



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: SICHALE J.A (IN CHAMBERS)

CIVIL APPLICATION NO. 356 OF 2018

BETWEEN

ELIUD KIMANI MWANGI.....APPLICANT

AND

BRITISH AMERICAN INSURANCE COMPANY LTD.....RESPONDENT

(An application for extension of time to serve the notice of appeal and leave to appeal out of time from the

Judgment of the High Court of Kenya at Nairobi (C.W Githua J) dated 18th October 2018

In

H.C.C.A No. 379 of 2006)

RULING

The applicant, **Eliud Kimani Mwangi (Eliud)** seeks leave of this court to file and serve, outside time, his notice and record of appeal against the judgment of the High Court (**Githua J.**) delivered on **18th October, 2018**. **Eliud** filed a first appeal to the High Court against the decision of the lower court (**Hon. Lorot**) which was called upon to determine the liability and quantum of damages in an accident which occurred on **31st March, 1999** between two vehicles: that is **Mitsubishi Canter KWV 046** (owned by **Eliud**) and **Peugeot Saloon KYJ 003**. **Eliud** sought special damages of **Kshs. 58,000/=** being repair costs for damage to his vehicle on the basis that the accident was caused solely by the negligence of the respondent's (**British American Insurance Co. Ltd**) driver. The respondent defended the suit apportioning total or material liability to the appellant or his driver and filed a counter-claim seeking **Kshs. 172,182/=** for costs incurred repairing the vehicle.

Hon. Lorot ultimately apportioned liability between the parties in the ratio of 70:30 in favour of the respondent and after setting off the appellant's successful claim of special damages for **Kshs. 17,400/=**, awarded **Kshs. 103,054.40/=** to the respondent. On appeal, **Githua J** in a ruling delivered on **18th October 2018** found no reason to interfere with the trial court's decision and dismissed the appeal with costs.

According to the applicant's notice of motion dated **28th November, 2018** and his supporting affidavit sworn on the same date, the applicant, through his advocate, sought to lodge his notice of appeal dated **1st November, 2018** but was unable to do so due to the unavailability of the court file. For the same reason, the applicant was unable to file the letter bespeaking the proceedings and a certified copy of the judgment. The applicant's advocate wrote a letter to the High Court on **31st October, 2018** seeking assistance in tracing the court file so as to proceed to file an appeal to this court without further delay.

The file was eventually traced on **1st November, 2018** and the typed proceedings made available on **15th November, 2018**. By this time the statutory period for filing the notice of appeal had lapsed, an omission that the applicant explained was not deliberate or intentional. The applicant urged the court to allow the application citing that no prejudice would be caused to the respondent; that the intended appeal is arguable as demonstrated by the draft memorandum of appeal; and that it was in the best interest of justice to allow the applicant to pursue his intended appeal.

The application was opposed via replying affidavit sworn on **2nd April 2019**, filed on behalf of the respondent. Therein, it is deposed that: no reasons have been disclosed to warrant granting of the orders sought; the lodging of a notice of appeal is not accompanied by a copy of the judgment intended to be appealed against; the application ought to be dismissed with costs as the same was never served upon the

respondent; that the firm currently on record **P.K Njiiri & Co. Advocates** is irregularly on record and has no audience before the Court; and finally that the intended appeal fails to raise any questions of law and therefore lacks merit.

In making submissions before me, learned counsel **Mr. K. Njiiri** attributed the delay to the applicant's previous counsel who failed to advise the applicant in time of the outcome of his case. This eventually necessitated the applicant to change legal representation. Counsel submitted that the delay of 30 days was beyond the applicant's control and that the respondent would suffer no prejudice should the application be allowed. Lastly, counsel submitted that he had duly filed a notice of change of advocates taking over from the applicant's previous counsel.

Mr. Mariaria appearing for the respondent opposed the application and highlighted the sudden change in counsel's tune in blaming the applicant's previous counsel for the delay as opposed to the averments in the applicant's affidavit that the delay was occasioned by the missing court file. Secondly, counsel submitted that the respondent would be prejudiced and insisted that litigation has to come to an end. As to representation, counsel submitted that the previous advocate needed to seek leave to represent the applicant since judgment had already been rendered. Furthermore, that **Mr. K. Njiiri** is not on record. I was urged to dismiss the application with costs.

In brief rejoinder, counsel argued that the applicant has an undoubted right of appeal and that the respondent, who had failed to demonstrate any prejudice, would have the opportunity to defend the appeal.

The discretion of a single judge under Rule 4 of this Court's Rules is wide and unfettered. However, the discretion must be exercised judicially so as to do justice to the disputants. There are a number of reasons to be considered in the exercise of such discretion. In **Karny Zahrya & Another Vrs. Shalom Levi, CA NO. 80 OF 2018, Koome J.A** stated:

"Some of the considerations to be borne in mind while dealing with an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie the intended appeal has chances of success or is a mere frivolity.

In taking into account the last consideration, it must be born in mind that it is not the role of a single judge to determine definitively the merits of the intended. That is for the full Court if and when it is ultimately presented with the appeal. In Athuman Nusura Juma vs. Afwa Mohamed Ramadhan, CA No. 227 of 2015, this Court stated thus, on that issue:

"This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word "possibly".

In the supporting affidavit, the applicant deponed that the delay in filing the Notice of Appeal and the letter bespeaking the proceedings was caused by the non-availability of the Court file. A Notice of Appeal dated **1st November, 2018** was annexed to the applicant's affidavit as well as a letter of the same date requesting for proceedings. During the hearing before me, the applicant placed blame on his previous counsel who failed to advise him of the outcome of his case. In my view, these are two different positions. I am also at a loss to understand why non-availability of a court file would militate against the filing of a Notice of Appeal and/or a letter bespeaking the proceedings. A letter bespeaking proceedings suffices if it is addressed to the Court without the necessity of filing it. It does not attract any payment. Further, the letter of **1st November, 2018**, bespeaking the proceedings does not comply with rule

83 (2) which provides that:

(2)"An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless the application for such copy was in writing and a copy of it was served upon the respondent".

In my view, the applicant is less than candid in what may have caused the delay. It is in view of this that I have come to the conclusion that the applicant is not deserving of the exercise of the Court's discretion in his favour.

The motion is hereby dismissed with costs.

It is so ordered.

Dated & Delivered at Nairobi this 11th Day of October, 2019.

F. SICHALE

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JUDGE OF APPEAL I certify that this is a true copy of the original.

DEPUTY REGISTRAR