



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 211 OF 2014 (UR 166/2014)

BETWEEN

ELIJAH MACHARIA GITHINJIAPPLICANT

AND

ROSEMARY WANJIRU KUNGU RESPONDENT

(Being an application for leave to appeal from the Judgment (Odunga, J.) delivered on 2nd July, 2014

in

HCC NO. 145 OF 2010)

RULING

This Court in exercise of its jurisdiction under **Rule 4** of its rules will extend time within which any act is required to be done by considering, first the length of the delay, the reasons for the delay, the prejudice to the respondent, and possibly the chances of the appeal succeeding if the application is granted. See **Leo Sila Mutiso V. Rose Wangari Mwangi** Civil Application No. 255 of 1997.

In considering the present motion for extension of time to lodge and serve both the notice of appeal and memorandum of appeal out of time, the above stricture must be observed.

The applicant was sued along with Antoplus Used Spare Parts Trading Company in High Court Civil Case No. 145 of 2010 for general and special damages in respect of a road accident in which the respondent suffered severe injuries.

The learned trial Judge framed the following questions for determination:-

- “1. Whether the plaintiff’s claim is time barred and whether the order extending time was properly granted.**
- 2. Whether the suit motor vehicle was owned by the 2nd defendant.**
- 3. Whether the said vehicle was being driven by the 1st defendant as agent of the 2nd**

defendant.

4. Whether there was an accident as pleaded and if so whether the accident was caused by the negligence of the defendants.

5. Whether the plaintiff proved her case to the required standards.

6. Whether the plaintiff is entitled to damages and if so, what is the quantum?”

The learned Judge found that the action was not time-barred as time for filing the suit was extended; that the motor vehicle that caused the accident belonged to the applicant; that it was being driven at the time of the accident by the applicant's agent; that the accident was caused by the negligence of the applicant's agent; and that the respondent was entitled to judgment in the sum of Kshs. 15,042,157.32.

This decision was rendered on 2nd July, 2014. It is the circumstances under which the judgment was delivered that forms the basis of this application. The applicant has averred that the judgment was initially reserved for 27th June 2014. The applicant's advocate was informed by the registry of the Judge's absence hence the judgment could not be delivered. It was on 19th July 2014 when the advocate's office was served with a draft decree that the applicant's advocate learnt that in fact the judgment had been delivered on 2nd July 2014, in his absence but in the presence of the respondent's advocate. In these circumstances, it was submitted that the delay was inadvertent. The applicant, who desires to challenge the decision of the High Court on appeal to this Court, holds the view that the intended appeal is arguable.

The events leading to the delivery of the judgment as explained above by the applicant, is not controverted by the respondent. For instance, it is common ground that the judgment was delivered in the absence of the applicant's counsel after the Judge failed to deliver it on the due date. The respondent only takes issue with the failure of the applicant's advocate to inquire from the court about the new date. The respondent has also sworn in the replying affidavit that the intended appeal lacks merit and is intended merely to delay the respondent from accessing the fruits of the judgment. She, however, adds that should the court be minded to grant the extension of time, then, the applicant be ordered to deposit the decretal sum of Kshs. 18,000,000 in an interest earning account.

The Judge having failed to deliver the judgment on the date it was initially scheduled to be delivered, it was the duty of the Court to notify counsel for both parties of the new date. It appears to me from the averments of the respondent that it was the effort of her advocate that the latter was able to know of the new date; that the respondent's advocate ought to have exercised similar diligence.

I reiterate that although the respondent's advocate was vigilant and diligent, the applicant's advocate cannot take responsibility for the failure of the registry to notify parties through their counsel once the Judge was ready with the judgment.

The judgment was finally delivered on 2nd July 2014. On 13th August 2014, the applicant brought this application. Under **Rule 75 (2)** of the Court of Appeal Rules, the applicant was required to lodge a notice of appeal within fourteen (14) days of the date of the judgment.

In strict computation of time, the notice of appeal ought to have been lodged on 23rd July, 2013. The memorandum and record would be lodged sixty (60) days from that date. This motion was filed on 13th August, 2014, twenty (20) days after the date the notice of appeal ought to have been lodged. That period, in my view, cannot be described as inordinate. The delay will inconvenience the respondent considering that the accident was in 2007 and the kind of injuries she suffered. But that inconvenience can be compensated by an award of costs.

The delay, as I have explained was not caused by the applicant, who is entitled to exercise his right to challenge the judgment in question. The applicant intends to ask this Court on appeal whether the learned

Judge correctly applied the law of limitation of actions. That is an arguable point that was at the heart of the applicant's defence and on which the learned Judge spent considerable time to discuss in the judgment. That question ought to be decided with finality by this Court.

In the result, I find that no prejudice will be suffered by the respondent if this application is allowed.

Accordingly, the motion dated 4th August, 2014, is allowed with costs to the respondent. The applicant will file and serve the notice of appeal within seven (7) days of the date of this ruling. Thereafter, within twenty one (21) days, he must lodge and serve the memorandum and record of appeal.

Dated and delivered at Nairobi this 28th day of November, 2014.

W. OUKO

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR