Farah & another v EA (Through her father and next friend) CAO (Civil Appeal 437 of 2018) [2024] KECA 268 (KLR) (8 March 2024) (Judgment)

Neutral citation: [2024] KECA 268 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 437 OF 2018

MSA MAKHANDIA, K M'INOTI & M NGUGI, JJA

MARCH 8, 2024

BETWEEN

HUSSEIN SAMIR FARAH ..... 1ST APPELLANT

ALI ANAM ZAINAB ..... 2ND APPELLANT

AND

EA (THROUGH HER FATHER AND NEXT FRIEND) CAO ..... RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Machakos (Kemei, J.) dated 29th September 2018 in Misc App. No. 65 of 2018)

JUDGMENT

1. The appellants, Hussein Samir Farah and Ali Anam Zainab are aggrieved by the ruling and order of the High Court of Kenya at Machakos (Kemei, J.) dated 29th September 2018 in which the learned judge dismissed the appellants' application for extension of time to appeal against a judgment of the Senior Principal Magistrate's Court at Mavoko. They contend that the learned judge misapplied the law and exercised her discretion injudiciously.

   By way of background, the respondent, EA, suing through her father and next friend, CAO, obtained a judgment from the Senior Principal Magistrate's Court at Mavoko following a road accident in which she sustained personal injuries after being knocked down by a motor vehicle belonging to the appellants. In a judgment dated 31st October 2017, the subordinate court found the appellants 100% liable for the accident and awarded the respondent general damages of Kshs. 900,000, future medical care of Kshs. 200,000, interest and costs.

2. On 12th February 2018, the appellants applied in the High Court for an order of stay of execution and extension of time to file appeal against the judgment of the subordinate court. The principle ground upon which the application for extension of time was based was that the appellants were never notified of the date for delivery of the judgment. They averred that it was only after the respondent served

upon them a notice of execution on 20th December 2017 that they perused the court file and found that the judgment had been delivered. By the time they learned of the judgment, the period of 30 days prescribed by section 79G of the *Civil Procedure Act* (the Act) for lodging an appeal had expired. The appellants further averred that the trial court had indicated that the judgment would be delivered on 24th October 2017, but instead it was delivered on 31st October 2017 without notice to them.

The respondent opposed the application by a replying affidavit sworn by her advocate, Mr. Anthony Njogu Mungai, on 26th March 2018. The respondent's position was that the suit was scheduled for mention on 14th September 2017 for the court to give a dated for the judgment. Although the appellants were duly served with the notice of the mention on 1st August 2017, they did not attend court and therefore the court set a date for judgment. The respondent did not indicate which date was set for judgment but confirmed that the judgment was delivered on 31st October 2017. The respondent further contended that the application was not brought without inordinate delay and accused the appellant of seeking to delay the respondent from enjoying the fruits of her judgment.

3. The application for extension of time was heard by Kemei, J. who framed two issues for determination, namely:

   i. whether the applicant had shown sufficient cause for extension of time; and

   ii. whether the applicant was required to file a certificate of delay.

4. On the first question, the learned judge found that the appellants' advocates were responsible for the blunders that made the application for extension of time necessary. However, relying on the decision of this Court in Philip Chemweno & Another v. Augustine Kubende [1982-1988] KAR 103 and that of the High Court in Patrick Mutunga Mwilu & 10 others Mary Katua & 2 Others [2012] eKLR, the learned judge refused to visit the consequences of the advocates' blunders upon the appellants. It is clear therefore, that as regards issue No. 1, the learned judge found in favour of the appellants.

   On the second issue, the learned judge cited the decision of this Court in Kyuma v. Kyema [1988] KLR 185 and held that it was mandatory to obtain a certificate of delay under section 79G of the Act and that in the absence of a certificate of delay, the application for extension of time did not have any merit. Accordingly, the learned judge dismissed the application with costs. In the circumstances, and properly in our view, the High Court did not address the prayer for stay of execution.

5. The appellants were aggrieved and lodged this appeal in which they impugn the finding of the High Court that a certificate of delay was required in an application for extension of time to appeal from the decision of a subordinate court.

   Both parties filed written submissions, those of the appellants are dated 10th October 2023 while those of the respondent bear the date 22nd March 2021. When the parties were invited to highlight the submissions, only the appellants' counsel, Mr. Okoth, appeared. There was no appearance by the respondent's counsel, although they were duly served with the hearing notice. Mr. Okoth elected to rely on his submission without highlighting them, which we shall consider alongside the submissions of the respondent.

6. The appellant submitted that by dint of section 65(1) of the Act, a party aggrieved by a decision of a subordinate court has an automatic right of appeal to the High Court. Such an appeal has to be filed within 30 days from the date of the decree or order appealed from, excluding the time certified to have been required to avail a copy of the decree or order to the intended appellant. Counsel further submitted that the learned judge erred by failing to find that a certificate of delay was not required in an application for extension of time under section 79G of the Act. He contended that a certificate of delay

is not issued before proceedings are typed and availed, and that there is no law requiring a party to wait for a certificate of delay before applying for extension of time. Counsel cited a number of authorities, which we do not need to consider simply because they addressed different statutes and rules, rather than the actual terms of section 79G of the Act.

For the above reasons, the appellants urged us to allow the appeal and award the costs of the appeal to them.

The submissions by the respondent, who is represented by Messrs. Njeri Lukorito & Mungai Advocates, did not address the real issues raised in the appeal, namely whether the High Court erred by holding that a certificate of delay was a mandatory prerequisite in an application for extension of time. Instead, the respondent addressed the prayer for stay of execution, which, as we have noted, the High Court did not deal with. The respondent thus veered off and submitted that the appellants had not demonstrates that they would suffer substantial loss; that the application for stay of execution had not been made without unreasonable delay; that the applicant had not furnished security for costs; and that the application was intended to delay the respondent from enjoying the fruits of her judgment. As is patently clear, these submissions relate to an application under Order 42 rules 6 and 7 of the Act, which has no relevance to this appeal. We shall not say more on the respondent's submissions.

7. In our view, this appeal turns on the interpretation and application of section 79G of the Act. The provision reads as follows:

> " 79G. Time for filing appeals from subordinate courts 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."

Section 79G requires a party desirous of appealing to the High Court from the decision of a subordinate court to do so within 30 days from the date of the decree or order appealed from. In reckoning the 30 days, the section allows exclusion of the period certified by the subordinate court to have been required to prepare and avail to the intending appellant a copy of the decree or order. This period is normally certified in a certificate of delay.

8. In Mistry Premji Ganji (Investments) Ltd v. Kenya National Highways Authority [2019] eKLR, this Court explained that the purpose of a certificate of delay is to specify the time taken to prepare proceedings and judgment for purposes of exclusion in reckoning the prescribed period for filing an appeal. Although the Court's decision was in the context of the Court of Appeal Rules, the certificate of delay serves the same purpose in appeals from decisions of the subordinate court to the High Court, namely, to specify the time taken to prepare the decree or order for purposes of exclusion in reckoning the 30 days within which the appeal is to be filed under section 79G.

Lastly, and in addition, it is important to note that the proviso to section 79G empowers the High Court to admit an appeal out of time upon being satisfied by the intended appellant that he had good and sufficient reasons for failure to file the appeal on time.

The central question, then, is whether under the proviso to section 79G, a certificate of delay is a mandatory requirement in an application for extension of time as held by the learned judge. In holding

that such a certificate is mandatory, the learned judge relied on the following passage from Kyuma v. Kyema (supra):

> "The appellant was entitled to appeal to the High Court against these orders if he felt aggrieved by them. Section 65(1) of the *Civil Procedure Act* confers a right of appeal on him. But in order to set on foot a competent appeal, the appellant must have filed his appeal within thirty days from the date of the order...This period may be extended provided he obtained from the magistrates court a certificate of delay within the meaning of section 79G of (Cap) 21. The section allows the thirty days to be extended by such period as was required to make a copy of the "decree or order of the Court." As the appeal was to be filed on a date beyond the 30 days prescribed by the rules, the appellant ought to apply and file the memorandum of appeal, not only the order of the court but also a certificate of delay."

9. The learned judge then concluded as follows:

> " From the above provision and the test in Kyuma case (supra), it follows that the applicant who intends to file an appeal under section 79G of the *Civil Procedure Act* must, considering that proviso is in mandatory term, obtain and file a certificate of delay certifying the time taken to prepare and deliver the order or the decree in the event his/her appeal will be filed outside the prescribed 30 days' limit. The Applicants here have not demonstrated that they applied for or obtained a certificate of delay as required. In view of the foregoing, the motion is found to have no merit and is hereby dismissed with costs."

10. With great respect, Kyuma v. Kyema does not support the conclusion reached by the learned judge. To begin with, that case did not involve an application for extension of time. The issue before the Court was whether or not an appeal in the High Court from the decision of a subordinate court was filed within the time prescribed by section 79G of the Act. Indeed, this Court succinctly summed up the central issue in the appeal as follows:

> "The important question raised for determination in this appeal is whether the memorandum of appeal filed by the appellant on the 29th April 1987, set on foot competent appeal from the Magistrate's judgment of the 5th December 1986 to the High Court."

11. The appellant in Kyuma v. Kyema relied on a certificate of delay relating to the period required for preparation of "proceedings and judgment" rather than for the preparation of the "decree or order" as required by section 79G. For that reason, the High Court found that the appeal was filed out of time and struck out the same.

    The appellant appealed to this Court. Dismissing the appeal, the Court held that a certificate of delay within the true intendment of section 79G of the Act must certify the time it took to prepare and deliver to the appellant "a copy of the order" of the Magistrate and that in the absence of such a certificate, the appeal was filed out of time.

12. To the extent that the Court was not dealing with an application for extension of time, the decision in Kyuma v. Kyema cannot be read to make a certificate of delay a mandatory requirement in an application for extension of time under section 79G. Properly understood, the judgment in Kyuma v. Kyema and section 79G of the *Civil Procedure Act* merely mean that the period of 30 days within which an appeal must be filled is automatically extended by the period certified by the subordinate court to have been required to prepare and deliver to the appellant a copy of the decree or order. That is why this Court stated in Kyumu v. Kyema that if there is a valid certificate of delay, it is not necessary to apply for extension of time.

As regards the proviso to section 79G of the Act, it enables an appellant who is otherwise out of time to apply for extension of time if he can satisfy the court that he had good and sufficient cause for not filing the appeal out of time. An application for extension of time is independent of the requirement for a certificate of delay and it is a misdirection to read into section 79G of the Act a requirement, mandatory or otherwise, for a certificate of delay. With respect, the learned judge conflated the question of competence of an appeal for lack of a valid certificate of delay, with the question of extension of time. Both involve totally different and distinct considerations. This right to approach the court for extension of time is separate and distinct from "extension" of time under the certificate of delay where the number of days required to avail the decree or order are excluded in reckoning the 30 days for filing appeal.

13. The High Court found that the appellant's application for extension of time was otherwise merited, save for the misdirection as regards the requirement of a certificate of delay. In the circumstances, we are satisfied that this appeal has considerable merit. Accordingly, we allow the appeal with costs to the appellants and direct the appellants to file their appeal in the High Court within 21 days from the date of this judgment. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH 2024.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR