



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, JA (IN CHAMBERS))

CIVIL APPLICATION NO. NAI 275 OF 2013

BETWEEN

MARGARET MUGURE.....APPLICANT

AND

JOHN NDUNGU GATHEBA.....RESPONDENT

(Being an application for leave to file memorandum of appeal and record of appeal out of time in an intended appeal from the Decision, Ruling and Order of the High Court of Kenya at Kericho (Mutende, J.) dated 4th December, 2012

in

H.C.C.C. NO.13 OF 2010)

R U L I N G

The applicant herein filed the notice of motion dated 20th September, 2013 under **Sections 3A, B of the Appellate Jurisdiction Act** and **Rules 1(2), 4** of this Court's rules with the prayer that she be granted leave to file her record of appeal out of time. There were grounds in the body of the application on which the motion was premised, the supporting affidavit, supplementary affidavit and a replying affidavit, all of which **Ms. R. Obaga**, learned counsel for the applicant referred to in her arguments. **M/S E. M. Juma & Company Advocates**, for the respondent, were served with the hearing notice herein but did not appear.

Ms Obaga told the Court that **G. B. M. Kariuki, J.** as he then was, delivered the judgment on 4th December, 2012 in the case brought under the Fatal and Law Reform Acts, claiming damages. The applicant filed the notice of appeal on 14th December, 2012 and on the same date applied for certified copies of the proceedings.

She went on to state that the proceedings from the High Court at Kericho were certified on 12th February, 2013 and the same were collected by her clerk in March, 2013, on a day she could not remember, but definitely after the last day to file a record of appeal had expired on/about 6th March, 2013. Then the present application was brought some six months later. The explanation given for this delay was that as deponed to in her affidavits, the parties attempted

to

settle the matter out of Court when **Ms Obaga** discussed some 3 files, including the claim herein, with the insurance company but the latter declined to settle that claim. And that her client was also financially challenged but had at last managed to raise and pay into this Court's subregistry at Nakuru Sh.6,000/= as security and followed that by filing the record of appeal – C.A. No.32 of 2013. The main point in the memorandum the applicant desires this Court to consider and rectify in the award of damages as currently computed, is that while the amended plaint, her evidence in chief and by the submissions

by both sides in the High Court, indicated that the deceased, **Dennis Miimbo Onyayo**, earned Sh.700/= *per day* as a matatu operator, yet the learned Judge in his judgment had instead based computation of damages under the Fatal Accidents Act on a multiplicand (income) of Sh.700/= *per month*. **Ms Obaga** saw this as an error on the part of the learned Judge and even filed a review application dated 17th February, 2012 which **Mutende J.** dismissed, finding that there was no error/slip to be corrected as to the regularity of the deceased's income, whether daily or monthly, because the court record showed that the applicant had said in cross-examination that the income was Sh.700/= *per month*. Accordingly, **Ms Obaga** urged the Court to find that it was arguable on appeal that indeed the learned Judge made a slip as to the income of the deceased and if this Court accepts that then her client's award/benefits could be computed to a larger figure than the High Court awarded, and thus justice and fairness would prevail.

It has been noted earlier that **M/S E. M. Juma & Company Advocates** were served with the hearing notice but did not appeal. But in their replying affidavit they deposed that the applicant had brought these proceedings after a long and unexplained delay and in any event the application as well as the appeal lacked merit.

It has been stated time without number, in the decisions of this Court that it will not assist an indolent, or negligent litigant who fails to adhere to the timelines set to do a required thing or take a given step in the course of litigation. Granting orders to such an applicant in order to enlarge time within which he/she should do that which he/she neglected to do, could only undermine the interests of justice and also prejudice the other party. However, this Court ought to consider with favour to grant such orders to an alert and deserving litigant who, for some satisfactorily explained reason, failed to take the required step or do the necessary thing. That this Court does that in the interest of justice.

In the present matter I perused the amended plaint, the evidence in chief and the submissions of both parties and noted that indeed the deceased's income was therein said to have been Sh.700/= *per day*. But in answer in cross-examination the record reflects the applicant as having said that that income was *per month*. And indeed in the judgment of the High Court that was the sum on which the learned Judge computed damages under the Fatal Accidents Act. So even as the respondent deposed in his replying affidavit that the appeal lacked merit, it appears that this issue of income of the deceased is worth being considered on appeal. Whether it succeeds or not is not for me to determine at this stage.

What falls for determination at this stage is whether the applicant deserves the order to enlarge time within which to lodge the record of appeal. Or as it has already been lodged, to deem the lodged appeal as validly lodged considering the circumstances.

In my opinion, the certified copies of proceedings took quite a while to be furnished. But because it was not stated as to when exactly the proceedings were collected in March after the last day to file the appeal on 6th March, 2012, had passed, it is not possible to say by how many days the filing of the record was late. But it is pertinent to note that even after the certified proceedings were collected in

March, 2012, the applicant took about 6 months to bring this application. **Ms. Obaga** explained the delay as deponed to in that there were attempts to settle the decretal sum, which failed and the review application to correct the regularity of the income also failed.

In the view of the foregoing, I am minded to accept that the delay in bringing the present application has been sufficiently explained. It does not appear from the replying affidavit that the respondent will be prejudiced if the sought orders are granted. He did not depone accordingly, even as I am inclined to think that in the event the appeal herein succeeds, there will be a heavier financial burden to be borne by the respondent's side in terms of the quantum of the award to be computed. But all this is not for me to remark on at this point. Both sides will be heard on the point thereby doing justice in the matter.

In sum the order sought is granted. In essence the record of appeal constituting Civil Appeal No.32 of 2013 is deemed validly filed and the parties should move to argue it. Costs in this application will be in the appeal

Dated and delivered at Nairobi this 18th day of July, 2014

J. W. MWERA

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JUDGE OF APPEAL

I certify that this is

a true copy of the original

DEPUTY REGISTRAR

/jkc