IN THE COURT OF APPEAL

AT NYERI

(CORAM: KIAGE, JA. (IN CHAMBERS)

CIVIL APPLICATION NO. 19 OF 2016 (UR 11/2016)

BETWEEN

PRINCIPAL SECRETARY MINISTRY

OF DEFENCE ……..……..…… 1ST APPELLANT/APPLICANT

THE ATTORNEY GENERAL ……..…….…… 2ND APPELLANT/APPLICANT

AND

DOROTHY KANYUA MBAKA ……..……..…… 1ST RESPONDENT

MARY SYONTHI MUSYOKA …… 2ND RESPONDENT

(An application for stay of execution pending appeal of the Judgment and Decree of the High Court of Kenya at Meru (Makau, J.) dated 2nd April 2014

in

H. C. C. C. NO. 15 OF 2004)

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RULING

By the motion dated 24th March 2016 but lodged at the registry more than a month later on 27th April 2016, the Attorney General on behalf of himself and the Principal Secretary Ministry of Defence (the applicants) seek, in the main, an order that the time limited by **Rule 82(1)** of the Court of Appeal Rules, 2010 be enlarged to enable them to file and serve their record of appeal out of time.

The grounds founding the application appear on the face of the motion as follows;

> ***1. THAT on 2nd April, 2014 the High Court, J.A. Makau J entered Judgment against the applicants for as compensation (sic) for damages amounting to Kshs. 19,239,100 and Kshs. 20,065,100 respectively.***
>
> ***2. THAT the applicants being aggrieved by the judgment lodged a Notice of Appeal dated 8th***

April, 2014 on the 9th April, 2014 well within time provided in the rules.

3. THAT together with the Notice of Appeal, we wrote to the office of the Deputy Registrar, High Court Meru vide letter dated 8th April, 2014 and copied to all parties seeking for typed copies of the judgment and proceedings to enable us institute the appeal.

4. THAT having not received the proceedings and a certified copy of the judgment, we did a reminder vide our letter dated the 11th May 2015 and 1st July 2015 respectively.

5. THAT we have never been supplied with the said copies of the proceedings despite the fact that we have duly requested the same from court.

6. THAT on 8th June 2015 we were served with Ex-parte Misc, Application No. 11 of 2015 seeking leave to apply for Judicial Review of mandamus to compel the applicant to pay the decretal amount failure will be committed to civil jail.

7. THAT the applicants have prepared the Memorandum of Appeal as required under Rule 82(1) of the Court of Appeal Rules, 2010 and within time frame given by court will file record of appeal.

8. THAT guided by Rule 4 of the Court of Appeal, 2010 the applicants humbly seek leave to file their Record of Appeal out of time.

9. THAT the delay is reasonable not inordinate and is explainable in the circumstances based on the fact we have been requesting for the proceedings.

10. THAT the appeal filed is not frivolous is arguable and has high chances of success.

11. THAT Article 159(1) of the 2010 Constitution enjoins the Courts to administer justice without undue regard to procedural technicalities.

12. THAT the orders sought will not prejudice the respondent in a manner that cannot be compensated by way of costs.

By way of evidence one Janet Kungu, a Principal State Counsel in the AG's Chambers swore a supporting affidavit on 24th March 2016 in which she averred in relevant part as follows;

"3. THAT being dissatisfied with whole of the judgment we lodged a Notice of Appeal dated 8th April, 2014 on the 9th April, 2014. Annexed herewith is a copy of the Notice of Appeal on record marked "JK S".

4. THAT together with the Notice of Appeal, we wrote to the office of the Deputy Registrar, High Court of Kenya Meru vide a letter dated 8th April, 2014, 11th May, 2015 and 11th July, 2015 (sic) seeking for typed copies of the judgment and proceedings to enable us institute an appeal. Annexed herewith is a copy of the letter marked "JK 3."

5. THAT on (sic) State Counsel who had conduct of the matter despite having filed the Notice of Appeal sought instruction on the way forward for the proceedings were taking long to be supplied by court.

6. THAT on 27th May, 2015 we were served with Misc. Application No. 11 of 2015 an application for mandamus. Annexed herewith is a copy of the application marked "JK 4."

She went on to swear that the applicant's delay was "reasonable, not inordinate and explainable in the

circumstances" based on the fact that they had been waiting to be supplied with certified copies of the proceedings to enable them to prepare their record of appeal. At paragraph 9 she averred that "the mistake was inadvertent and the same should not be visited upon the client" and at paragraph 11 that the applicants "have formidable grounds for appealing and this being a matter of public interest, the appellants and the public at large will suffer irreparable loss if the appeal is not regularized." Annexed to the affidavit in a draft memorandum of appeal raising some four grounds of grievance against the impugned judgment.

The respondents would hear none of the applicant's pleas and averments. They filed a replying affidavit sworn on 19th May 2016 by their Advocate on record, Ashord Gerrard Riungu who swore that he had represented them since they filed their suits no. 15 and 16 of 2004 at the High Court in Meru, which were later consolidated by consent. He detailed the long and chequered history of the suit until judgment was delivered on 2nd April 2014. He then assailed part of the applicant's memorandum of appeal as follows;

> ***"18. THAT it is regrettable for the Principal State Counsel to state in ground 2 of her intended memorandum of appeal that the;***
>
> ***'Honourable Judge erred in law and in fact in wholly disregarding as fairly to accord due and proper consideration upon the appellants' written submission'***
>
> ***No such submission had been filed by the time a date for judgment was taken by consent both counsel."***

For that among other reasons, the deponent averred that the memorandum of appeal was frivolous and an abuse of the court process and that;

> ***"22. … [it] raises no arguable grounds in the circumstances of this matter at all since it is the same appellant/applicant who in the primary suit had told the court that they had no evidence to offer."***

The respondents also castigated the application for referring to a non-existent letter dated **8th April 2014** (bespeaking the proceedings) which he says was never copied or served on the respondents as required by **Rule 82(2**) of the Court of Appeal Rules. He stated further that; the proceedings were in fact ready in time but the applicants failed to follow upon the same and "decided to do nothing for a period inordinately long." For good measure he exhibited copies of the proceedings and judgment. He then surmised that;

> ***"27. It is very clear from the averments of paragraph 6 and 7 of the supporting affidavit that were it not for the Judicial Review Miscellaneous Application No. 11 of 2015 this application would not have been brought and disguised as very urgent to shield the respondents (sic) from execution of the decree.***
>
> ***28. THAT the applicant's delay in filing the appeal and this application is unreasonable inordinate and un explainable in the circumstances as the same was caused by the in-action of counsel for the appellant/applicant.***
>
> ***29. THAT it is not true that the mistake, if any, was inadvertent as deponed in paragraph 9 of the supporting affidavit."***

Mr. Riungu concluded his affidavit by referring provisions of the Constitution and the Persons with Disability Act, Cap 133 to say that the applicants/appellants have caused untold pain and suffering to the respondents by the failure to satisfy the decree in favour of the respondents who have been disabled and confined to wheel chairs for the last 18 years.

The applicants responded to that reply by filing a further affidavit sworn by the same Janet Kungu on 30th

May 2016. That affidavit was later withdrawn and substituted by a supplementary affidavit by the same deponent on 7th June 2016 and filed with leave of the Court. The said affidavit questioned the authenticity of the proceedings annexed to the replying affidavit as they were not certified by the Deputy Registrar of the High Court at Meru. At paragraph 8 she averred that the failure to copy the letter dated 9th April 2014 "was regrettably inadvertent on the counsel" and sought the Court's discretion. She swore further that she personally attended the Meru High Court registry to enquire whether certified copies of proceedings were ready but was informed by a Mr. Ongeri that the two files were yet to be traced from the court registry achieves for purposes of availing the said proceedings. She then averred thus;

"11. THAT the circumstances under which the respondents obtained the proceedings without any form of formal request is unduly unclear and the Deputy Registrar, Meru High Court should be summoned to appear before this Honourable Court for purposes of explaining the mystery."

She then prayed that;

"13. …it is in the interest of substantive justice that he applicants be allowed to file their record of appeal using the proceedings availed in the Affidavit of ASHFORD BENARD RIUNGU sworn on 19th May, 2016."

During a case management appearance before me, it was agreed that the parties would file written submissions, which they did, and I have fully considered them. They are an expansion and elucidation of the matters deposed to in the rival affidavits. In them the applicant contends, and the respondents dispute, that there is disclosed a reasonable explanation for the delay in filing the record of appeal which delay is, moreover, not inordinate. It is submitted that the applicant took reasonable and diligent steps to obtain certified copies of the requisite documents and that the delay was neither inordinate or deliberate.

In their submissions the respondents contend that the 2-year delay in filing the record of appeal is inordinate and excessive and urge that I should not exercise my discretion in favour of the applicant bearing in mind that I should exercise that discretion in accordance with ***"the rule of reason and justice"*** and not according to my personal whim. They pressed that given that they have been confined to wheel chairs for the last 18 years, and will remain so for the rest of their lives, any further delay in the execution of the decrees meant to delay with such pressing needs as electric wheel chairs, beds and mattresses, drugs, suppositories, physiotherapy and the like, would cause them prejudice contrary to the Constitution and statute.

Both sides also cited various rulings of this Court in the subject of enlargement of time, which I have considered. I must observe though, that ***KIGUMO SUB-COUNTY DRINKS CONTROL COMMITTEE –vs- KIBAO SAVINGS CREDIT CO-OPERATIVE SOCIETY LIMITED & 6 OTHERS*** [2016] eKLR cited by the applicant is on the subject of stay of execution and is relevant only on the question of judicial discretion.

It is beyond argument that each case must be decided as per the facts and circumstances peculiar to itself but with the aim of doing justice and arriving at a fair and just result. I am also aware that my discretion in the matter is wide and unfettered to the end of the attainment of justice. It is a judicial discretion exercisable on the basis of sound principle, not capriciously in accordance with the single judge's predilictions, personal prefences, sympathy or whim. See. ***PAUL WANJOHI MATHINGE –vs- DUNCAN GICHANE MATHENGE*** [2015] eKLR.

What this means in essence is that whereas the discretion is wide and unfettered, it is not automatic. It is not available for the taking merely by the asking. Were it the case that the fact of applying for extension itself, without more, would mean granting of extension in every case, it would render the whole procedure of seeking extension meaning-less: why trouble litigants and the Court with application whose outcome is pre-determined? The rule requiring extension of time would be irrelevant and it would make more sense for it to be open season for appellants to file their records of appeal as and when they felt themselves ready to do so. And that would be the epitome of absurdity.

Thus it is that consideration of an application for extension of time is a rational process. The judge exercises his mind, which means the applicant must place some material before the judge upon which the judge may exercise his discretion in a logical, principled manner. Some of the things to be considered, and the list is merely indicative and is, moreover, non exhaustive, are;

(a) The length of the delay

(b) The reason for the delay

(c) (Possibly) the prospects of the appeal succeeding

(d) The degree of prejudice (if any) that may be suffered by the respondent in the case of grant

(e) The general conduct of the parties, so that concealment, non-disclosure, lack of candour or any inequitable conduct is more likely to disentitle an applicant.

(See **POTHIWALLA –vs- KIDOGO BASI HOUSING CO-OPERATIVE SOCIEY LIMITED & 31 OTHERS** [2005] KLR 733**; GITETU –vs- KENYA COMMERCIAL BANK LIMITED** [2009] KLR 545).

In the matter under consideration, it is not in dispute that more than two years after the notice of appeal was filed on 9th April 2014 the record of appeal had not been filed as at the time the application before me was filed on 27th April, 2016. Nor has it been filed at the date of this ruling. It is also not in dispute that the time provided for the filing of such record of appeal under **Rule 82(1)** of the Court of Appeal Rules 2010, is sixty days after the lodgment of the notice of appeal. At first blush, it would seem that the record of appeal itself, and the application before me seeking to enlarge time for its filing, are hopelessly out of time and the delay is long and on the face of it inordinate.

It has to be observed, however, that the Rules do not contain any cut off point beyond which an application for extension of time may not be brought. It is therefore possible for an applicant who has been inordinately late to nonetheless proved a perfectly plausible and satisfactory explanation for the delay and thus be a beneficiary of the single Judge's favourable discretion. But an explanation there must be. In the instant case, all the applicant says is that proceedings were applied for by a letter to the Deputy Registrar of the High Court at Meru dated 8th April 2014 which was however no copied to counsel for the respondent. Had it been so copied, then whatever time the Deputy Registrar would have certified as being necessary for the typing of the proceedings would not have been reckoned in the computation of time and there would probably have been no necessily for the present application. But it was not.

A more glaring failing of the applicant, however, is the fact that the all-important letter of the 8th April 2014 is not anywhere on record. The only letters annexed to the supporting affidavit of Janet Kungu are those dated 11th May 2015 and 1st July 2015 both mentioning ***"past correspondence dated 8th April 2014."*** Mr. Riungu has in his replying affidavit questioned the very existence of that letter. I have myself had considerable difficulty accepting its existence. This has been little helped by the averment in paragraph 4 of the supporting affidavit which appears to totally obfuscate the issue of the letter, by suggesting that "a letter" "dated 8th April 2014, 11th May 2015 and 11th July 2015" sought typed proceedings contemporaneously with the filing of the notice of appeal. This was not the case as the other letters could only have been reminders of the initial letter, which is itself not displayed. What emerges is a picture of unclarity and I cannot but wonder whether it was inadvertent or deliberately meant to mislead. That state of things does not inspire confidence that the applicant is deserving of a favourable discretion.

I find the explanation given by the applicant for the failure to file the record of appeal in time namely the unavailability of proceedings, to be unconvincing. I am not satisfied that it is consistent with diligence for an intended appellant to merely write a letter asking for proceedings, (assuming, that one was written in this case) and then do nothing for nearly two years. Such a cavalier and non-chalant attitude is

suggestive of a belief that appellate litigation moves on auto-pilot. It does not. Had the applicant been really keen on pursuing the appeal, there would have been evident efforts of following up the proceedings through letters and even details of physical visits to the registry concerned. These are absent, with the two letters exhibited being questioned as they were not copied to the respondents' advocates.

Indeed, it is an indictment of the applicant's conduct herein that he seems unaware of the proceedings having been available and now strangely asks this Court to summon the Deputy Registrar of the court below to come and explain why and how the respondents came to be in possession of the proceedings. He then paradoxically pleads that he be allowed to use the very proceedings he trashes for the preparation of a belated record of appeal. With great respect, this Court should not aid a litigant who flip-flops in such a manner and who appears to blame other parties for being more diligent.

In short I am not at all persuaded that a reasonable or plausible explanation has been provided for the applicant's tardiness in this matter. There is mention of an inadvertent mistake having been made but the nature of the mistake is a mystery as it is not disclosed. I am also not satisfied that the failure or omission to serve on the respondents' counsel a copy of the letter (if it existed) bespeaking the proceedings was a minor procedural misstep as the applicant asserts. The omission deprives the applicant of the exclusion of days certified to have been necessary for the preparation of the proceedings, with the effect that the delay the applicant has to explain is commensurately longer.

The inordinate delay and the lack of explanation aside, this motion must also fail on the basis that granting it would cause the respondents grave and unconscionable prejudice. It is a sad commentary on our justice system that 18 years after the applicants suffered gruesome and debilitating injuries in a road accident, they are yet to receive compensation. The depressing litany of injuries they suffered, which grossly undermined and diminished their quality of life and confined them to wheelchair-bound disability for the rest of their lives cannot be further prolonged in the name of another round of snail's pace litigation without a cynical disregard for justice and their essential dignity. In stating this I am not being sentimental, but real. I would have to be stony-hearted to bend over backwards to extend time for the applicant who is so undeserving of such extension while ignoring the plight of the respondents who, too, need to access the fruits of their long-awaited judgments. There appears to be merit in their assertion that it is in fact their attempt to enforce those decrees by committal that roused the applicant to bring this application.

The upshot is that I find no merit in the motion before me and accordingly dismiss it with costs to the respondents.

Dated and delivered at Nyeri this 7th day of September, 2016.

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR