IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO. 247 OF 2014

BETWEEN-

PHELISTER MASISTA MASHETI.....1ST APPELLANT

WYCLIFFE AMOLA SHIMUNAGA.....2ND APPELLANT

AND

ARNOLD SITATI BWISA.....1ST RESPONDENT

NATIONAL HOSPITAL INSURANCE FUND.....2ND RESPONDENT

*(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (**D. A. Onyancha, J**) dated 23rd June, 2015*

in

H. C. Misc. Appl. No. 693 of 2013)

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JUDGMENT OF THE COURT

1. The appeal before us calls for interference with the exercise of the discretion of the lower court. Such interference is well ring-fenced by the settled principle that it will not be done unless the appellate court is satisfied that the decision of the lower court was clearly wrong. Sir Charles Newbold P. in the old case of ***Mbogoh & Anor v Shah [1968] EA*** **93**:put it this way:-

> ***"..a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercise his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."***

2. Summarizing the same principles in a latter case, ***United India Insurance Co Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd vs East African Underwriters (Kenya) Ltd[1985] eKLR,*** Madan JA (as he then was) stated thus:-

"The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. (It) is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

3. It is on those principles that we embark on the examination of the appeal. It arose from the refusal by the High Court **(Onyancha J.)** in his ruling made on 23rd June 2015 to grant leave as sought by the appellant before us, to appeal against a decision of Nairobi Chief Magistrate **(Hon. Mrs.T.W.C. Wamae)** made more than two years earlier on 22nd June 2012. The chief magistrate had decided in favour of the appellant in a running down matter in which the appellant's husband was knocked down by a motor vehicle driven by the 1st respondent and owned by the 2nd respondent. The accident happened near Yaya centre where, according to the sole witness called by the appellant, the deceased was standing off the road when the respondents' motor vehicle was driven at high speed in an effort to avoid two *matatus* ahead of it and in the process knocked down the deceased.

4. On the other hand, the 1st respondent testified that he was driving at normal speed along Argwings Kodhek road when, at a point near Kwality Hotel, a person suddenly appeared from behind a parked *matatu* but he was unable to avoid the collision, despite taking avoiding action, because the person was too close. No traffic police officer was called to shed light on the exact point of impact. In the result the trial court was unable to apportion liability and instead made the presumption that both the deceased and the 1st respondent were equally to blame.

5. For reasons given in the Judgment, the following awards were made in favour of the appellant:

(a) Pain and suffering.....10,000/-

Loss of expectation of life.....100,000/-

Loss of dependency.....280,000/-

Special damages.....51,600

--441,600

Less 50%-220,800 (Two hundred and twenty thousand, eight hundred

6. If either of the parties was dissatisfied with the judgment, they ought to have filed an appeal under ***Section 79G*** of the ***Civil Procedure Act (CPA)***, which provides as follows:

"79G. Every appeal from a subordinate court to the High Court shall be filled 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."

7. Apparently the appellant was not satisfied with the Judgment but did not file the appeal within 30 days. She applied for extension of time on 9th July 2013 and explained that she applied for "uncertified copy of proceedings and a certified copy of judgment" on 29th June 2012 but could not file the letter bespeaking the copies because the court file went missing. It was only traced on 17th December 2012 when the letter

was filed and subsequently, the copies were availed together with a certificate of delay from the deputy registrar on 27th June 2013. The delay, according to the appellant, was caused by the court.

8. The application was opposed by the respondents on the basis that there was no proof that the delay was caused by the court. They observed that there was no evidence laid before the court to show that the court file went missing. To the contrary, the deputy registrar had certified that the proceedings had been applied for on 17th September 2012, which was more than two and a half months after the judgment, and therefore, in the respondents' view, there was inordinate delay and the application was an afterthought.

9. Dismissing the application after examining the law governing the exercise of his discretion, the High Court Judge stated as follows:-

> ***"The record shows that the judgment was delivered on 22nd June 2012 and the certificate of delay states that the applicant applied for the proceedings after the required period for filing appeal had expired. The allegation that the court file was missing appears far-fetched from the evidence on record. The supporting affidavit stated that the file was traced on 17th September 2012 and the certificate of delay issued by the Chief Magistrate confirms that indeed the applicant applied for the copies on 17th September 2012. I agree with counsel for the respondent, that the application is an afterthought, as the applicant could not be aggrieved by the decision of the lower court and wait for 61 days to start applying for the proceedings. In my view the delay is inordinate and the applicant has not established a good and sufficient cause for not filing the appeal within the required time. The applicant has not satisfactorily explained the steps taken to ensure compliance."***

10. The appeal before us lays out four grounds and the parties, represented by their respective counsel, Mr**. L. M. Ombete** instructed by M/S L.M. Ombete & Company Advocates for the appellant, and **Mr. Ondego** instructed by M/S Nderitu &Partners, Advocates, for the respondents, agreed to have the appeal determined by way of written submissions with oral highlighting. The written submissions were filed on both sides, albeit outside the timelines set, but Mr. Ombete made no appearance at the oral hearing of the appeal despite service of hearing notice. Mr. Ondego called for dismissal of the appeal on the basis of the written submissions.

11. In the grounds of appeal as well as the written submissions, the appellant faults the High Court judge for finding that there was no satisfactory explanation for the delay; finding that the letter bespeaking copies of proceedings was made after the period of appeal had expired; dismissing the assertion that the trial court's file was missing and failing to exercise his discretion judiciously. It was submitted that there was affidavit evidence explaining that the letter bespeaking copies was written on 29th June 2012, nine days after the judgment but was not stamped by the court's registry until 17th September 2012 because of the missing court file. According to counsel, it was a notorious fact that court files go missing and the judge should have taken judicial notice. The explanation made in this case was that it was in the typing pool all the time. According to counsel, it did not matter that they did not write to the registry complaining about the missing file because three months time lapse was not long. Finally, counsel submitted that the learned Judge relied on the wrong principles for the exercise of his discretion since he cited the case of ***Aviation Cargo Support Ltd v. St. Mark Freight Services Ltd [2014] eKLR*** on the principles of the application of ***Rule 4*** of the ***Court of Appeal Rules (CAR)***. He asked us to rely on the case of ***Kyuma v. Kyema [1988] K.L.R 185*** on the application of the proviso to **Section 79G**.

12. In response, the respondents submitted firstly, that the notice of appeal before us was filed out of time without leave and the appeal was thus incompetent. Secondly, it was submitted, the certificate of delay obtained by the appellant to file the appeal before the High Court was incompetent since it relates to the time taken to prepare and supply copies of proceedings and judgment. However, what was envisaged as a certificate of delay under Section 79G was the time taken to prepare the "**decree or order**." They relied on the ***Kyuma case*** *(supra*) for that submission and asked us to disregard the certificate of delay. It was their view that the discretion exercisable under Rule 4 of the Court of Appeal Rules is the same as the one applicable under ***Section 79G*** of ***CPA*** and in any event, the Supreme Court had now re-set the principles

applicable for extension of time in the case of

Nicholas Kiptoo arap Korir Salat vs Independent Electoral and Boundaries Commission (IEBC) and Others [2014]eKLR. As for the substantive issues, the respondents found no reason to disturb the discretion of the lower court as it was based on solid observations and findings. Finally, the respondents submitted that allowing the application would be prejudicial to them because they had been led by the appellant to believe that there would be no appeal when she pursued the decretal sum as well as costs, which the appellants settled in full.

13. We have considered all those submissions and the authorities cited before us. We shall first deal with the legal issues raised on both sides. Firstly, by the respondents, that the appeal is incompetent by virtue of the notice of appeal having been filed out of time. The straight answer is that the complaint is raised too late in the day. **Rule 104(b)** of CAR prohibits the raising of any objection to the competence of the appeal which might have been raised by application under rule 84, without the leave of the Court.

Rule 84 provides for applications for striking out the notice of appeal which must be done within 30 days of service of the notice of appeal. No leave was sought or given to raise the issue, and we therefore reject it.

14. The second issue raised by the appellant was that the principles applicable in the exercise of discretion under **Rule 4** are different from the principles under **Section 79G** and vice versa. The phraseology in the two provisions is indeed different as it appears to make the discretion exercisable under section 79G more stringent since it requires that the court can only extend time when it is satisfied that there is ***"good and sufficient cause."*** As stated in the Indian Supreme Court case of ***Parimal v. Veena[2011] 3 SCC 545:***

> "***Sufficient cause means that a party had not acted in a negligent manner or there was want of bona fides on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been 'not acting diligently' or 'remaining inactive'. However, the facts and circumstances of each case must afford sufficient grounds to enable the Court concerned to exercise discretion for the reason that wherever the Court exercises discretion, it has to be exercised judicially".***

15. On the other hand, under ***Rule 4***, the stricture of ***"sufficient reason"*** was removed by amendment in 1985 thus conferring unfettered discretion on the Court. There is therefore no limit to the number of factors the Court may onsider so long as they are relevant and accord with the justice of the matter under consideration.

16. More recently, our Supreme Court has settled the approach to the discretion exercisable in applications for extension of time in the ***Nicholas Salat case*** *(supra)* where it stated thus:-

> ***"1. Extension of time is not a right but an equitable remedy and is only available to a deserving party and at the discretion of the Court.***
>
> ***2. A party who seeks for extension of time has the burden of laying the basis to the satisfaction of the Court.***
>
> ***3. Discretion to extend time is a consideration to be made on a case to case basis.***
>
> ***4. Where there is a reasonable reason for the delay, it should be explained to the satisfaction of the Court.***
>
> ***5. Whether there will be any prejudice suffered by the respondent if the extension is granted.***
>
> ***6. Whether the application has been brought without undue delay.***
>
> ***7. Whether in certain cases, like elections, public interest should be a consideration for***

extending time."

17. In this case, the High Court did not cite the Supreme Court decision, but we are satisfied that it considered the relevant elements of the principles enunciated by that Court. There was no error in principle.

18. The final legal issue raised by the respondents was that the certificate of delay was of no consequence as it was not in compliance with the law. We think there is some substance in this submission as it is grounded on authority. The ***Kyuma case*** (supra) which was relied on by both sides, clearly pointed out that ***Section 79G*** provides that the period may be extended where the applicant obtains from the trial court a certificate of delay indicating the period that was required to prepare "***a copy of the decree or order".*** It was held, per Apaloo JA:

> ***"But in order to set afoot a competent appeal, the appellant must have filed his appeal within thirty days from the date of the order…… This period may be extended provided he obtained from the Magistrate's Court a certificate of delay within the meaning of Section 79 G. The section allows the thirty days to be extended by such period as was required to make a copy of the 'decree or order of the Court'. As the appeal was to be filed beyond the 30 days prescribed by the rules, the appellant ought to apply and file with the memorandum of appeal not only the order of the Court, but also a certificate of delay. Instead of applying for the copy of the order, the appellant applied for 'a certified copy of the proceedings and judgment'. He was given a certificate of delay which certified the time required for preparing the 'proceedings and judgment'...The learned Judge held that was not the certificate of delay contemplated by Section 79G. The learned judge was right, it has very serious consequences for the appellant."***

19. The appellant in this matter did not apply for a *"copy of the decree or order"* but sought "*uncertified copies of the proceedings and a certified copy of the judgment"* which rendered the certificate of delay, in the words of **Kwach JA** *"absolutely worthless and incapable of remedying the delay that occurred."* We would say the same of the certificate of delay in this matter.

20. On the substantive issues, the learned judge considered the sole explanation given for the delay that it was on account of a missing court file and found it wanting. We think so too. A diligent litigant would have written to the court complaining about the disappearance of the file and received a written explanation from the deputy registrar. The appellant or his advocates never did so because, in their view, three months was not a long wait. We say it was inordinate when the apparent inaction is not accompanied by a reasonable explanation. It is not even an excusable mistake worth considering. The deputy registrar was clear in the certificate issued that the copies were applied for on 17th September 2012 and not June 2012 and the High Court made no error in relying on that date to fault the appellant.

21. We also think the conduct of the appellant was prejudicial to the respondents. The appellant does not deny that she pursued the payment of the decretal sum as well as the costs of the suit, which were settled. The respondents say they were of the impression that there was no appeal contemplated in the matter and were being taken by surprise. We think it is a reasonable apprehension.

For the foregoing reasons we do not find any merit in the appeal and we order that it be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 16th day of June, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

…….……..

JUDGE OF APPEAL

P. O. KIAGE

…….……..

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR