



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: W. OUKO, (P) IN CHAMBERS)

CIVIL APPLICATION NO. 176 OF 2019

BETWEEN

CHARLES JOHN MUSEE.....APPLICANT

AND

CORPORATE INSURANCE COMPANY LIMITED.....RESPONDENT

(An application for leave to appeal out of time against the judgment of the High Court at Nairobi (J.K. Sergon, J) dated 13th July, 2018

in

HCCC No. 159 of 2014)

RULING

It is well settled that the power to determine whether or not to extend time for filing a notice of appeal or lodging the appeal in an application made pursuant to **Rule 4** of this Court's Rules is discretionary and will depend on the length of the delay; the reason for the delay; the degree of prejudice to the respondents if the application is granted; and (possibly) the chances of the appeal succeeding if the application is granted. See Leo Sila Mutiso V. Rose Hellen Wangari Mwangi, Civil Appeal No. 155 of 1997.

On 13th July, 2018 the High Court at Nairobi (Sergon, J), in determining a dispute arising out of an insurance contract, entered judgment in favour of the respondent declaring that it was entitled to avoid the insurance policy in question in respect of any claim against the applicant arising out of injury or loss sustained by any passengers traveling in Motor Vehicle Registration No. KAV 623J on 1st June, 2012 when the said vehicle was involved in an accident.

Aggrieved by this decision, the applicant ought to have lodged his notice of appeal within 14 days from the date of the judgment being 27th July, 2018 but did not, hence the instant application for enlargement of time to do so. The other omnibus prayer for "leave to operate as stay of execution" is alien to an application brought pursuant to **Rule 4** of the Court's rules.

The only prayer to be considered in this application is one for enlargement of time. To begin with, there is on record a Notice of Appeal filed on 14th August, 2018 which was outside the prescribed time.

The applicant attributed the delay to the fact that he was represented by the firm of Andrew Makundi & Company Advocates before the trial court; that after the delivery of the judgment, he instructed them to appeal against the said judgment; that they assured him that the appeal had been filed and that he would be informed of the directions that the court would give; that after waiting for long without any feedback as promised by the said firm, he engaged a different firm, B.M. Mungata & Company Advocates with the aim of establishing the actual position of the file; that it was only after perusal of the court file that he learnt that his former advocate had only filed a Notice of Appeal. It was at that point that he realized that he had been misled to believe that the appeal had been filed as required by law; and that the 60 days' period within which to file the appeal had since lapsed. For the foregoing reasons, it was submitted that the delay in filing the appeal was not deliberate and the applicant should not suffer for the mistakes of his advocate. Further, that the applicant through a letter dated 3rd June, 2019 has applied for a copy of the typed proceedings and intends to expeditiously dispose of the matter if granted the opportunity to appeal. Lastly, it was posited that the respondent has not filed a replying affidavit to the motion as such there would be no prejudice suffered by the respondent.

It is true the respondent did not file a response to the application and did not appear during the hearing of this application despite being

served with the notice of hearing on 16th September, 2019.

In the instant application, the issue for consideration is whether the applicant has offered sufficient explanation for delay between 13th July, 2018 when the impugned judgment was delivered and 17th June, 2019 when the application for extension of time was filed. The applicant majorly attributed the delay to his former advocate whom he submitted led him to believe that the appeal was duly filed.

The mistakes of advocates may not always be visited upon their clients see Tana & Athi Rivers Development Authority V. Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR and such mistakes should not automatically lead to dismissal of applications for enlargement of time. See: Kenya Industrial Estates Ltd v Samuel Sang & another, (2008) eKLR where Deverell J.A stated thus:

“I am mindful of the numerous decisions of this Court stressing that lengthy delays resulting from mistakes of advocates should not always lead to dismissal of applications for extension of time.”

However, a client should not simply blame his advocate for all transgressions in the matter, he has a duty to pursue the prosecution of his or her case. See Habo Agencies Limited V. Wilfred Odhiambo Musingo (2015) eKLR, where it was stated:

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

From the record, it is evident that the Notice of Appeal was filed 30 days after the delivery of the judgment by the firm of Andrew Makundi & Company Advocates which was previously had the conduct of the matter. In the affidavit in support of the application deposed by Doreen Waviya Mwau, the advocate presently in conduct of this matter, it is stated that she received instructions from the applicant on 3rd June, 2019 to represent him in the intended appeal; that her instructions were that the appeal had already been filed and she should proceed with the hearing; that upon perusal of the court file she discovered that only a Notice of Appeal had been filed; that she informed her client of her findings and was instructed to file the current application; that on the same day being 3rd June 2019 she applied for a copy of the typed proceedings. The said application was filed on 17th June, 2019 being approximately 13 days after the receipt of instructions.

Although there has been considerable delay of approximately 11 months and 3 days, the applicant has sufficiently explained it. Being a lay person and having been assured by his advocates that all was well, he genuinely believed that an appeal had been filed. From his conduct, instructing his current advocates to proceed with the hearing as though the appeal had actually been filed is itself evidence that he has been desirous of having the appeal heard. It is apparent that the applicant had been waiting for a long period but was frustrated by his former advocate. Nevertheless, he has demonstrated diligence since he learnt that no appeal had been filed. He filed the instant motion and expeditiously prosecuted it.

The respondent having failed to participate in the proceedings, we cannot see any prejudice that it would suffer if prayers in this application are granted.

Lastly, on the likely chances of success of the appeal, I note that the applicant has not annexed a draft memorandum of appeal to its application. It is from the draft memorandum of appeal that the Court can ascertain the chances of success. This failure is however not fatal as Leo Sila (supra) qualifies this aspect with a rider that the Court may (possibly) consider the chances of success of the appeal. In view of the foregoing, the application has merit and is accordingly allowed. The notice of appeal filed herein is deemed to have been properly filed and served. The applicant has twenty-one (21) days to lodge and serve the record of appeal, failing which leave granted herein will stand vacated.

Costs will abide the outcome of the intended appeal.

Dated and delivered at Nairobi this 8th day of November 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR