. ……..***"

12. She urged that the Judgment sought to be appealed was delivered on the **19th December, 2017** and the Applicant filed the application to set it aside on the **5th March, 2018** and did not seek leave of the Court until four (4) months later when she filed the instant application on the **13th July, 2018.** That the Applicant has not demonstrated what he did to try and obtain the Judgment and he was not candid as to what he needs to appeal against, whether it is the Ruling or the Judgment. Therefore the delay has not been explained by the Applicant.

13. Further, it was urged that the interlocutory Judgment that was entered in the Lower suit remains intact as the Applicant did not seek to have it set aside. To fortify the argument she cited the case of **Abdullahi Ibrahim Ahmed (Suing as the personal representatives of the Estate of Anisa Sheikh Hassan (Deceased) vs. Lem Lem Teklue Muzolo (Civil Appeal No. 278 of 2005)** where the Court of Appeal stated thus:

> ***"For the reasons that will become clear shortly, we do not intend to deal with those submissions, save to reiterate what is now settled law that once interlocutory judgment has been entered the question of liability becomes a foregone conclusion. The second principle we need to restate in***

this appeal is that court must only deal with matters brought before it by parties. Regarding the first principle we can do no better than to repeat what was said by this court in the case of <u>Felix Mathenge V. Kenya Power & Lighting Co. Ltd.</u> Civil Appeal No. 215 of 2002 that:-

> ***"The role of the Court after entering the interlocutory judgment was only to assess damages since interlocutory judgment having been regularly obtained there can never be any doubt that judgment was final with regard to liability and was unassailable. It was only interlocutory with regard to the quantum of damages."***

14. Regarding service of summons it was urged that it was not challenged.

15. That it was upon the Applicant to demonstrate that the Appeal is not frivolous and from the draft Memorandum of Appeal it was stated:

> ***"Being an appeal from part of the judgment and decree of Hon. Murage (SRM) delivered on the 19/12/2017 in Kitui CMCC 88/2017."***

and that grounds raised are confusing so as not to enable the Respondent and Court to tell whether the Appeal is against the Ruling or Judgment and that the delaying tactics by the Applicant are prejudicial to the Respondent.

16. I have duly considered rival submissions of both Counsels.

17. I have gleaned through prayers sought in the application and am of a considered view that the first issue I should address is whether leave to appeal out of time should be granted. The **Nick Salat Case (Supra)** case mentioned is explicit on the issue. The Court has the discretion to extend time depending on the explanation given. It is also provided in **Section 79G** of the **Civil Procedure Act** that states 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."***

The law in the circumstances is very clear, the obligation is upon the Applicant to give a plausible explanation as to why he did not appeal within the timeline set by statute. It is not in doubt that the impugned Judgment was entered on the **19th** day of **December, 2017.** It is urged by the Applicant that the application was brought soon after he was served with the draft Decree therefore there was no undue delay. It is however argued by the Respondent that after delivery of Judgment on the **19th December, 2017,** a subsequent Ruling was delivered on the **21st June, 2018.** This Ruling arose from an application dated **5th March, 2018** on **6th March, 2018** seeking to set aside the Judgment of the Lower Court. Thereafter he stayed for four (4) months without filing the instant application.

18. It is explained in the affidavit in support of the application that the delay was inadvertent as it ensued while he was obtaining a copy of the affidavit. It is however not demonstrated if he did seek to obtain the Judgment, when exactly he moved the Court to avail it and when he eventually got it. It is argued that the Applicant was not served with the Plaint and Summons to Enter Appearance. An affidavit of service deponed by **Alex Wambua Muthenya,** a Process Server (Annexure NNM'2' to the Replying Affidavit) stated that service upon the Applicant was personal but he declined to sign on the principal copy. The Applicant did not seek to interrogate this particular averment by having the deponent cross examined. A draft Decree was brought to the attention of the Applicant as early as **21st February, 2018.** Subsequently an application was made to set aside the Judgment that was dismissed on the **21st June, 2018.** Similarly

the Applicant did not act until he was woken up by proclamation of attachment of his property on the **18th July, 2018.** The intended Appeal being against the Judgment delivered on the **19th** day of **December, 2017,** this application was brought seven (7) months later. There was some delay and the reason for the delay is not convincing.

19. In the interest of having justice done to the parties I must interrogate whether the Appeal has a chance of succeeding. It was pointed out in the Replying Affidavit that the order the Applicant sought to appeal against was not availed for perusal. On the **31st July, 2018** the Applicant's Counsel sought leave to file a Supplementary Affidavit after perusal of the Replying Affidavit, this was however not done.

20. Looking at the draft Memorandum of Appeal. It is against part of the Judgment delivered on the **9th December, 2017.** It faults the trial Magistrate for finding the Applicant 100% vicariously liable and reaching the finding on the quantum payable to the Respondent and dismissal of the application. It is silent on the interlocutory Judgment entered against him. With this kind of uncertainty as to what is actually required in the intended Appeal, it is doubtful if the Appeal has any chance of succeeding.

21. In the result I decline to grant the Applicant leave to appeal out of time. Consequently the question of setting aside the Judgment and subsequent Ruling delivered on the **21st June, 2018** as sought cannot arise.

22. Regarding the prayer of staying execution pending hearing of the intended Appeal, the principle of granting the same is provided by **Order 42 Rule 6** of the **Civil Procedure Rules.** The Applicant must satisfy the Court that:

> ***i. Substantial loss may result unless the order sought is granted.***
>
> ***ii. The application has been made without unreasonable delay; and***
>
> ***iii. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the Applicant has been given (Also see Mukuma vs. Abouga (1988) KLR 867)"***

23. In the case of **Kenya Shell Ltd vs. Kibiru (1986) KLR 410 at Page 416** the Court of Appeal stated that:

> ***"…… If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented."***

24. It is argued that the Appeal shall be rendered nugatory if orders sought are not granted. Having declined to grant the Applicant leave to appeal out of time granting such an order would be an exercise in futility.

25. In the result, the application by the Applicant is devoid of merit. Accordingly, it is dismissed with costs to the Respondent.

26. It is so ordered.

Dated, Signed and **Delivered** at **Kitui** this **13th** day of **November, 2018.**

L. N. MUTENDE

JUDGE