IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 3 OF 2016

CONSOLIDATED WITH

CIVIL APPEAL NO. 4 OF 2016, CIVIL APPEAL NO. 5 OF 2016,

CIVIL APPEAL NO. 6 OF 2016, CIVIL APPEAL NO. 7 OF 2016

AND CIVIL APPEAL NO. 8 OF 2016

BETWEEN

MWANENGO KATOTO ……..……...APPELLANT

AND

ALI ZULEKHA ……..……....1ST RESPONDENT

ALI ABSY NASSIR……2ND RESPONDENT

(Being appeals from the ruling and order of the High Court of Kenya

at Malindi (Chitembwe, J.) dated 15th May, 2015

in

H.C.C. Misc. Appl. No. 39 of 2015.)

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JUDGMENT OF THE COURT

For determination by this Court are Civil Appeals Nos. **3, 4, 5, 6, 7** and **8** all **of 2016**. The appeals were consolidated by consent of the parties and **Civil Appeal No. 3 of 2016** was taken as the running file. The appeals arise out of a road traffic accident that occurred on 22nd September, 2009, when a Nissan *matatu* ferrying passengers rammed into a stationary lorry along the Mombasa-Malindi highway causing the passengers in the matatu to sustain varying degrees of injuries including some fatalities.

Arising from the accident, 15 suits were filed against the owners of the two motor vehicles by **Messrs. Wambua Kilonzo & Co. Advocates** acting on behalf of some the passengers in the matatu, for recovery

of damages, jointly and severally. The owners of the matatu were defended by the firm of **Kairu & McCourt Advocates,** whereas the firm of **Menezes Oloo & Chatur Advocates** represented the owners of the lorry. After the plenary hearing of the test suit by the trial court, liability was apportioned between the motor vehicles owners in the ratio of 70:30%. The owners of the *matatu*, were to bear 70% of the liability while the owners of the lorry were assigned 30%. The owners of the lorry promptly paid and settled their portions of the decretal amount to the appellants. However, that was not the case with the respondents. They dilly dallied and settled the claims intermittently. Indeed at some point, the respondents failed completely to settle their portion of the decretal sum forcing the appellants to file declaratory suits in the trial court to enforce the judgment against them. It was only after the filing of the suits aforesaid that the respondents were spurred into action. They filed two similar applications in the High Court seeking in principal stay of execution of the trial court's judgment, stay of all proceedings in the lower court and leave to appeal out of time against the judgment and decree of the trial court. The first application was filed by Messrs. Kairu & McCourt Advocates and the second application was filed by the firm of **Messrs Kithi & Co. Advocates**. The record shows that when the two applications came up for hearing, Messrs. Kairu & McCourt Advocates withdrew their application and the application by Messrs. Kithi & Co. Advocates remained on record and was in fact heard and allowed by the High Court, setting the stage for the appeals before us.

In essence therefore, the appeals before us emanate from the aforesaid ruling of the High Court (**Chitembwe,** J.), sitting in Malindi, delivered on 15th December 2015. In the ruling, the learned Judge found that the prayer for stay of execution by the respondents was untenable since the respondents had already settled the decretal sums to the appellants. That the only question for determination before him therefore was whether to grant leave to the respondents to appeal out of time. As to why the respondents had not filed the appeal against the decision of the trial court in time, it was argued before the High Court that the trial court had delayed the typing of the proceedings and judgment although the request was made in time, that is to say, soon after the delivery of judgment. Perhaps to show that the intended appeals had chances of succeeding the respondents contended that the apportionment of liability by the trial court was erroneous and that the amount of damages awarded to the appellants were excessive.

In opposing the application, the appellants argued that the intended appeals were an afterthought as the decretal sums had been substantially settled which action signaled no intention to appeal on the part of the respondents. Further, that a certificate of delay from the trial court to prove delay on the part of the trial court in supplying the certified proceedings and judgment had not been tendered in evidence. The appellants also alleged that a notice of change of advocates was never filed since the respondents were initially, or during the trial, represented by Messrs. Kairu & McCourt Advocates and then by Messrs Kithi & Company Advocates. They also contended that the respondents' delay of about one year before filing the appeal was inordinate.

In his determination, the learned Judge granted the respondents leave to file their appeal out of time holding that:-

> **"….The dispute is attributed to a road traffic accident. The applicants are entitled to question the decision of the lower court with respect to both assessment of liability and quantum. The intended appeals are not frivolous. I do find that the application are merited and the same is hereby allowed. The applicants to file and serve their memorandum of appeal within fourteen (14) days hereof; thereafter the applicants to file and serve the record of appeal within ninety (90) days. Due to the delay in filing the applications, the applicants are hereby condemned to meet the costs of the applications. For avoidance of doubt, the applications shall be treated as one for purposes of costs."**

Aggrieved by the above decision the appellants are now before this Court seeking principally that the aforesaid ruling be vacated and/or set aside and in lieu thereof an order dismissing the respondents' application in the High Court. In essence and in broad terms, the appellants are questioning the exercise of judicial discretion by the High Court when it allowed the application.

The parties by consent chose to canvass the appeal by way of written submissions. However, when it

came to highlighting, **Mr. Wambua Kilonzo,** learned counsel for the appellants, opted to rely entirely on his written submissions. On his part, **Mr. Bwire** teaming up with **Mr. Makaya**, learned counsel for the respondents, submitted that there was no requirement under the law to file a certificate of delay in interlocutory appeals. Further, counsel submitted that no prejudice could be occasioned to the appellants if the appeal was heard.

In our view, and as already stated, the only issue falling for consideration is whether the discretion to grant the respondents leave to file their appeals out of time by the learned Judge was exercised judiciously. In determining the issue, this Court is alive to its mandate that it can only interfere with the exercise of judicial discretion by a trial court if it is satisfied either that the Judge misdirected himself on the law; or he misapprehended the law; or he took into account considerations which he should not have or the decision was plainly wrong. (See **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**). Similarly in **Matiba v Moi & 2 Others [2008] 1 KLR 670** this Court held that:-

> "**The High Court was exercising discretion and the Court of Appeal was not entitled to substitute the Judges' discretion with its own decision. It had to be shown that the Judges' decision was clearly wrong because he misdirected himself or because he acted on matters on which he should not have acted on or because he failed to take into consideration matters which he should have taken into consideration and in doing so, arrived at a wrong decision.**"

It is trite that the decision whether or not to extend the time for appealing is essentially discretionary. Though discretionary, the applicant must satisfy "*the court that he had good and sufficient cause for not filing the appeal in time*". See **Section 79G** and **95** of the Civil Procedure Act. In order to establish whether the learned Judge exercised his discretion judiciously, this Court is bound to revisit the circumstances under which the same was exercised. In deciding whether or not good and sufficient cause for failure to file the appeal in time was presented to warrant the extension of time, the learned Judge was bound to consider, the length of the delay; the reason for the delay; the chances of the appeal succeeding if the application was granted; and lastly, the degree of prejudice to the respondent if the application was granted. These are merely some of the considerations in our view that would inform the exercise of the discretion by the learned Judge. However, this is not to say that these are the only considerations as at the end of the day, each case must turn on its own set of facts.

So did the High Court take any of these factors into account? In dealing with the length and reason for the delay, this is how the learned Judge delivered himself:-

> "…**The applicants acknowledged that the delay is quite long. No certificate of delay has been annexed should the court allow the application, the applicant will have to prove that there was delay on the part of the court. I do find that the absence of the certificate of delay cannot be a good reason to dismiss the application at this stage.**" (sic)

The learned Judge having found that the respondents had failed to prove their allegation that the delay in filing their intended appeal was occasioned by the subordinate's court failure to furnish them with proceedings in good time, should have held that one of the factors needed for him to be deemed to have exercised his discretion judiciously remained a mirage. The reason for the delay should have been explained and/or satisfactorily proved to enable the Judge to decide whether the delay was reasonable or excusable in the circumstances. It was not just a matter of certificate of delay. The respondents had to satisfy the Judge regarding the delay and the reason (s) therefor. Considering that the alleged delay was for a period in excess of one year, whereas **Section 79 G** requires appeals to be filed within 30 days from the date of the decree, surely a reasonably convincing and persuasive excuse ought to have been put forth by the respondents. Secondly, it is not quite clear whether that was really the cause of the delay. The respondents partly also blamed their former lawyers. The nature of the malfeasance by the said lawyers is not disclosed.

In dealing with the factor whether the intended appeals had chances of succeeding, the learned Judge stated as below:-

"**The dispute is attributed to a road traffic accident. The applicants are entitled to question the decision of the lower court with respect to both assessment of liability and quantum. The intended appeals are not frivolous. I do find that the applications are merited and the same is allowed**."

With tremendous respect to the learned Judge, we do not see the basis for such conclusion. It appears that the learned Judge did not consider the aspects of the lower court's judgment on which the respondents wished to pursue the appeal. No reference is made by the learned Judge or is apparent from the record as to whether he referred to the draft memorandum of appeal if at all annexed to the application. It is this that would have guided the learned Judge in deciding whether the intended appeals were frivolous or merited. In the absence of any reference to such enabling document, we doubt whether the Judge's conclusion that the intended appeals were not frivolous was well founded.

The other consideration was whether any prejudice would result to the appellants if the application was allowed. In deciding this factor, the Judge should have taken into account the salient aspects of the dispute. In the end, and as we have already stated, every case must be decided upon its own set of circumstances. It is not in contention that the decretal sums as per the judgment of the trial court have substantially been paid and settled. In their written submissions the appellants state that the payments were made and settled in 2014. After that, there was a delay of about one year before filing the application, the subject of this appeals. The appellants allege that the respondents were possibly spurred into pursuing an appeal when they filed the declaratory suits to enforce the judgment of the trial court which by then remained unsatisfied by the respondents. They have also alleged that the intended appeals must be taken as an afterthought therefore. These allegations were not dispelled by the respondents. In our view, it can be reasonably inferred that the appellants, who were passengers travelling in a *matatu* and thus probably of average means, have since enjoyed the fruits of their successful litigation in the trial court. Further it appears that the Judge did not consider the impact of reopening the proceedings by way of an appeal would have on the owners of the lorry who had paid and fully satisfied their potions of the decretal sums.

Taking all these matters into consideration, we hold the view that it would be unfair and not in the interests of justice that the appellants be taken through the rigors of litigation again. We are satisfied that had the High Court considered all the foregoing, it would not have allowed the respondents' application. Obviously, the High Court in reaching its determination imported into consideration matters it should not have and or failed to take into account matters it should have, thereby resulting in injudicious exercise of discretion.

The appeals are accordingly allowed. The ruling and order of the High Court dated 15th December 2015, is set aside and substituted with an order dismissing the respondents' application dated 6th August, 2015. The appellants shall have the costs of these appeals.

Dated and delivered at Malindi this 30th day of September, 2016

ASIKE- MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

K. M’INOTI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR