IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: KARANJA, KOOME & ODEK, JJ.A)

CIVIL APPEAL NO. 59 OF 2018

BETWEEN

ABUBAKER MOHAMED AL-AMIN.....APPELLANT

AND

FIRDAUS SIWA SOM.....RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Mombasa (Thande, J.) dated 11th May, 2018 ***in Misc. Applic. No. 4 of 2018.*****)**

****

JUDGMENT OF THE COURT

1. The crux of the appeal before us is the import of ***Section 79G*** of the ***Civil Procedure Act*** and more particularly, the proviso thereto which reads:

> **"Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:**
>
> **Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.***"* *[Emphasis added]*

2. Concomitant to the above issue is whether the learned Judge (Thande, J.) properly exercised her discretion by declining to grant the appellant leave to lodge an appeal out of time against a judgment of the Kadhi's court dated 23rd March, 2017 in Civil Cause No. 173 of 2011 and to stay the execution of the said judgment.

3. The brief facts culminating in this appeal are that the parties herein celebrated their marriage on 17th November, 2005 under Islamic law. Apparently, there was a huge age gap difference of over 40years between the two which made the appellant's children suspicious of the respondent's motive of consenting to the marriage. Be that as it may, the two lived as husband and wife until 29th June, 2011 when, at least as per the respondent, the appellant's children threw her out of the matrimonial home.

4. Thereafter, the respondent was served with what seemed to be a divorce declaration by the appellant known as '*talak*' under *sharia* law. According to her, the authenticity of the declaration allegedly issued on 29th June, 2011 was questionable since the appellant was suffering from acute depression which affected his mental stability. She believed that the declaration had emanated from the appellant's children who took advantage of his mental status.

5. Moreover, she was also served with proceedings relating to Misc. Applic. No. 22 of 2011 in the Kadhi's court supposedly instituted by the appellant who was intent in formalizing the divorce declaration by obtaining a certificate of divorce. Apprehensive that the appellant or rather his children were bent on obtaining the certificate of divorce without meeting her rights under *sharia* law, the respondent lodged a suit as well in the Kadhi's court being Civil Suit No. 173 of 2011 wherein she sought *inter alia*:

> **a. A declaration that the alleged divorce is a nullity and the plaintiff's (the respondent herein) and the defendant's (the appellant herein) marriage still exists.**
>
> **b. Provision of Edda maintenance under sharia law.**

c. Restitution of conjugal rights.

d. Release of her personal effects.

6. Subsequently, the two suits were consolidated and the matter proceeded for formal proof. Upon the close of the respondent's case, the matter was adjourned severally on the ground that the appellant was abroad seeking medical attention for his mental condition. Ultimately, when he appeared for the hearing of his defence, the court as well as counsel for the parties noted that he seemed not to be in full control of his mental faculties. This provoked the Senior Resident Kadhi, Honourable Khamis Ramadhani, to direct that he undergoes a medical evaluation which he did.

7. By a medical report dated 12th May, 2014 Dr. Omar J. Aly indicated that owing to the appellant's mental illness he was not fit to appear before the Kadhi's court. It is on the basis of this report that the defence hearing at the subordinate court proceeded without the appellant giving evidence. Nonetheless, evidence was led on his behalf with respect to the divorce by witnesses who were allegedly present when he uttered the declaration of divorce.

8. At the conclusion of the said trial, the subordinate court in a judgment dated 27th March, 2017 found that the declaration of divorce issued by the appellant was not valid under the Islamic law; due to the prevailing circumstances the objectives of marriage could no longer be attained between the parties thus, the respondent was entitled to a divorce which was granted. The Kadhi also awarded the respondent maintenance and compensation for her personal belongings which he assessed at Kshs.6,925,000 to be paid within seven days of the date of judgment.

9. As would be expected, the appellant was not happy and an appeal against the said judgment was filed in the High Court being H.C.C.A No. 11 of 2017. Stay of execution of the said judgment was also sought vide an application dated 4th April, 2017. In opposing the application, the respondent filed a preliminary objection challenging its competency. The gist of the objection was that the appellant lacked the requisite mental capacity to give instructions for the institution of the appeal and application. The learned Judge agreed as much and by a ruling dated 19th January, 2018 she not only struck out the application but the appeal as well.

10. Later on, the appellant filed yet another application dated 2nd March, 2018 in the High Court being Misc. Applic. No. 4 of 2018 seeking leave to file an appeal against the Kadhi's judgment out of time and stay of the said judgment pending the determination of the intended appeal. In support of that application, the appellant deposed that the delay in lodging the appeal was occasioned by the striking out of his initial appeal due to his mental condition; he has since recovered and has been certified medically fit to pursue an appeal against the Kadhi's judgement. In his opinion, the intended appeal has overwhelming chances of success and in the event stay is not granted there is a real likelihood that the respondent would execute the judgment by selling his property, Plot No. Mombasa/XLVII/41 through public auction to his detriment.

11. In reply, the respondent deposed that he was not convinced of the appellant's alleged recovery and asserted that there was no medical evidence to that effect. In any event, the appellant had not given a reasonable explanation for the delay. Furthermore, the appellant had failed to attach a draft memorandum of appeal hence the High Court had no basis of exercising its discretion in his favour.

12. After taking into consideration the rival submissions by the parties the learned Judge dismissed the application with costs in a ruling dated 11th May, 2018. In doing so, she expressed herself with respect to the leave sought as follows:

> **"The wording of the proviso in Section 79G clearly shows that the leave to be sought is for admission of a filed appeal and not for filing an appeal.**
>
> **…**
>
> **The Applicant ought therefore to have filed a competent appeal and at the same time seek the Court's leave to have such appeal admitted out of time. As things stand, there is no appeal before this Court in respect of which the Court can exercise its discretion to admit."**

13. Declining to stay the execution of the Kadhi's judgment the learned Judge in her own words stated:

> "**An application for stay of execution of a judgment must be filed within an appeal against that judgment. As stated above, there is no appeal before this Court. Where an application for stay is directed to a decision against which no appeal has been filed as in the present case, the Court has no jurisdiction to entertain the same.**
>
> **…**
>
> **In the absence of an appeal for the Court to consider, the arguments that the appeal will be rendered nugatory and that the same has high chances of success are mere statements which are of no persuasive value. Indeed any attempt by this Court to entertain the Application is tantamount to the Court arrogating to itself jurisdiction not conferred upon it by law."**

14. It is that decision that sparked the appeal herein which is predicated on nine grounds which can be aptly summarized as the learned Judge erred in fact and law by-

i. Misinterpreting the proviso to Section 79G of the Civil Procedure Code.

ii. Failing to find that the appellant had given a reasonable explanation for the delay in filing the appeal.

iii. Failing to find that the respondent would not be prejudiced in any way if the extension of time to file the appeal was granted.

iv. Failing to uphold the appellant's right to appeal.

v. Failing to realize that the intended appeal raised a jurisdictional question which warrants the High court's consideration.

15. Taking issue with the learned Judge's interpretation of ***Section 79G*** of the ***Civil Procedure Act***, Mr. Gikandi, learned counsel for the appellant, asserted that the phrase '*an appeal may be admitted out of time'* therein does not mandatorily require an appellant to first file an appeal out of time and then seek admission of the same. In his view, the legislature's intention was clear, in that, the section provides a mechanism for a party, who did not, for reasonable cause file an appeal on time, to approach the High Court for leave to file the appeal out of time. Accordingly, admission of an appeal out of time under the said section connotes both the admission of a filed appeal or granting leave to file the said appeal.

16. To bolster that line of argument, reference was made to the definition given to the word 'admitted' under the Oxford dictionary thus:

"to give right or means of entrance or permit to exercise a certain function or privilege."

Reliance was also placed on the case of ***Charles Karanja Kiiru vs. Charles Githinji Muigwa [2017] eKLR*** wherein, according to the appellant, this Court affirmed the following sentiments of High Court in ***Martha Wambui vs. Irene Wanjiru Mwangi & another [2015] eKLR***:

"In my view, the use of the term "admitted" connotes both the act of allowing an appeal to be filed out of time and also the act of allowing or permitting an appeal already filed to be admitted out of time …"

17. Counsel went further to draw an analogy from the exercise of this Court's discretion under ***Rule 4*** of the ***Court of Appeal Rules***. He argued that the Court has time and again granted intending appellants leave to appeal out of time by either admitting an appeal which had been filed out of time without leave or allowing an appeal to be filed.

18. According to him, the learned Judge in adopting the narrow and technical interpretation of ***Section 79G*** failed to uphold substantive justice contrary to ***Article 159(1)(d)*** of the ***Constitution*** as read with the oxygen principles enshrined under ***Sections 1A, 1B & 3A*** of the ***Civil Procedure Act***. He went on to state that whenever a court is dealing with an application under ***Section 79G*** it should as much as possible give a chance to an intending appellant to pursue his/her grievance in the appellate court. More so, considering that the right of appeal overlaps with the right to access to justice and right to fair trial under ***Articles 48*** and ***50(1)*** of the ***Constitution***.

19. As far as Mr. Gikandi was concerned, the appellant had met all the requirements of enlargement of time to file an appeal out of time as set out by the Supreme Court in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 others [2014] eKLR**. The appellant had explained the delay was due to the fact that his initial appeal had been struck out on account of his metal condition coupled with the mental treatment he underwent. It was upon his recovery that he sought leave to file an appeal out of time. Furthermore, the intended appeal raises a jurisdictional issue which warrants the High Court's determination, namely, whether under Mohamedan law a former husband can be ordered to pay maintenance to his wife for a period of over 3 months. It is on the premise of the above submissions that Mr. Gikandi urged us to allow the appeal.

20. Opposing the appeal, Mr. Mkan, learned counsel for the respondent, submitted that the learned Judge's decision was correct since a similar application had been filed in the initial appeal which was struck out. In his view, the court had applied its judicial mind in the earlier application and made a decision thus the application dated 2nd March, 2018 was *res judicata*.

21. The competency of the application dated 2nd March, 2018 was also attacked on the ground that the affidavit in support thereof was sworn by the appellant whose mental capacity was found wanting. Further, there was no medical report confirming he was mentally fit to institute the application in question.

22. Counsel added that extension of time to file an appeal was not as a matter of right. Rather the onus was on the appellant to meet the established principles of granting such an extension of time which he failed to do. More specifically, a draft memorandum of appeal had not been attached to the application hence the learned Judge had no way of determining whether the intended appeal was arguable. The appellant had also failed to give a reasonable explanation for the delay in filing the intended appeal.

23. As for stay of the Kadhi's court judgment, Mr. Mkan submitted that it was not enough for the appellant to just allege that the intended appeal was arguable and he should have demonstrated the prejudice or injury, if any, he would suffer and that such injury was incapable of being compensated by an award of damages.

24. We have considered the record, submissions of the parties and the law. It is common ground that extension of time is not a right of a party. It is an equitable remedy which is only available to a deserving party, at the discretion of the Court. In this case, the provision which applies to the extension sought by the appellant is ***Section 79G*** of the ***Civil Procedure Act*** which is set out herein above. In issue, as noted in the opening paragraph of this judgment, is the import of the proviso thereto. In other words, whether the admission of an appeal out of time as stipulated in the said proviso means that such an appeal ought to have first been filed out of time before admission and/or whether it also includes leave to file such an appeal.

25. There appears to be two schools of thought with regard to the said proviso. The first is steadfast that the appeal sought to be admitted under the proviso should first have been filed out of time. This position is reflected in the persuasive decisions of the High Court to mention but a few, ***Gerald M'limbine vs. Joseph Kangangi [2009] eKLR, GK Associates Limited & another vs. National Bank of Kenya Limited [2017] eKLR*** and ***Amri Mchoro Mwamuri vs. Indian Ocean Beach Club [2018] eKLR***.

26. The second holds a similar view as the appellant, that is, that the proviso makes room for both admission of appeals already filed out of time and allowing for an appeal to be filed out of time. These decisions include ***Martha Wambui vs. Irene Wanjiru Mwangi & another [2015] eKLR*** and ***Masoud M Y Noorani vs. General Tyre Sales Limited [2014] eKLR.***

27. This calls for the interpretation of the said provision in order to discern the intention of the legislature. See ***Halsbury's Laws of England, 4th Edition (Reissue), Butterworths, 1995, Vol. 44(1), para 137***. Establishing the legislature's intention entails looking at the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. See ***Cusack vs. Harrow London Borough Council [2013] 4 ALL ER 97***.

28. In our view, the essence of the proviso to ***Section 79G*** and more specifically, the phrase '*an appeal may be admitted out of time'* does not exclude an appeal that is yet to be filed. In ***Charles Karanja Kiiru vs. Charles Githinji Muigwa (supra)*** this Court was dealing with the issue of an appeal that had been filed out of time without leave of the Court. The learned Judge of the High Court was being cudgelled for granting leave and deeming as having been duly filed, an appeal that had in the first instance been filed without leave of the court.

29. This Court held that an appeal can be filed out of time and validated later by way of seeking and obtaining leave of court to admit it out of time. This decision seemed to validate the decision in ***Martha Wambui vs. Irene Wanjiru Mwangi & another (supra)*** and the other decisions in the second school of thought referred to above. Did the decision invalidate the position taken by the first school of thought? We answer this in the negative and add that this decision sanctioned both positions. We echo with approval the words of Aburili, J. in **Martha Wambui** (*supra*) where she stated :-

> **"In my view the use of the term 'admitted' connotes both the act of allowing an appeal to be filed out of time and also the act of allowing or permitting an appeal already filed to be admitted out of time…"**

30. We hold the view that the above expression by Aburili, J. portrays the correct interpretation of the proviso to **Section 79G** of the Civil Procedure Act. Having arrived at that finding, it goes without saying that the learned Judge fell into error when she dismissed the prayer to file the appeal out of time on grounds that leave could not be granted before the appeal itself had been lodged. However, the learned Judge was correct in holding that in the absence of the appeal there was nothing upon which the stay orders sought under ***Order 42*** of the ***Civil Procedure Rules*** could be anchored. Towards that end, we concur and adopt the observations made by Meoli, J. in ***Rosalindi Wanjiku Macharia vs. James Kiingati Kimani (Suing as the Legal Representative of the Estate of Martin Muiruri (Deceased)) [2017] eKLR*** where she stated;

> **"In my view, even if the prayer to appeal out of time had been granted, and the said prayer for stay pleaded in the Motion, it would still have failed for the reason that the existence of an appeal is a condition precedent to the exercise of this court's discretion under Order 42 Rule 6 (1) of the Civil Procedure Rules.**
>
> **…**
>
> **It would seem that the invocation of the jurisdiction of this court under Order 42 Rule 6 (1) or 6 (6) of the Civil Procedure Rules must be preceded by the filing of an appeal, or compliance with the procedure for filing appeal, in this case a memorandum of appeal (See Order 42 Rule 1 of the Civil Procedure Rules). Until the memorandum of appeal is filed, the court would be acting in vacuo by granting a stay of execution pending appeal."**

31. The prayer for stay of execution could only be canvassed after the appeal had been filed pursuant to the leave granted by the court. The two prayers should not have been lumped together in one application. We are satisfied from the grounds on the face of the application and the appellant's depositions in the supporting affidavit dated 2nd March, 2018 that leave ought to have been granted.

32. In the end, we find that this appeal succeeds in part, only to the extent that prayer No. 4 of the Notice of Motion dated 2nd March, 2018 is hereby allowed, prayers 2 and 3 having been properly dismissed. The appellant is granted leave to file his appeal within 14 days from the date of this judgment, failing which this order will stand discharged. In view of the partial success of the appeal, we order that each party bears its own costs of this appeal.

Dated and delivered at Mombasa this 8th day of November, 2018.

W. KARANJA

…….……..

JUDGE OF APPEAL

M. K. KOOME

…….……..

JUDGE OF APPEAL

J. OTIENO-ODEK

…….

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR