



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISC. NO. 91 OF 2018

KARSAN MURJI & COMPANY LIMITED.....CLAIMANT

VERSUS

JACOB MUDENZO BIDINYO..... RESPONDENT

RULING

Introduction

1. The application before the court is a Notice of Motion dated 10.8.2018. it is brought under Order 50 Rule 6 and Order 51 of the Civil Procedure Rules (CPRs) and Section 1A, 1B and section 95 of the Civil Procedure Act (CPA) and it seeks the following orders:-

- (a) **THAT** this application be certified as urgent and heard exparte in the first instance.
- (b) **THAT** this Honourable court do extend the time within which the Applicant may file is Memorandum of Appeal from the Judgment emanating from **CIVIL SUIT NO. 2562 OF 2014 – JACOB MUDENZO BIDINYO VS KARSAN MURJI & CO. LTD** (delivered on 31.5.2018) as per the annexed daft Memorandum.
- (c) **THAT** costs of this Application be in the cause.

2. The application is premised on the following two grounds set out on the body of the motion:-

- (a) The Judgment is for a substantial sum of Kshs.435,183/=
- (b) That Judgment was delivered on the 31st May 2018 without notice to the applicant.

3. The application is supported by the supporting Affidavit sworn on 10.8.2018 by Mr. Joseph Mwai, Senior Claims Officer UAP Insurance Company Limited, the underwriter of the applicant herein. In brief, he deposed that the impugned judgment was delivered on 31.5.2018 and the underwriter engaged in extensive consultation on the appropriate cause of action and hence the delay in instituting appeal. He therefore prayed for enlargement of time to file the intended appeal contending that the respondent will suffer no prejudice which cannot be compensated by costs.

4. The respondent opposed the application through his Replying Affidavit sworn on 18.11.2018. In brief, he deposed that the application is an afterthought, devoid of merits, and only meant to delay the course of justice. That the applicant has not shown any good and sufficient cause for not filing the appeal on time.

5. He contended that the Applicant was aware of the judgment but deliberately chose not to file any appeal within the statutory limitation period. That from 22.6.2018 to 17.8.2018, her counsel and his counsel engaged in correspondences specifically on the issue of costs and reached an agreement but thereafter the applicant failed to pay the decreed sum plus the agreed costs.

6. He further contended that granting the orders sought will prejudice him because the application is devoid of merit, and it is brought in bad faith to frustrate him and deny him the fruit of his judgment.

7. On without prejudice to the foregoing, he contended that if the order sought is granted, then the same should be on condition that the appellant releases at least a half of the decreed sum to him and the balance be deposited in a joint interest earning account to be held by the counsel for the two parties. The other condition proposed is that the appellant be ordered to undertake to set down and prosecute the appeal within six months and in default he be at liberty to move the court for dismissal.

8. The issues for determination arising from the motion and the rival affidavits is whether the applicant has met the legal threshold for granting extension of time to file appeal out of time.

Applicant's Submissions

9. The applicant submitted that the court is endowed with wide discretion to extend the time within which to file an appeal. She relied on *Shah vs Mbogo & another [1967]EA 116* to fortify the foregoing contention. She further relied on *John Gakobo Machaira v Kenya Power & Lighting Co. Ltd[2009]2KLR 73* to submit that in determining an application of this nature, the court should be mostly concerned with doing justice to the parties.

10. She submitted the delay in making the application was neither unreasonable nor inordinate and the delay was due to extensive consultations on the cause of action to take. She further contended that the intended appeal is arguable as the quantum of damages awarded to the Respondent vis a vis the injuries suffered was exorbitant, unconscionable and excessive given the prevailing jurisprudence and precedents.

11. She concluded by contending that it is in the interest of justice that the application be allowed because any prejudice suffered by the Respondent can be compensated by an award of costs.

Respondent's Submissions

12. The Respondent submitted that application is supported by an affidavit sworn by a person who is not a party to the suit and without authority to swear the affidavit. To fortify the foregoing, he relied on *Chania Shuttle Bus vs Rebecca Mbogho (suing as Legal Representative of the Estate of Joseph Mwanyika (deceased) [2016]eKLR.*

13. In addition, the Respondent submitted that the applicant has not demonstrated any justifiable reason for delay in lodging the appeal. That all what the applicant has stated is that the reason for the delay was that the underwriter was involved in extensive consultations. He relied on *Annah Mwiwaki Wairuru v Hanna Wanja Wairuru[2017]eKLR* and *Lucy Ann Wangumi Njagi v Francis Miano [2019]eKLR* to fortify his said submission.

14. He concluded by contending that the application should be dismissed with costs because delay in filing the appeal is not only an ordinate but also an after thought since the applicant had initially agreed to pay the decreed sum plus the agreed costs.

Analysis and determination

15. Rule 8 of the ELRC (procedure) Rules and Section 79G of the Civil Procedure Act provides that the time required to file an appeal is within 30 days from day when the impugned decision was delivered. The legal threshold for granting leave to file out of time in this court is set out in section 79 G of the CPA which states as follows:-

“Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient case for not filing the appeal in time.”

16. In *Paul Musili Wambua v Attorney General & 2 Others [2015]eKLR* cited in the *Lucy Ann Wangumi Njagi Case*, the Court of Appeal held that:-

“... the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted; the degree of prejudice to the respondent if the order is the granted.”

17. In *Bagajo v Christian Children Fund Inc. [2004]2KLR 73* cited in the *John Gakobo Macharia Case*, the Court of Appeal set out the guidelines for exercising discretion in an application for leave to file suit out of time, thus:-

“(iii) In exercising its discretion, the Court's primary concern should be to do justice to the parties. The court should inter alia, consider:-

- (a) The length of the delay in lodging the notice of appeal;***
- (b) Where applicable, the delay in lodging the notice and record of appeal;***
- (c) Whether or not the intended appeal is arguable;***
- (d) The prejudice to the respondent if the application is granted;***
- (e) The public importance, if any of the matter; and***
- (f) Generally the requirements of the interest of justice in the case.***

(iv) it is for the person seeking the favourable exercise of the discretion of the court to place such material as will adequately inform the court in the exercise of such discretion."

18. Applying the foregoing guidelines, to the facts of this case, I find that the applicant's explanation for the delay in filing the appeal in time does not pass the muster for exercising the discretion sought in her favour. All what the applicant has stated in the supporting affidavit is that the reason for the delay was the extensive consultations by her underwriter on the cause of action to take.

19. In my view, a party aggrieved by a decision of the court is supposed to act quickly to impugn the decision. Immediate steps to take would include requesting for certified copy proceedings and judgment. In this case, the applicant has not demonstrated that she took such immediate steps towards challenging the impugned judgment. On the contrary, her counsel engaged the respondent's counsel on the issue of costs with all indications that the applicant was not preferring any appeal.

20. It is a fact that the applicant abruptly and without notice to the Respondent, filed this application in what the respondent calls an act of bad faith and after-thought intended to deny him the fruit of his judgment. In the circumstance, I find and hold that the delay to file the appeal in time has not been adequately explained. I would also agree with the respondent that the applicant has acted in bad faith and has come to seek equity with unclean hands, namely by concealing to this court that she had accepted the judgment and even negotiated the costs payable with the Respondent's counsel.

21. I have further considered the draft Memorandum of Appeal annexed to the Application and found that the same does not establish an arguable appeal. The appeal is only premised on one ground, namely:

"1. That the learned Magistrate erred in law and in fact in awarding general damages for pain and suffering at Kshs.700,000/=."

22. The reliefs sought by the appeal is that the award of Kshs.700,000 be substituted with an award of Kshs.350,000 and that she be awarded costs of the appeal and the lower court. In my view, the appeal and the reliefs sought are not in consonance. The ground of appeal in my view is not challenging the quantum of damages awarded but the decision to award damages for pain and suffering. On the other hand, the relief sought is for the court to interfere with the quantum of damages assessed by the trial court for pain and suffering and award a lesser amount.

23. The foregoing notwithstanding, the court also notes that the applicant has not cited any grounds in the draft appeal upon which she implores the court to interfere with the discretionary award of the General damages by the trial court. Consequently, I find and hold that the intended appeal is not arguable and it has no good chances of success.

24. Finally, the court agrees with the Respondent that granting the leave sought would occasion prejudice to him, which cannot be sufficiently compensated by costs. As noted above the applicant had accepted the judgment and even agreed the amount costs payable with the Respondent's counsel before changing mind two months later. She did not even seek stay of execution in this application or at all. I therefore find that the applicant is just delaying the settlement of the decree of the trial court to the detriment of the Respondent who was successful in his suit.

25. In the end the court returns that the applicant has not met the legal threshold for granting leave to file appeal out of time, namely demonstrating a good and sufficient cause for the delay, as set out in Section 79G of the Civil Procedure Act, consequently I dismiss the Notice of Motion dated 10.8.2018 with costs to the Respondent.

Dated, Signed and Delivered in Open Court at Nairobi this 11th day of October, 2019

ONESMUS N. MAKAU

JUDGE