



IN THE COURT OF APPEAL

AT MALINDI

CORAM: MURGOR, J.A.

CIVIL APPLICATION NO. 79 OF 2019

BETWEEN

CONSTANCE KEMBI CHIVATSI.....APPLICANT

AND

BASH HAULIERS LIMITED.....RESPONDENT

(Being an application for extension of time and leave to file and serve a Notice of Appeal from the Judgment of the High Court at Malindi, Nyakundi, J delivered on 12th July 2019 in Succession Cause No. 4 of 2011)

RULING

By a Notice of Motion dated 20th May 2019 brought under *rules 4 and 42 (2)*, of the *Court of Appeal Rules, sections 3A* of the *Appellate Jurisdiction Act* and *sections 1A and B* of the *Civil Procedure Act*, *the applicant, Constance Kembi Chivatsi* has sought orders for extension of time within which to file and serve a Notice of appeal against the orders of the High Court dated 12th July 2019, and further for the draft Notice of appeal attached to the motion to be deemed as properly filed and served.

The motion was expressed to be made on several grounds and was supported by an affidavit sworn by the applicant which contended that, when the judgment was delivered on 12th July 2019, the learned judge read out the summary of the judgment and thereafter ordered the parties to obtain the full judgment from the registry; that the applicant's advocates frantically sought to obtain the judgment, but without success; that an uncertified copy of the judgment was eventually released on 29th July 2019, following which the applicant's counsel explained its outcome to the applicant. It was further contended that the applicant was dissatisfied with the judgment particularly the learned judge's assessment of the damages, and the conclusion reached that the claim for future medical expenses was not specifically pleaded and proved, thereby leading to the award being set aside. It was the applicant's assertion that the delay was not inordinate, and that the appeal had a high chance of success.

Submitting on behalf of the applicant, *Mr. Kazungu*, learned counsel for the applicant reiterated the grounds and averments of the application, save to add that the delay in obtaining the full judgment was the reason for the delay in filing the appeal. Counsel concluded by opining that in any event, the delay was not inordinate.

There was no appearance for the respondent despite it having been served with the hearing notice.

An application for extension of time is governed by *rule 4 of* this Court's Rules. Under *rule 4*, it is settled that, the Court has unfettered discretion on whether or not to extend time for filing of an appeal. In so doing, the discretion should be exercised judiciously and not whimsically, having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent would suffer prejudice if the extension sought was granted. These principles were outlined in the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997* where this Court stated;

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”

This Court's rules specify that the Notice of appeal must be filed within 14 days from the date of the judgment or ruling. In this case the

judgment was delivered on 12th July 2019, and this application seeking leave to file the Notice out of time was filed on 13th August 2019, a delay of 18 days. The applicant has explained that the reason for the delay is that when the judgment was delivered on 12th July 2019, it was only delivered in summary, and that the learned judge thereafter ordered the parties collect the full judgment from the registry. It was the applicant's contention that the full judgment was not made available to the parties until 29th July 2019, and the delay in obtaining the full judgment occasioned the delay in filing the appeal.

As to whether the reason provided is sufficient to explain the delay, I have perused the record, and indeed, the judgment shows that it was delivered on 12th July 2019. There is also a letter addressed to the Deputy Registrar, High Court from the applicant's advocate dated 12th July 2019, requesting for a photocopy of the full judgment. No registry stamp is affixed to the letter as evidence of its receipt by the registry. An email from one, Titus Kirui allegedly forwarding the full judgment is also attached. The email does not indicate whether it emanated from the Deputy Registrar, High Court and neither does it indicate who Titus Kirui is.

In short, though the applicant had attributed the delay in filing the appeal to the delayed release of the full judgment by the learned judge or the registry, she has not provided any support for this allegation. The applicant has not demonstrated that when the learned judge ordered the parties to collect the full proceedings from the registry, that on arrival there they were informed that the full judgment was not available, or that following her advocate's letter to the registry requesting for the full judgment, they had received information to the effect that the full judgment had not been released by the judge. There is nothing to show that the registry was even aware that the parties were awaiting the full judgment. Worse still, is the alleged email from one Titus Kirui who, in seeming to masquerade as the Deputy Registrar, purported to forward the full judgment by email to the applicant's advocates. The email does not disclose its origin, or even indicate that it originated from the Deputy Registrar, High Court at Malindi. Presented in the format produced, it could have emanated from anywhere. And finally, if indeed the full judgment was to be obtained from the registry, were the parties not to have collected it upon payment of a minimal fee evidence by a receipt which would have displayed the date it was released? No such evidence was produced to assist the Court, in the absence of which would lead me question the veracity of the assertions.

In *John Koyi Wakule vs Moses Masika Wetangula & 2 Others* [2010] eKLR this Court considered the effect of untruthful explanations included in such affidavits and stated thus,

“The issue of untruthful affidavit had been raised before the single judge but it appears that he never considered that point. We do not think the learned judge would have granted the application if he had considered the fact that the affidavit in support of the application which was intended to explain the delay was untruthful. An application seeking exercise of the court's discretion must be supported by an honest explanation. It is a serious matter to mislead the court by untruthful affidavits.”

In Mzamil v. Ansari (supra) this Court said:-

“In view of the inconsistencies and contradictions in Asige's affidavit bristles, we do not think the application for extension of time can succeed. Sufficient reason cannot be established on the basis of an obviously incorrect affidavit.”

“The application for extension was supported by what was obviously incorrect and untruthful affidavit. Whether we call it an error of principle or a misapprehension of a point of law or a plainly wrong approach, we agree with Mr. Shah that we ought to interfere with the exercise of the discretion of the learned single judge.”

My view, based on the averments and the documents attached, is that the insinuations that the learned judge or the registry delayed the release of the full judgment are not entirely correct, and the applicant and her advocate have been less than candid as to the actual reason for the delay. The explanation crafted seems to me to point to inadvertence on the advocate's part, which explanation, if placed before this Court, might have provided a more plausible reason for the delay, rather than the applicant falsely attributing it to the learned judge or the registry. I therefore find this implausible assertion insufficient to explain the delay.

I now turn to whether the intended appeal is likely to succeed. The applicant's complaint is that the learned judge misdirected himself by interfering with the trial court's assessment of the damages, and was wrong in setting aside the award on the claim for future medical expenses for reasons that it was not specifically proved. Though the Plaintiff discloses that the applicant's claim for future medical costs was pleaded, whether or not she was entitled to the amount claimed turned on proving how the amount was arrived at. The record does not disclose the basis of the amount claimed, and therefore whether she was entitled to the award for future medical expenses is arguable.

As to prejudice, I do not envisage that any would be visited on the respondent, in the event the time to file the appeal was extended, but this notwithstanding, having taken all the requisite factors into account, I come to the conclusion that the application for extension of time is not merited, and I decline to exercise my discretion to allow it. Accordingly, the Notice of Motion dated 13th August 2019 be and is hereby dismissed with costs to the respondent.

It is so ordered.

Dated and Delivered at Mombasa this 17th day of October, 2019.

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR