



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 39 OF 2018

GEORGE KIANDA.....1ST APPELLANT/APPLICANT

ASTRAL INDUSTRIES LIMITED.....2ND APPELLANT/APPLICANT

VERSUS

1. JUDITH KATUMBI KATHENGE

2. VINCENT MUSYIMI MWONGE (Suing as legal representatives of the estate of

Peter Mwonge Musyimi (deceased)).....RESPONDENTS

RULING

1. In these proceedings, the applicants herein, **George Kianda** and **Astral Industries Limited**, seek in substance, that this Court grants to them leave be granted to appeal out of time against part of the judgment and decree in Machakos CMCC No. 654 of 2016; **Judith Katumbi Kathenge & Another vs. Astral Industries Ltd & Another** by **Honourable K Kisiangani**, (Resident Magistrate) dated and delivered on 7th March, 2018. They also seek an order that the Memorandum of Appeal dated 26th April, 2018 and filed on the same date be admitted out of time and be deemed as filed and served upon the Respondents within the prescribed time.

2. The application was based on the following grounds:

1) The Applicants are aggrieved by the Judgement of the Honourable C.K Kisiangani delivered on the 7th March 2018 in Machakos CMCC No. 654 of 2016; *Judith Katumbi Kathenge & Another Vs. Astral Industries Ltd & Another*, and have preferred an appeal against part of Honourable Court's Judgement and the resultant decree and have file an Appeal being Machakos HCCA NO. 39 of 2018; *George Kainda & Another-VS-Judith Kathumbi Kathenge & Another (suing as legal representatives of the estate of Peter Mwonge Musyimi (deceased))*.

2) On 7th March, 2018 the Subordinate Court (*Hon. C.K Kisiangani, Resident Magistrate*) delivered its Judgement in CMCC No. 654 of 2016; *Judith Katumbi Kathenge & Another vs. Astral Industries Ltd & Another* and awarded the Plaintiff Kshs.3,275,550/= as damages together with costs of the suit.

3) There was stay of execution of 30 days from the date of delivery of the said Judgement which stay lapsed on 5th April, 2018.

4) The Applicants herein being dissatisfied with the Judgement of the Subordinate Court are desirous of appealing against part (*damages for loss of dependency*) of the said Judgement.

5) The Applicants filed a Memorandum of Appeal dated 26th April, 2018 on the same date in *Machakos HCCA NO. 39 of 2018; George Kainda & Another-VS-Judith Kathumbi Kathenge & Another (suing as legal representatives of the estate of Peter Mwonge Musyimi (deceased))*, twenty one (21) days later after the lapse of the 30 day stay period within which a party aggrieved by a judgement should lodge an appeal.

6) Notably, on 20th March, 2018 the Respondents filed a Notice of Motion Application dated 19th March 2018 seeking review of the Subordinate Court's Judgement for damages awarded for loss of dependency on grounds of discovery of new and

important evidence. The said Application was dismissed by Subordinate Court vide its Ruling delivered on 6th June, 2018.

7) The Application for review posed a possibility of varying the Subordinate Court's Judgement and the resultant decree in the likely event the said Application was successful this in turn delayed the Applicants effort to file the Memorandum of appeal on time and obtain the Subordinate Court's decree. Nevertheless, the Applicants filed the memorandum of appeal out of time pending hearing and determination of the said review Application.

8) The present application seeks admission of Applicants' appeal that has already been filed save out of time in *Machakos HCCA NO. 39 of 2018; George Kainda & Another-VS-Judith Kathumbi Kathenge & Another (suing as legal representatives of the estate of Peter Mwangi Musyimi (deceased))*.

9) One of the grounds in the Memorandum of Appeal is that the Learned Magistrate erred in Law and fact in assuming, estimating and speculating the deceased's earnings to be Kshs. 30,000/= without basis and without any evidence to proof of earnings and disregarding the well-established principles in law on how to calculate earnings of a deceased person in the event the same is not proved by the plaintiff.

10) The Applicants intended appeal is merited and if the Applicants application to appeal out of time is not granted they stand to suffer grievous injustice and prejudice.

11) On 19th September, 2018 the Subordinate Court granted conditional stay of execution pending appeal and which conditions the Applicants have fully complied with at the time of filing this Application.

12) The Applicants' Application has been brought without unreasonable delay and the intended appeal is arguable and has high chances of succeeding. Hence it is in the interest of justice that this Application be allowed as prayed.

3. These were the same facts which were deposed to in the replying affidavit.

4. The application was however opposed by the Respondents.

5. According to the Respondents, **Hon CK Kisiangani** Resident Magistrate delivered her judgement in Machakos CMCC 654 of 2016 and awarded the us the sum of Kshs. 3,275,550/- as General Damages plus costs and that the court granted a stay of execution of 30 days from the date of the judgement which stay lapsed on 5th April 2018.

6. It was deposed that the Defendants/Appellants failed, refused and/or neglected to file any Memorandum of Appeal within the period of stay and only bought up the same on 26th April 2018, being 21 days later. Based on their advocate's information, the Respondents averred that on 8th March 2018, being a day after the Court delivered its judgement in this matter, the Appellants/Defendants' advocates wrote to the Respondent's Advocates asking for a breakdown of the Plaintiff/Respondents' costs so that they can call for the settlement cheque.

7. It was the Respondent's contention that this Application is made late, in bad faith and purely an afterthought meant to delay the Respondent from enjoying the fruits of her hard fought judgment. To the Respondent it was surprising to note that the Appellants herein who were ready on 8th March 2018, to call for the Plaintiff's settlement cheque, changed their mind later and decided to appeal against the judgment of the subordinate court without any explanation. It was therefore the Respondent's position that the delay is in-excusable as the ground on which the Appellants are relying on being that the Respondents had filed an Application for a review of the Honourable court's judgement is not a ground good enough to have prevented the Appellants from filing their Memorandum of appeal.

8. According to the Respondent, the Appellants are misleading this Court that the delay and/or failure to file their Memorandum of Appeal was because the Plaintiffs' Application for review posed a possibility of varying the Subordinate Court's Judgement in case the Application was successful, yet and significantly, their Memorandum of Appeal was filed on 26th April 2018 while the hearing and determination of the Plaintiff/ Respondent's application for review was still pending in court.

9. The Respondent however pleaded that in the event that the Court grants leave to the Appellants to file their appeal out of time as prayed, then they should similarly grant her similar orders since she intends to challenge the order of the court issued on 10th June 2018 dismissing her application for review of the court's judgement dated 7th March 2018, in form of a cross appeal. The Respondents disclosed that she had intended to appeal this decision to dismiss her application for review but the Defendants Advocates engaged her Advocates in some negotiations with a view to settling the dispute herein without having to proceed with the intended appeal by the Defendant/Applicants.

10. It was deposed that the Defendants' Advocates gave a picture of people committed to the negotiations and willing to compensate the Respondent if only she could make a small reduction from the original court award of 3, 275, 550/-. In a desire to have this matter settled amicably, the Respondent agreed to make a reduction of 175,550/- from the initial award of 3,275,550/- to 3,100,000/-. However, it later dawned on her that the Applicants were not committed to the negotiations but were merely playing a delaying tactic.

11. The Respondents asserted that litigation must come to an end at one point and the same should apply to this matter by dismissing the application by the applicants. In intimating her intention to file a cross appeal to the Defendants/Appellants' intended appeal, the Respondent revealed that she has documents in her possession which she found after the court's judgment which prove that the deceased's monthly income was far beyond the Kshs.30, 000/- adopted by the court. It was therefore her view that she stands to suffer irreparable loss and damage if the order for leave to file Appeal out of time is granted to the Appellants alone, without the same being given to her since this will affect the Court's ability to arrive at an accurate and fair decision during appeal, which in itself amounts to an injustice to her. In her view, the Defendants/ Appellants will not suffer any prejudice if the orders for leave to Appeal out of time is given to both the

Appellants/Defendants and the Respondents/Plaintiffs herein.

12. She however maintained that it is in the interest of justice that the Application herein be dismissed. However, should the Court be inclined to grant leave to the Defendants/Appellants to file an Appeal out of time, the same order be granted to her to enable her Appeal the decision of the Court on 6th June 2018 in form of a cross Appeal.

Determination

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

14. 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.

15. 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.

16. As to the principles to be considered in exercising the discretion whether or not to enlarge time in **Leo Sila Mutiso –VS- Helen Wangari Mwangi Civil Application No. Nai. 255 of 1997 [1999] 2 EA 231** the Court of Appeal set out the factors to be considered in deciding whether or not to grant such an application and these are first, the length of the delay; secondly the reason for the explanation if any for the delay; thirdly, (possibly), the chances of the appeal succeeding if the application is granted i.e. 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; and fourthly, the degree of prejudice to the respondent if the application is granted and 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.

17. In this case the reason for the delay is that after the delivery of the judgement sought to be appealed against, the Respondent filed an application for review whose result might have affected the outcome of the judgement. It is however contended by the Respondent that this could not have been the reason for the delay since this appeal was filed during the pendency of the application for review. It was further contended that the Applicant lulled the Respondent into a false sense of security that the matter was being settled hence this application is an afterthought. In my view the pendency of the application for review, though a misconceived basis for not filing the appeal, may well constitute a sufficient reason for appealing out of time. As was held in **Shital Bimal Shah & 2 Others vs. Akiba Bank Limited Civil Appeal (Application) No. 159 of 2005 [2006] 2 EA 323:**

“An error of judgement on the part of a legal adviser may help build up sufficient reason under rule 4 to induce the court to exercise its discretion to extend time for the doing of any act under the Rules of the Court. Mistakes of counsel come in all shapes and sizes but some have been rejected by the Court such as total inaction by counsel disguised as a mistake. A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by a senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictate.”

18. As regards the length of the delay, it is clear that the delay was for a period of 21 days. However as held by the Court of Appeal in **Kenya Ports Authority vs. Silas Obengele Civil Application No. Nai. 297 of 2004 [2006] 2 KLR 112:**

“Whereas it is now settled that whenever there is a delay, even for one day, there must be some explanation for it otherwise an extension may not be granted where there was material before the single judge from which he could and did conclude that the delay or the periods of delay...the full bench will not interfere”

19. In this case the delay was for 21 days and as I have found the reason was excusable. In **Concord Insurance Company Limited vs. Susan Nyambura Hinga Civil Application No. Nai 251 of 2002** it was held that a delay for 28 days is not inordinate for purposes of an application for extension of time to appeal.

20. As regards the merits of the contemplated action, the applicants have indicated that the appeal will be centred on whether the Learned Trial Court applied a proper figure in terms of the deceased’s income. That issue in my view cannot be said to be frivolous.

21. The Respondent has not stated that she cannot be adequately be compensated in costs for any prejudice that she may suffer as a result of a favourable exercise of discretion in favour of the applicant. 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.**

22. In the result I hereby admit this appeal out of time.

23. The Respondent has however deposed that in the interest of justice, she ought to be granted leave to file a cross appeal out of time as well. As stated hereinabove, a party seeking extension of time is expected to give an explanation for failing to file his appeal within time. That explanation cannot be based on the fact that the application by the other party has been allowed as each default must be considered on its own merit. Therefore without an application by the Respondent, this Court cannot grant the orders that the Respondent purports to seek by way of a replying affidavit. Secondly, this Court is not aware of a procedure for filing of a cross-appeal in this Court as opposed to the Court of Appeal. This Court is however aware of the provisions of Order 42 Rule 32 of the ***Civil Procedure Rules*** which makes a reference to a cross-appeal but in a negative manner as follows:

The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross-appeal.

24. The known procedure, in the absence of an express provision dealing with cross-appeals in the High Court, is however for each party to file separate appeals and apply for their consolidation.

25. Suffice it to say that there is no proper application before me seeking for extension of time to either file an appeal or cross appeal out of time. In the premises the Respondent's plea that she ought to be granted leave to cross appeal is misconceived and cannot be granted in the instant proceedings.

26. It is so ordered.

Read, signed and delivered in open Court at Machakos this 12th day of November, 2018.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr. Kilonzo for Kamunde for Applicants

N/A for Respondents

C/A Geoffrey