IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO. 71 OF 2016

BETWEEN

CHARLES KARANJA KIIRU …… APPELLANT

AND

CHARLES GITHINJI MUIGWA …..... RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Mombasa (Otieno, J.) dated 19th February, 2016 **in H.C.C.A No. 133 of 2014)**

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JUDGMENT OF THE COURT

1. This appeal emanates from the ruling of the High Court (Otieno, J.) dated 19th February, 2016. Pursuant to that ruling the learned Judge extended time within which the respondent could lodge an appeal against a decision of the subordinate court which dismissed the respondent's application for setting aside a default judgment and also issued stay of execution of the decree therein pending the determination of the appeal. As far as the appellant is concerned, the learned Judge did not exercise his discretion judicially in granting the said orders.

2. By way of background**, t**he brief facts culminating in this appeal are that by a suit filed on 2nd July, 2013 in the surbordinate court being CMCC No. 1222 of 2013, the appellant sued the respondent for recovery of a debt amounting to Kshs. 2,500,000 together with costs and interest thereon. Subsequently, a default judgment was entered against the respondent for non-appearance. As would be expected, the appellant commenced execution proceedings by taking out a Notice To Show Cause (NTSC) for committal of the respondent to civil jail. Apparently, the respondent only learnt of the said proceedings when he was served with the NTSC on 6th February, 2014.

3. The respondent then instructed M/S Oduor Okumu & Co Advocates to act for him in the matter. The first thing that the respondent's advocate did was to file an application dated 14th February, 2014 seeking to set aside the default judgment which in the respondent's opinion was irregularly and illegally entered, for the reason that he was never served with the summons to enter appearance.

4. However, before the said application could be prosecuted, the respondent's relationship with his advocate turned sour resulting in the said advocate filing an application to cease acting for the respondent dated 25th March, 2014. The application was set down for hearing and allowed on 27th June, 2014 in the

absence of the respondent. In addition, on the same day, the appellant's advocate requested the subordinate court to dismiss the application for setting aside the default judgment for want of prosecution and the court acceded vide a ruling dated 19th August, 2014. Again, at least as per the respondent, he was not served with the notice of the said ruling.

5. Nonetheless, the appellant continued with execution process and took out another NTSC in response to which the respondent appeared before the subordinate court on 30th September, 2014. Sympathetic to the condition of his health, the subordinate court released the respondent on a bond of Kshs. 500,000 and directed him to appear in court once again on 14th October, 2014. For some reason the respondent did not turn up on the scheduled date culminating in his arrest and production before the court on 21st October, 2014. This time round the court was not as sympathetic and committed him to civil jail for a period of one month.

6. It was while he was in custody that he filed an appeal on 24th October, 2014 against the ruling dated 19th August, 2014 together with an application seeking his release. Eventually, by consent of the parties the respondent was released on 1st December, 2014. Still determined to execute the decree, the appellant attached the respondent's matrimonial property described as Mwiga/Block/1133. This came as a shock to the respondent who was under the impression that the parties were engaged in negotiations to reach an out of court of settlement.

7. Perhaps those circumstances contributed to the respondent filing an application on 26th March, 2015 before the High Court seeking *inter alia*

- **Stay of execution of the decree in CMCC No. 1222 of 2013 pending the determination of the appeal.**
- **Enlargement of time within which to file an appeal against the ruling dated 19th August, 2014 and thereafter the appeal filed on 24th October, 2014 be deemed as filed with leave with court.**

8. The application was anchored on the grounds that the default judgment which resulted in the decree in question was irregularly entered; the application for setting aside the default judgment was heard and dismissed in the absence of the respondent; the appeal raises serious questions of law that ought to be considered by the High Court; and there is likelihood that the appellant would dispose the respondent's matrimonial home rendering his entire family destitute.

9. In reply, the appellant maintained that the respondent had been served with the summons to enter appearance and had at all material times been aware of the proceedings in the subordinate court. Since his release from civil jail on 1st December, 2014 the respondent had not made any effort to prosecute the appeal. In any event, the appeal would not be rendered nugatory because the appellant is a man of means and capable of refunding the decretal amount. It was in the interest of justice that he should enjoy the fruits of his judgment.

10. Upon considering the application on merit, the learned Judge (Otieno, J.) in the impugned ruling allowed the respondent's application. It is that decision which is subject of the appeal before us wherein the appellant complains that the learned Judge erred in law and fact by –

a. Exercising his discretion and extending time for filing an appeal yet no sufficient reason had been offered to justify the same.

b. Disregarding the doctrine of stare decisis by deeming an appeal filed out of time as properly on record.

c. Granting a stay of a monetary decree.

11. The appeal was disposed of by way of written submissions as well as oral highlights. Mr. Kongere, learned counsel for the appellant, submitted that the major issue for consideration was whether the learned Judge properly exercised his discretion by first, extending time to file the appeal and secondly, by deeming the appeal filed out of time as being properly on record. Noting that an appellate court ought not to ordinarily interfere with the exercise of discretion, he stated that there were exceptions to that rule. Expounding on those exceptions, he cited ***Benja Properties Limited vs. Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR*** wherein this Court expressed,

> **"An appellate court will interfere if the exercise of the discretion is clearly wrong because the Judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a Judge unless it satisfied that that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice."**

12. In his opinion, the learned Judge not only misdirected himself on the law but also took into consideration things he shouldn't have. In that, he did not take into account the applicable principles of enlarging time. Specifically, he failed to appreciate that the respondent had not offered any explanation for the delay in filing the appeal. Making reference to ***Hilda Kaari Mwendwa vs. Zakayo M. Magara & 2 Others [2016] eKLR & Kaplan & Stratton vs. L.Z. Engineering Construction Limited & 2 others [2000] eKLR*** he stressed that a reasonable or plausible explanation of the delay (if any) is what unlocks the court's flow of discretionary favour. In the absence of such explanation, even where the appeal is arguable, the court ought not to grant such enlargement. In that regard, he referred the Court to ***Aviation Cargo Support Limited vs. St. Mark Freight Services Limited [2014] eKLR***. He reiterated that between delivery of the ruling on 19th August, 2014 and the filing of the appeal on 24th October, 2014, a delay of 41 days hadn't been explained. Equally, no plausible reason had been given for the delay of about 5 months in filing the application for extension of time.

13. He faulted the learned Judge for distinguishing the facts of this case from ***Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 others [2014] eKLR (Salat case)*** wherein the Supreme Court expressed that an appeal filed without leave could not later on be deemed as properly on record. According to him, the learned Judge was bound to show fidelity to the sentiments of the Supreme Court.

14. Mr. Kongere added that to allow the memorandum of appeal as filed by the respondent posed a difficulty. This is because it challenges his committal and the dismissal of the application seeking to set aside the default judgment both of which relate to different decisions delivered on different dates. Furthermore, leave was required to be obtained from the subordinate court before an appeal against the respondent's committal could be filed.

15. Last but not least, he argued that the respondent did not demonstrate what substantial loss (if any) he would suffer if stay was not granted. Moreover, the appellant was clear that he was capable of refunding the decretal amount in the event the appeal succeeds. Consequently, there was no justification for the learned Judge to issue the stay orders. He urged the Court to allow the appeal on those grounds.

16. In his submissions, Mr. Wameyo, learned counsel for the respondent, claimed that the learned Judge in exercising his discretion was guided by ***Order 50 Rule 6*** of the ***Civil Procedure Rules***. The said provision lends the court wide powers to the extent of even deeming the appeal filed out of time as being properly on record. He went on to submit that the effect of enlargement of time regularizes the act or step taken after lapse of the period provided by the law. In other words, enlargement of time is the expansion of time from when time first stopped.

17. He argued that he had explained the delay in filing the appeal. On account of the prevailing circumstances, it was just for the extension of time sought to be granted. The respondent also contended that his application was specific that the leave sought was to appeal against the subordinate's court's

ruling dated 19th August, 2014.

18. On the ***Salat case,*** he argued that the same was in respect of the application of ***Rule 53*** of the ***Supreme Court Rules*** to appeals arising from election petitions. Besides, the Supreme Court did not close the door on the applicant who had filed the appeal without leave but gave him 14 days within which to file a fresh appeal. In the same way, he urged that if this Court is convinced that the appeal filed out of time could not be saved, it should give the respondent an opportunity to file a fresh appeal.

19. We have considered the record, submissions of the parties and the law. It is trite that 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 the Court. In this case, an appeal from the subordinate court to the High Court is governed by ***Section 79G*** of the ***Civil Procedure Act*** which provides-

> **"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.**
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> ***Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time". Emphasis added.***

20. Whenever an application for extension of time is before a court, the court ought to take into account several factors as observed by Odek, JJ.A in ***Edith Gichugu Koine vs. Stephen Njagi Thoithi [2014] eKLR***, thus

> **"Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others..."**

There is also a duty now imposed on courts to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court.

21. From the record, it is clear that the respondent in his application filed on 26th March, 2015 sought leave to file an appeal out of time against the ruling dated 19th August, 2014. Like the learned Judge, we find that whether the subordinate court could properly entertain the application for setting aside the default judgment without notice to the respondent is a matter that warrants consideration by the High Court.

22. With regard to the reason(s) for the delay in filing the appeal, we take note that the respondent maintains that when the learned Judge heard the appellant's advocate on the application to set aside the default judgment on 27th June, 2014 the said application wasn't scheduled for hearing on that date. Accordingly, the application was heard and determined in his absence. Furthermore, he was never served with the notice of delivery of the said ruling. He only learnt that the application was dismissed when he was arraigned in court on 30th September, 2014 in response to a NTSC. He went on to state that he was able to file the appeal on 24th October, 2014 after appointing another advocate on even date. Even if we give the respondent the benefit of doubt which we do, his explanation related to the period from the date of the delivery of the ruling on19th August, 2014 until 24th October, 2014. There was no explanation for the delay in making the application for extension of time, of about 5 months after learning of the dismissal of the application of setting aside, save that he was committed to civil jail on 21st October, 2014 until his release on 1st December, 2014.

23. Be that as it may, this Court in ***Kamlesh Mansukhalal Damji Pattni vs. Director Of Public Prosecutions & 3 others [2015] eKLR*** articulated that-

> **"It must be realized that courts exist for the purpose of dispensing justice. Judicial Officers derive their judicial power from the people or, as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of the Constitution which succinctly states that "judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution." Judicial Officers are also State officers, and consequently are enjoined by Article 10 of the Constitution to adhere to national values and principles of governance which require them whenever applying or interpreting the Constitution or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity are upheld. For these reasons, decisions of the Courts must be redolent of fairness and reflect the best interest of the people whom the law is intended to serve. Such decisions may involve only the rights and obligations of the parties to the litigation inter se (and hence only the parties' interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the Court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice." (emphasis added.**

24. In light of the foregoing coupled with circumstances surrounding this case, we concur with the following sentiments of the learned Judge;

> **"It suffices to comment that a court of law should be hesitant at closing the door to the corridors of justice prior to a litigant being heard on his complaint. So far the applicant did not have a chance to file a defence. He sought to set aside that default judgment and that application was dismissed on a date he contends the same was not due for hearing and when he had no notice.**
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> ***Those complaints, coupled with the fact that the applicant has paid the ultimate price by loosing his liberty when he was committed to civil jail lead me to view the application with some favour, while considering that the very purpose of a justice system is to hear and determine disputes… I am inclined to find and do find that he has made out a case for extension of time. I therefore extend time within which to file the appeal."***

25. Having expressed ourselves as herein above the other issue that falls for consideration is whether the appeal filed out of time on 24th October, 2014 could be deemed as being properly on record. There is a plethora of authorities from the High Court which interpret the proviso to ***Section 79G*** of the ***Civil Procedure Act*** to mean that an appeal filed out of time can be admitted as being properly on record once extension of time is granted. Emukule, J. in the ***Gerald M'limbine vs. Joseph Kangangi [2009] e KLR*** stated that-

> **"My understanding of the proviso to section 79G is that an applicant seeking "an appeal to be admitted out of time" must in effect file such an appeal and at the same time seek leave of court to have an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the court's permission to admit a non-existent appeal out the stipulated period. To do so would actually be an abuse of the court's process under Section 79B".**

Similarly, Aburili, J. in ***Martha Wambui vs. Irene Wanjiru Mwangi & another [2015] eKLR*** held,

> ***"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 …"***

See also ***Apa Insurance Limited vs. Michael Kinyanjui Muturi [2016] eKLR.***

This is the position this Court has taken when dealing with applications for extension of time. We have always, and we believe lawfully so, deemed as duly filed applications filed without leave where leave is

sought and subsequently granted. Learned counsel for the appellant submitted that this position was found to be untenable by the Supreme Court which pronounced itself as follows the **Nicholas Kiptoo Arap Korir Salat-vs- Independent Electoral and Boundaries Commission &7 others** [2014] eKLR (***Salat case***,)

> **"… counsel for the applicant acknowledged having already filed his appeal. <u>He now prays for extension of time and urges that once so granted, the Petition of appeal already filed be deemed to have been duly filed</u>.**
>
> ***What we hear the applicant telling the Court is that he is acknowledging having filed a 'document' he calls 'an appeal' out of time without leave of the Court. Pursuant to rule 33(1) of the Court's Rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. <u>Under rule 53 of the Court's Rules, this Court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires.</u>***
>
> ***By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such 'an appeal', is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.***
>
> ***To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the Court. Such a filling renders the 'document' so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court." Emphasis added***.

26. In our view however, the Salat case was in respect of **Rule 53** of the Supreme Court Rules which simply provides as follows;-

> **"The Court may extend the time limited by these Rules, or by any decision of the Court."**

That Rule only applies to applications before the Supreme Court and not before any other court. Conversely **Rule 4** Court of Appeal Rules provides as follows on extension of time.

> **"The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court, or of a superior court, for the doing of any act authorized or required by these Rules, <u>whether before or after the doing of the act</u>, and a reference in these Rules to any such time shall be construed as a reference to that time as extended". (emphasis supplied)**

We find it necessary to cite the above Rule in entirety because even assuming the learned Judge was wrong in deeming the appeal as having been deemed to have been duly filed, this Court would still have jurisdiction to validate the said leave if it deemed it appropriate to do so. Moreover, in our view, under **Order 50, Rule 6** of the Civil Procedure Rules on which the learned Judge relied, the court has power to enlarge time ***"upon such terms as the justice of the case may require…"***

If therefore the learned Judge finds it in the interest of justice to deem an already filed document as having been duly filed, then his discretion in that respect should not be fettered.

27. From the record before us, we are satisfied that the learned Judge addressed himself to all the facts and evidence placed before him before arriving at the conclusion that :-

> ***"In my view this is one of the situations that the decree holder may be reasonably told to hold on and await the outcome of the appeal filed even if it be ordered that the attached property remains so attached pending the determination of the appeal.***

"That, the Respondent has already identified and attached the landed property of the applicant to me is a sufficient comfort because a draft consent has been exhibited which show that if the properly is sold it may just realise the full decretal sum and a surplus. There is therefore a security for the due performance of the decree provided the prohibition registered against title is maintained."

28. Accordingly, we find no good reason to fault the learned Judge who upon weighing the interests of both parties granted the orders in the impugned Ruling.

In the circumstances, we find that this appeal is devoid of merit and dismiss it. Given the circumstances leading to this appeal we find that the justice of the case dictates that each party bears its own costs of this appeal.

Dated and delivered at Mombasa this 23rd day of November, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

…….

JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR