



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC CIVIL CASE NO. 257 OF 2018

JAMES KARANJA KURIA 1ST APPLICANT

DANIEL NGURE2ND APPLICANT

FRANCIS KINYURI NJOROGE.....3RD APPLICANT

VERSUS

MARY WANJIRU WAINAINA.....RESPONDENT

RULING

1. By a Notice of Motion dated 23rd April 2018, the three applicants namely *James Karanja Kuria, Daniel Ngure and Francis Kinyuri Njoroge* moved this court principally seeking leave to lodge an appeal out of time against the judgment and decree of *Hon. G. Mmasi* in CMCC No. 4085 of 2016 and stay of execution of the said judgment and decree pending the hearing and determination of their intended appeal.
2. The application is premised on the grounds stated on its face and the depositions made in the supporting affidavit sworn on 23rd April 2018 by *Pauline Waruhiu*, the Claims Manager of *Directline Assurance Company Limited*, the insurers of motor vehicle registration number KBK 196Y which was involved in a road traffic accident the subject matter of the suit in the lower court.
3. In the supporting affidavit, it is stated that the 1st and 2nd applicants are aggrieved by the trial court's judgment delivered on 6th March, 2018 particularly the award of damages to the respondent in the sum of KShs.300,000 together with costs and interest; that by the time their insurer instructed their advocates to lodge an appeal, the time prescribed for filing appeals had already expired; that the delay was not deliberate as the applicants took time to go through the judgment to decide on an appeal strategy; that the defendants have an arguable appeal with high chances of success and if the application is not allowed, the respondent is likely to execute for the decretal amount; that if execution proceeded, the applicants will suffer substantial loss as they will be unable to recover the decretal sum from the respondent; that if the application is allowed, the respondent is not likely to suffer any prejudice that cannot be compensated by way of costs; and, that the applicants are ready and willing to comply with any terms the court may set as a precondition to enlargement of time to file an appeal.
4. The application is opposed through a replying affidavit sworn by the respondent, *Mary Wanjiru Wainaina*. The gist of the respondent's opposition to the motion is that the application lacks merit and ought to be dismissed with costs as the applicants' intended appeal has no chances of success; that the applicants have failed to sufficiently explain their failure to file their appeal within time to warrant grant of the orders sought. The respondent also denied the applicants' claim that if she is paid the decretal amount, she will be unable to refund the same in the event the appeal succeeded. She averred that she is a person of means and is ready to deposit with the court a bank guarantee of KShs.400,000 within 14 days of the order pending determination of the intended appeal. That therefore, even if execution proceeded, the applicants are not likely to suffer any loss.
5. When the application came up for hearing on 23rd April 2018, the parties agreed to have the application canvassed by way of written submissions. The applicants filed their written submissions on 21st September 2018 while those of the respondent were filed on 28th August 2018.
6. I have considered the application, the affidavits on record, the rival submissions and the authorities cited. I find that the applicants' prayer for stay of execution pending determination of the intended appeal is dependent upon the outcome of the prayer for enlargement of time to file an appeal because if this prayer is not granted, the prayer for stay of execution will automatically collapse.
7. The law relating to the filing of appeals from the lower court to the High Court in civil cases is stipulated in *section 79 G* of the *Civil Procedure Act* which states 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.”

8. From the above provision, it is clear that appeals to the High Court must be filed within a period of 30 days from the date the decree or order appealed against was made but the court has powers and discretion to enlarge the prescribed time if it is satisfied that there was good and sufficient cause for not having filed the intended appeal in time.

9. Although the decision regarding whether or not to grant extension of time to file an appeal is discretionary, that discretion must be exercised judiciously not capriciously or arbitrarily. It must be exercised in accordance with the law and on the basis of the facts and circumstances of each case. Some of the factors the court must bear in mind in exercising its aforesaid discretion is the length of the delay in filing the intended appeal and the explanation given for the delay. See: *Kenya Shell Company Limited V Charles, CA No. 7 of 2000 [2003] eKLR.*

10. In this case, the judgment sought to be appealed against was delivered on 6th March 2018. The intended appeal therefore ought to have been filed on or about 6th April 2018. The applicant filed the instant application on 23rd April 2018 to which it annexed a memorandum of its intended appeal. There was thus a delay of about 17 days between the expiry of the time prescribed for filing appeals and the time the application was filed.

11. The applicants sought to explain the above delay by claiming that it was occasioned by the insurer’s failure to instruct its advocates on time; that by the time the insurer instructed its advocates to lodge the appeal, the time limited for filing of appeals had expired. The date on which the insurers allegedly gave their instructions to their advocates was however not disclosed and there is nothing to substantiate the claim that they were issued after the time limited for filing appeals had expired.

In any case, no reason was given to explain why the appellant’s insurer could not have instructed its advocates in good time to allow them to file an appeal within the prescribed time. The claim that the insurer had to study the judgment of the lower court to decide on an appeal strategy cannot avail the applicants since no complaint was made to the effect that the applicants applied for copies of the judgment sought to be appealed against but the same was not made available to them or their insurers within a reasonable time.

It is therefore clear from the foregoing that the applicants have totally failed to establish sufficient cause to warrant the exercise of this court’s discretion in their favour by enlarging time to file an appeal.

12. The applicants have in their submissions implored me to invoke the inherent powers of this court under *section 3 A* of the *Civil Procedure Act* (the Act) to grant the orders sought. *Section 3 A* of the Act saves the inherent power of the court to make orders as may be necessary for the ends of justice or to prevent abuse of the court’s process.

In my view, *Section 3 A* of the Act cannot aid the applicants in this case considering that they have failed to give a satisfactory explanation for their failure to file their intended appeal within time and the respondent, being a successful litigant is entitled to the fruits of her judgment.

13. For the foregoing reasons, the applicants’ prayer for enlargement of time within which to file an appeal fails and it is hereby dismissed. With this finding, the applicant’s prayer for stay of execution pending their intended appeal has no legs to stand on and must also fail.

14. In the end, it is my finding that the Notice of Motion dated 23rd April 2018 is devoid of merit and it is hereby dismissed with costs to the respondent.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 9th day of November, 2018.

C. W. GITHUA

JUDGE

In the presence of:

Ms Mathenge for the applicants

Mr. Odhiambo for Mr. Kaburu for the respondent

Mr. Fidel: Court Assistant