



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, JA (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 122 OF 2016

BETWEEN

SOLOMON KARANJA GITHINJIAPPLICANT

AND

MAGDALENE NJERI MBUGUA &

FRANCIS MWAURA MUCHAMBA (Both suing as the personal

representatives of the estate of BENARD MBUGUA – Deceased)RESPONDENTS

(An application for extension of time and seek leave to file and serve the notice of appeal out of time against the judgment of the High Court of Kenya at Nairobi (Waweru, J.) dated 5th June, 2015

in

H. C. CIVIL SUIT NO. 303 OF 2011)

RULING

By the motion dated 10th May 2016 and expressed as brought under **Rules 4 and 5(2) (b)** of the Court of Appeal Rules, the applicant Solomon Karanja Githinji prays as follows;

- 1. THAT this application be certified urgent and be heard ex-parte in the first instance.***
- 2. THAT this honourable court be pleased to enlarge the time within which to file the notice of appeal and record of appeal out of time from the judgment of Nairobi HCCC No. 303 of 2011 delivered on 5th June, 2015.***
- 3. THAT there be a stay of execution of the judgment in Nairobi HCCC No. 303 of 2011 pending the hearing and determination of this application.***
- 4. THAT the annexed appeal to be deemed duly filed and served upon payment of the requisite fees.***

5. THAT there be a stay of execution of the judgment in Nairobi HCCC No. 303 of 2011 pending the hearing and determination of the intended appeal.

6. THAT costs of this application be in the cause.

I say right away that the application is omnibus and improperly framed. It combines a prayer for enlargement of time which is properly before me as a single judge under **Rule 4**; and a prayer for stay of execution under **Rule 5(2) (b)** which a single judge of this Court has no jurisdiction to entertain, let alone grant. That much is clear from Rule 4 of the Rules. In former times that impropriety alone would have attracted the striking out of the entire motion for being fatally defective or incompetent. I subscribe to the view though, that the acts of procedural sin such as committed by the advocates who framed the application should not earn the wages of substantive death. I will therefore ignore the impropriety and proceed to deal with the motion on merit but counsel ought to avoid such elementary errors. It does not take much effort.

The grounds on which the application is premised, and which mercifully deal only with the plea for extension, appear on the face of the motion as follows;

(a) THAT it is in the interest of justice that time be extended to enable the applicant be heard on appeal since the applicant's intended appeal is arguable.

(b) THAT the matter came up for mention on 27th November, 2015 to confirm filing of submissions and take a judgment date, the date was taken by consent in open court on 29th October, 2014.

(c) THAT on 27th November, 2015 we were informed that the judgment would be delivered on notice given that honourable Waweru J was on transfer.

(d) THAT we only became aware of entry of judgment in Nairobi HCCC No. 303 of 2011 when we were notified by the plaintiff's advocate that the same had been posted on the Kenya Law Reports website.

(e) THAT the delay in filing the notice of appeal in time was occasioned by failure of the court issuing a judgment notice.

(f) THAT failure to file the notice of appeal in time was inadvertent.

(g) THAT the orders sought will not prejudice the respondents in any event.

(h) THAT it is in the interest of justice.

In support of the application one Serah Weru, a legal officer at the applicant's insurance company swore an affidavit on 10th May 2016 which was the basis of submissions by learned counsel, Miss Ochieng before me. In it the deponent states that the hearing of the suit at the High Court closed on 9th October 2014 whereafter the parties would have filed submissions as agreed. This was not to be, however, as the learned judge (H. Waweru, J) was transferred out of station. She refers to a letter from the applicant's advocates dated 24th March, 2016 by which they advised that they had come to learn that the learned judge **"moved with the court file to Muranga and did the judgment without notice to either party and posted it on KLR"** and even suggesting that the respondents' advocates were themselves not aware of the judgment.

It is upon so learning of the judgment that is indicated to have been **"dated, signed and pronounced in open court at Muranga this 5th day of June 2015"** that instructions were given on 6th April 2016 for the filing of an appeal, believed to be meritorious in the basis of the attached draft memorandum of appeal. The applicant's advocates by a letter to the Deputy Registrar of the High Court dated 8th April

2016 sought certified copies of the proceedings, judgment and decree. The same was copied to the respondents advocates. The deponent states that the failure to file a notice of appeal in time was inadvertent and that an extension of time would not occasion prejudice to the respondent.

The respondents oppose the application. Their learned counsel Miss Rose Obaga swore a replying affidavit on which she based her submissions before me. She swore that whereas it is true judgment was to be delivered on notice to parties, the application has not been candid and has deliberately misled and/or failed to disclose material facts in seeking this Court's discretionary powers. In demonstration of this she swears at paragraph 7 thus;

“7. That I know of my own knowledge (sic!) and from information received from the court records that on the 11th day of March 2015, the court did issue notices of delivery of judgment to both advocates for the 15th day of May 2015. Copies of the said notices and registration slips are annexed hereto and marked

„RO1? a & b and „RO2 a & b? respectively”.

She goes on to swear that the applicant deliberately failed to disclose that on 21st July 2015, the High Court did acknowledge receipt of the court file and records from the Muranga High Court (sic) vide a letter copied to both advocates on record so that **“it is clear that the applicant must have been aware of the judgment”**.

The deponent goes on to state matters in opposition to the applicant's prayer for stay of execution, which I need not go into, but returns to the enlargement of time with the averment that the application is guilty of indolence and inordinate, unexplained delay which is charged to be unreasonable and deliberate. She urged me to dismiss the application for being prejudicial to the respondents and not in the interests of justice and fair play. Miss Obaga stated that the applicant's intended appeal has no chances of success and would be merely academic while the respondents will be kept away from recovery of the reasonable compensation awarded for the death of a father whose children are still in school and in need of funds.

On a motion under **Rule 4** for extension of time, an applicant appeals to the single judge's discretion. The judge has a wide and unfettered discretion designed to facilitate the meeting of the ends of justice. It is an acknowledgment of human failings which may lead to a default in meeting the timelines imposed by the Rules. Wide as the discretion is, however, it is not exercisable on a whim dependent on a judge's mood, sympathy or personal idiosyncrasies. It is first and last a judicial discretion to be exercised judicially on the basis of sound principle. The judge decides on the basis of some material being placed before him on consideration of which he is satisfied to extend time or otherwise. Among the matters a judge properly considers are those that were identified in **KENYA AIRWAYS vs. MWANGI** [2003] KLR 486, namely;

- (1) The length of the delay
- (2) The reason or explanation given for the delay
- (3) Possibly, the chances of the appeal or intended appeal succeeding and;
- (4) The degree of prejudice that a grant of the application may cause to the respondent.

The said grounds are indicative and are not exhaustive as the judge is at liberty to consider all the other issues that may legitimately fall for consideration on a matter of discretion including the conduct of the parties and the degree of candour displayed by the applicant.

I have considered the application, the supporting affidavit, the replying affidavit and the rival submissions in support and against it with those principles in mind. It is not in dispute that at the conclusion of the trial Waweru, J was transferred from Nairobi to Murang'a. It is also not in dispute that the advocates on record were informed that judgment would be rendered on notice. What is in dispute is whether the applicant is a victim of non-notification of the delivery of judgment as is asserted on his behalf, or an indifferent and

indolent author of his own misfortune by failing to take action when he learnt of the judgment that was against him as alleged by the other side.

To counter the applicant's claim of being in the dark about judgment having been delivered and essentially stumbling upon it on the internet, the respondents have gone to some lengths to demonstrate that the applicant's advocates were actually notified of the intended delivery of judgment and of the fact of its having been delivered. I have in particular seen the notice of judgment by the Deputy Registrar of the High Court at Muranga dated 11th March 2015 notifying the advocates that judgment would be delivered on 15th May 2015 at 11.00am. Attached also is a certificate of posting from the Postal Corporation of Kenya showing that an article was sent by the Principal Magistrate, Murang'a, to Obaga & Co. Advocates of P.O. Box 14434-00100, Nairobi. That is the address of the respondents' advocates from the records before Court. There is also exhibited a letter from the Deputy Registrar and copied to both advocates acknowledging receipt of the court record. The said letter was received by the firm of Obaga & Co. Advocates on 20th August 2015 at 9.45am from the date stamp. There however is no corresponding certificate of posting for the notice of judgment addressed to the firm of Kinyanjui Njuguna & Co. Advocates for the applicant. Nor is there any receipt stamp or affidavit of service to show the said firm was served with the notice and/or the letter copied to them.

With respect to the respondents, I am not prepared to conclude that because their advocates were served with notice and were in the know, therefore the applicant's advocates were similarly served and in the know. Ideally that is what should have happened. In matters of court process, however, a court cannot proceed on the basis only of what should ordinarily happen or ought to have happened. A court acts on proof of service and evidence of knowledge before it can hold a party culpable of default. On a balance of probabilities therefore, I find and hold that the applicant's contention that he did not know of the date the judgment was to be delivered and learnt of it only when it was seen on the eKLR website to be plausible. Indeed, I have seen the letter from Ms. Kinyanjui Njuguna & Co. Advocates dated 14th May 2015 addressed to the Deputy Registrar of the High Court at Milimani wishing to know when judgment was to be delivered. That letter was copied to M/s Obaga & Co. Advocates and there has been no denial of its receipt. It remains unchallenged and lends credence to the applicant's averments.

I need to mention that the applicant exhibited a letter dated 24th March 2016 by which his advocates express the view that "the award is reasonable in both limbs (sic) of liability and quantum and advice (sic) on settlement". This was a legal opinion given by counsel to their client who, by their e-mail dated 6th April 2016, nevertheless instructed them to appeal. It was not prudent for the advocates to have exhibited the letter showing the advice they gave as it seems to confirm, the respondents' assertions that the applicant has no arguable appeal. As I am not bound to consider the likelihood of success of the intended appeal, however, I will not make much of the opinion expressed in that letter. I think that it is enough that the applicant's advocates had no notice of the judgment and did move with reasonable speed to set in motion the appeal process and to regularize matters.

The upshot is that I find merit in this application. I accordingly enlarge time and order that the applicant shall file and serve his notice of appeal within **seven (7)** days of the date hereof.

Costs shall be in the intended appeal.

Dated and delivered at Nairobi this 25th day of November, 2016.

P. O. KIAGE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR