



IN THE COURT OF APPEAL

AT MOMBASA

CORAM: KOOME J.A (IN CHAMBERS)

CIVIL APPLICATION NO. 16 OF 2018

BETWEEN

BASARI COMPANY LIMITED.....APPLICANT

AND

EMMANUEL KOMBE NZAI.....RESPONDENT

(Being an application for extension of time to file and serve Notice of Appeal, letter requesting for certified copies of proceedings, the Memorandum of appeal and record of appeal from the Judgment of the High Court of Kenya at Mombasa (Mwangi J.), dated 19th December, 2017

in

HCCC No. 80 of 2015)

RULING

[1] This is an application for extension of time within which to file and serve a notice of appeal, and all that appertains to filing of an appeal. It is expressed to be brought under an array of enactments being the provisions of **Article 159 (2) (d)** of the **Constitution, Section 3A** of the **Appellate Jurisdiction Act** and **Rules 4, 5 (2) (b), 41, 42, 43, 74, 75** and **82** of the **Court of Appeal Rules**. The relevant one of course being **Rule 4** of the **Court of Appeal Rules**. The applicant wishes to appeal against the Judgment of **Mwangi, J.** delivered on 19th December, 2017 (*the impugned judgment*) in which the respondent was awarded a sum of Kshs.20,938,096 being general and special damages in respect of injuries sustained following a motor vehicle accident .

[2] In a nutshell, the orders sought by the applicant in this application are two fold; firstly, for extension of time within which to lodge and serve the Notice of Appeal, the letter bespeaking proceedings and the Memorandum of Appeal and secondly; for stay of execution of the impugned Judgment and decree pending the determination of the appeal. Needless to state that the second prayer is otiose as it does not fall within the realm of a single Judge.

[3] The grounds upon which the application is predicated are indicated on the face of the application as well as in an affidavit in support thereof, sworn by one Pauline Waruhiu. The applicant contends that it is regrettable that the Notice of Appeal was lodged out of time, but hastens to add that the delay was caused by the fact that since the decretal sum awarded was hefty, it attracted a greater degree of consultations between the applicant's management team and their counsel; coupled with the attendant advisory opinions by counsel. As a result, by the time counsel was instructed to lodge the appeal, the statutory 14 days window within which the Notice of Appeal was to be lodged, had lapsed. Notwithstanding the time lapse, the applicant nonetheless lodged the Notice of Appeal and requested for the typed proceedings and it is in this regard that she pressed this Court to exercise its discretion in her favour by enlarging the time within which the said documents were to be lodged and by extension, deem the same to be properly on record.

[4] With regard to the prayer for stay of execution, the applicant reiterated that the decretal sum is substantial and therefore, allowing the respondent to execute the judgment would render the intended appeal nugatory; more so, given that the respondent is a man of straw who was unlikely to repay the decretal sum in the event the appeal succeeds. Accordingly, the applicant urges this court to grant an order staying the execution of the judgment pending the hearing and determination of the appeal. The applicant also submitted that the appeal has overwhelming chances of success and that the respondent stands to suffer no prejudice if the orders sought are granted. On the same note, the applicant also indicated that she was ready to abide by any terms the Court may deem fit to impose; even if it meant depositing the undisputed portion of the decretal sum in Court.

[5] The application was opposed vide the respondent's replying affidavit sworn on 7th June, 2018; wherein the respondent terms the application frivolous, vexatious and an afterthought. He affirms that the delay was inexcusable as no cogent reasons have been given for it. Further, the respondent termed the contention that the delay was necessitated by consultations as lacking legal or even factual basis, given that no advisory opinion was tendered in evidence as proof of the alleged consultations. The respondent asserted that the application is an afterthought, as the applicant has already paid Kshs.3,000,000/- of the decretal sum. In conclusion, that stay of execution should not be granted where there is no valid appeal and since nothing had been shown to warrant the exercise of discretion by this honourable court, the application should be dismissed with costs.

[6] As foretasted, an application for extension of time is provided for under **Rule 4** of this Court's Rules. *It is also settled that the Court has an unfettered discretion to decide on whether to extend time or not. This is obviously with the usual caution that discretion should always be exercised judiciously, and in accordance with the established principles, by having regard to 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 court granted the extension sought. The principles were as outlined in the case of Leo Sila Mutiso v. Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997 – 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.”

[7] That said, the impugned Judgment was delivered on 19th December, 2017. It is common ground that the applicant never lodged the Notice of Appeal nor served a letter bespeaking of the proceedings. Under **Rule 75(2)** of this Court's Rules, the applicant had fourteen days from the date of the impugned judgment to lodge the Notice of Appeal. While factoring in the Christmas vacation in the computation of time, this meant that the Notice of Appeal should have been lodged by 29th January, 2018. The present application was filed within 4 days after the deadline. This period in my humble view cannot be termed as inordinate in the circumstances. The applicant has claimed that the same was necessitated by consultations between herself and counsel, given the magnitude of the decretal sum. Again, bearing in mind the period of delay and the reasons given, I am of the view that taking the circumstances stated herein the delay of 4 days is excusable.

[8] With regard to the chances of the appeal succeeding, I am guided by the decision in the case of In Athuman Nusura Juma v. Afwa Mohamed Ramadhan, CA No. 227 of 2015, where it was held that:

“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”.

Though the applicant has not annexed a draft memorandum of appeal to enable this Court weigh in on the possibility of the appeal succeeding, she has intimated her intention to challenge the impugned decision particularly on quantum of damages. This court is thus inclined to grant the extension of time to file appeal.

[9] Turning to the issue of stay of execution, the jurisdiction of this Court under **Rule 5(2)(b)** of the rules is well established. Orders of stay of execution are not orders that can be made this Court sitting as a single Judge as stated the second prayer does not lie. In the result and for reasons stated here above I am inclined to grant the applicant an extension of time within which to file and serve the record of appeal. This should be done within 30 days from the date of this Ruling and in default this order shall lapse.

Costs of the application to be borne by the applicant.

Dated and delivered at Mombasa this 20th day of September, 2018.

.....

M.K. KOOME

JUDGE OF APPEAL

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

DEPUTY REGISTRAR