



IN THE COURT OF APPEAL

AT MOMBASA

CORAM: KOOME J.A (IN CHAMBERS)

CIVIL APPLICATION NO. 3 OF 2017

BETWEEN

JAMES MATATA

JOSEPHAT SAIDI INYOSI

MJOMBA DOUGLAS KIBURI (suing as legalrepresentatives of the estate of

NYANGE MASAGA (deceased).....APPLICANTS

AND

KENYA POWER LIMITEDRESPONDENT

(In the matter of an application for extension of time for leave to appeal against part of the judgment of High Court of Kenya at Voi, (Kamau J.) delivered on the 25th day of October, 2016 in H.C.Civil Appeal No. 20 of 2015)

RULING

[1] The notice of motion under my consideration in this Ruling is predicated on **Rule 4** of this Court Rules and seeks an extension of time within which the applicants can lodge and serve a Notice of Appeal out of time. The judgment the applicants intend to appeal against was delivered on 25th October, 2016 in Voi Civil Appeal No. 20 of 2015 by **Kamau, J.** The motion is supported by the affidavit of Shem Kebongo learned counsel for the applicant, who asserts that he became aware of the judgement on 2nd November 2016; where upon he immediately advised the applicants of the outcome and they instructed him to file an appeal. The applicants' grievance stems from the fact that the said judgment reduced their award of damages down to Kshs.205,500/- from the Kshs.1,045,500/- previously awarded by the trial magistrate's court.

[2] The application is opposed vide the respondent's grounds of opposition dated 10th July, 2018. By the said opposition, the respondent primarily asserts that the applicants have inexplicably delayed in making the present application and on account of the inordinate and unexplained delay, the application is mischievous and should be dismissed.

[3] During the hearing, learned counsel **Mr. Tsofora**, who held brief for **Mr. Kebongo** for the applicants, relied on the grounds set out on the face of the application and on the averments contained in the supporting affidavit, the gist of which is as captured above. In a nutshell, counsel submitted that the delay in the institution of the appeal was mainly due to a mistake of a clerk at the applicants' advocates' offices, who failed to diarize the date when the matter was slated for judgment; as a result of which the delivery of judgment came and passed. The advocate only learnt of the same on 2nd November, 2016 when he deputized the said clerk to check on the matter at the registry. Nonetheless, upon learning of the judgment, the advocate is said to have promptly informed the applicants, who in turn instructed him to mount an appeal against the said decision.

[4] In his reply to the aforesaid submissions, learned counsel for the respondent **Mr. Wairagu**, was emphatic that no reasonable grounds had been laid out to explain the delay and as such, the application should be dismissed.

[5] In considering the above grounds on which the application is premised, and the opposition thereto as well as the parties' respective submissions, it is imperative to bear in mind that this involves discretionary powers. The sole issue for determination that is discernible is whether the applicants are entitled to an extension of time for purposes of filing an appeal. Under **Rule 75 (2)** of the **Court of Appeal Rules**, a Notice of Appeal ought to be lodged within 14 days of the decision sought to be appealed against.

[6] However, **Rule 4** affords relief to a party who fails to meet those timelines, but even while granting that amnesty, a Judge must exercise that discretionary power judiciously (See **Julius Kamau Kithaka v. Waruguru Kithaka Nyaga & 2 others CA No. 14 of 2013**). Consequently, the applicant must satisfy the Court that the application was made expeditiously; the Court will also evaluate the time taken and determine whether good reasons abound explaining the delay; and lastly, the Court has to consider whether the respondent would suffer prejudice if the application is granted. These principles were succinctly put forth in **Sila Mutiso v. Rose Hellen Wangari Mwangi CA. No. Nai 251 of 1997**) as follows:

“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] In determining the viability of an application for extension of time, I have also taken cue of the decision of the Supreme Court in the case of **Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others, SC Appl No. 16 of 2014**; wherein it was stated that:

“i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of court;

ii. The party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

iii. The Reason for the delay should be explained to the satisfaction of the court;

iv. The court should consider whether there will be any prejudice suffered by the respondent if the extension is granted;

v. The application should have been brought without undue delay.”

[8] As stated above, the onus is always upon the applicant to satisfy the Court that the delay in failing to file the Notice of Appeal timeously is excusable. In this case, the applicants’ contention is simply that owing to a mistake on the part of their counsel, whose clerk failed to diarize the matter, led to an oversight as a consequence of which, the judgment was belatedly received. I would have been ready to accept this as an excusable reason that the judgment was not collected on time. Nonetheless, this reason fades away because the judgment was delivered on 25th October, 2016 and counsel for the applicant learnt of it on 2nd November, 2016, some 6 days later. From counsel’s own admission he was promptly instructed by the applicants to mount an appeal. However there is no explanation why it took him up to 31st January, 2017 to file the instant application for leave.

[9] If anything, in his affidavit sworn in support of the application, the applicants’ counsel deposed in part as follows:

“7. THAT I subsequently and immediately advised the applicants on the outcome thereof and was instructed to lodge an appeal against the same and more particularly on the honourable Judge’s finding that varied the decision of the learned trial (sic) Magistrate by deducting the sum of Kshs.840,000/- being damages awarded for loss of dependency under the Fatal Accidents Act.”

It is without doubt that counsel relayed the news of the belated judgment the moment he got wind of the same. I am cognizant that under **Order 50 rule 4** of the **Civil Procedure Rules 2010**, time ceases to run from 21st December till 13th January of every year as this is the period constituting the Christmas vacation. Even under **Rule 3 (e)** of **this Court’s Rules**, that time is exempted in computation. Nonetheless, if counsel conveyed the information as timeously as he claimed and received instructions on how to proceed just as promptly, a question still looms as to why no action was taken the whole month of November 2016 as well as the first part of December 2016 and the month of January 2017 as the application before me is dated and was filed on 31st January, 2017; long after counsel had been instructed to appeal.

[10] Given that the explanation given for this inordinate delay is not plausible at all, there is nothing to justify an exercise of judicial discretion in favour of the applicants for extension of time. In the result, the applicants have failed to demonstrate that the delay was reasonable or was caused by unavoidable circumstances. Consequently, the application fails to meet the threshold required for the exercise of this Court’s discretion for extension of time. The application is dismissed with no order as to costs as I do not wish to set the parties against each other anymore.

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

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M.K KOOME

JUDGE OF APPEAL

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

DEPUTY REGISTRAR