REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 309 OF 2005

GLORY CAR HIRE, TOURS & SAFARIS LIMITED

PATRICK WAMBUA KIVUVA ……..……. APPLICANTS

AND

MARTHA WANGUI MURIITHI ….…… RESPONDENTS

(An application for leave to file and serve fresh Notice of Appeal out of time in an intended appeal from the judgment of the High Court of Kenya at Nairobi (Lady Justice Ang'awa) dated 17th March, 2004

in

H.C.C.C. NO. 1805 OF 2002)

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R U L I N G

The applicants' seeks leave under ***Rule 4*** of the Rules of this Court to file and serve fresh Notice of Appeal out of time.

The applicants intend to file an appeal against the judgment and decree of the superior court in *H.C.C.C. No. 1805 of 2002.* In that suit ***Martha Wangui Muriithi*** (Respondent) claimed damages against the two applicants as a result of death of her son ***Munene Murunga Muriithi*** (deceased) in a road traffic accident. On 30th December, 1999 at about 10 a.m. motor vehicle Registration No. KZK 26 Peugeot 205 saloon, driven by deceased collided with motor vehicle Registration No. KAL 123C Nissan Mini bus driven by Patrick Wambua Kivuva – 2nd applicant and owned by the 1st applicant as a result of which the respondent's son died. There was no eye witness to the accident. The respondent called a witness who went to the scene soon after the accident and who took the deceased to hospital. The respondent also produced an inquest file where the magistrate after hearing evidence recommended that:

"***Fresh investigations be carried out with a view to charging Patrick Kirumi (sic) with causing death by dangerous driving".***

The second applicant did not give evidence at the hearing of the suit. It appears that the 2nd applicant is the person that the magistrate in the inquest recommended that he be charged with the offence of causing death by dangerous driving. In the circumstances of the case the trial judge (Ang'awa J) relying on ***Welch v Standard Bank Ltd*** [1970] EA 115 and ***Baker Market Harborough v Industrial Co-operative***

society Ltd [1953] 1 WLR 1472 apportioned liability equally (that is 50/50). It appears from the judgment of the superior court that the parties had agreed on damages for lost years under Law Reform Act, and for loss of dependency under Fatal Accident Act, subject to liability.

The damages for lost years agreed was Shs.4,480,000/= arrived at by applying the formula thus: Kshs.35,000/= x 16 years x 12 x2/3.

The loss of dependency was agreed at Kshs.220,000/= arrived at by applying the formula thus: Kshs.35,000 x 12 x 1/3.

The trial judge confirmed the quantum of damages agreed upon and awarded the higher figure of Shs.4,480,000/= and reduced it by 50%. The judgment of the superior court was delivered on 17th March, 2004. The applicants filed a Notice of Appeal on 22nd March, 2004 stating that they intended to appeal "*against parts only of the said decision"*. The respondent filed an application to strike out the Notice of Appeal for being defective (for vagueness) on 21st February, 2005 and served it on the applicants' advocates on 22nd February, 2005. When the application for striking out the Notice of Appeal came for hearing on 16th November, 2005, the applicants' counsel conceded the application and the notice of Appeal was struck out.

The applicants' advocates deposes that he was instructed to appeal on the issue of liability and failure to discount the lumpsum payment only.

The application is opposed on the grounds that the intended appeal has no merit; that there was a delay of 9 months between 22nd February, 2005 when the applicants' counsel was served with the application to strike out the notice of Appeal and 16th November, 2005 when the notice of Appeal was truck out and on the further ground that the respondent will suffer prejudice by delay as the applicant has obtained and order of stay of execution of the decree pending appeal.

The principles upon which this court exercises its discretion under ***Rule 4*** are firmly settled. The Court has a unfettered discretion but in exercising its discretion the court is guided by such factors as the merits of the intended appeal, the reason for the delay, the length of the delay and the question of prejudice to the respondent, if the application is allowed (see ***Wasike v swala*** [1984] KLR 591.

Regarding the merits of the intended appeal the applicants' counsel contended that it is pre-emptive to look at the merits of the intended appeal at this stage. That is not so. The merits of the intended appeal is one of the important considerations when exercising jurisdiction to extend time to file appeal out of time. The application to extend time is likely to be considered more favourably, (all factors being equal) where the intended appeal or appeal is meritorious than where the appeal on the face of it is frivolous. The applicants have not stated the grounds of appeal which they intend to argue in the appeal. The judgment of the superior court showed that the liability was apportioned 50/50 on sound and settled principles of law. The judgment also shows that the parties had agreed on the formulae of assessment of the quantum of damages. The judgment of the superior court is very specific that the court awarded the higher figure of Shs.4,480,000/= and not both the Shs.4,480,000/= and Shs.2,240.000/=.

The applicants have not shown that grounds exist to fault the decision of the learned judge. That is sufficient ground for dismissing the application.

The applicants' advocates became aware that the Notice of Appeal, was defective on 22nd February, 2005, when they were served with the application to strike out the defective notice of appeal. Yet they did not file an application for the extension of time to file a valid notice of appeal promptly or alternatively give consent to the striking out of the defective notice of appeal immediately the application was filed to pave way for the filing of an application for extension of time without delay. This long delay is inexcusable.

Lastly, the respondent will suffer unjustifiable prejudice as a result of any further delay. She has not

enjoyed the fruits of the judgment for two years.

I find no merit in the application. It is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 17th day of March, 2006.

E. M. GITHINJI

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR