



DICKSON MUTUMA KIRUTHU.....APPLICANT

VERSUS

BEATRICE WACHERA MAINA.....RESPONDENT

RULING

On 17th December 2012, the Applicant filed in this Court a Notice of Motion dated 10th December, 2012 under a certificate of urgency of the same date. The Motion was brought under **Section 79G, Section 3 and Section 3A of the Civil Procedure Act** and **Order 51 Rule 1 of the Civil Procedure Rules 2010** and all enabling provisions of law. Principally, the Applicant sought leave to appeal out of time against the judgment of the Honourable Senior Principal Magistrate Mr. A.K. Kaniaru (now a judge in the Environment and Land Court) in **Murang'a Senior Principal Magistrates Court Civil Case No. 269 of 2010** delivered on 30th July, 2012. Pending the hearing and determination of this application for leave, the Applicant sought stay of execution apparently of the judgment aforesaid. The Motion is supported by the affidavits of the Applicant himself and one Lillian Munyiri both sworn on 10th December, 2012.

According to the Applicant, the chronology of events that led to his Motion are that sometimes around 25th April, 2010 the Respondent was injured in a road traffic accident involving motor vehicle registration number KBH 141C owned by the Applicant at the material time. The vehicle was under the insurance cover of Gateway Insurance Company Limited and which, by virtue of the doctrine of subrogation, assumed responsibility of any claims against the Applicant arising out of the road traffic accident. One such claim was instituted by the Respondent in **Murang'a Senior Principal Magistrates Court Civil Case No. 269 of 2010** for special and general damages in compensation for injuries sustained and losses suffered as a result of the accident aforesaid. By consent of the parties in that suit, judgment on liability was entered at the ratio of 90:10 in favour of the Respondent. The determination of quantum of damages payable was based on written submissions filed by the parties

The Applicant contends that upon filing of the written submissions, judgment was set to be delivered on 25th July, 2012; it was not, however, delivered as scheduled but was finally delivered on 30th July, 2012, in the absence of the Applicant or his representative. The Applicant complains that he was not aware and neither was he notified of the alternative date when the judgment was delivered. According to the fifth ground of the grounds upon which the Notice of Motion is based, the Applicant only became aware of the judgment on 17th August, 2012 but even then, though within time to lodge an appeal the Applicant did not file his appeal due to what he says was an inadvertent error or oversight on his part.

The Applicant seems to have woken up to action on 17th December, 2012 when he filed the Motion herein; no tangible court action seems to have been taken between 17th August 2012 when the Applicant alleges he became aware of the judgment and December, 2012 when he finally filed this Motion. The Applicant does not offer any explanation of the delay in his affidavit but rather it is Lillian Munyiri, the Legal Officer of Gateway Insurance Company Limited who has proffered, as far as I can gather, two reasons for the delay. According to her, the delay was caused, first, by the failure of service of Notice of Judgment upon the Applicant's advocates. Secondly, the delay arose from the misplacement of the relevant file in the insurance company's office.

The Respondent opposed the Motion and she filed a Replying Affidavit sworn on 31st day of January, 2013 and filed in court on 1st February, 2013; both counsel opted to proceed by way of written submissions which I have carefully considered.

Before proceeding further, I must make some quick remarks on the reasons given for the delay. While failure to be notified of when judgment was to be delivered may explain why no action was taken between 30th July, 2012 when the judgment was delivered and 17th August 2012 when the Applicant was allegedly informed of the judgment, it certainly does not explain why no action was taken between the time the Applicant became aware of the judgment and the time he filed his Notice of Motion in Court. The second reason given appears to be equally less convincing; Ms Munyiri deposes that the relevant file was misfiled in one of the company's cabinets and that it was only after a regular audit of all the files when it was noticed that no instructions to lodge an appeal had been given in this particular file. That may be so but it is not clear from Munyiri's affidavit when this regular audit of the files was done; how does the court tell the speed at which the applicant moved to commence action if it is not clear from her affidavit when the events that prompted action, in this case the recovery of the misplaced file, occurred? How does the court assess the applicant's diligence? In all fairness in an application such as this, where timeliness of any action taken is fundamental to the success or failure of the application, it is necessary for the applicant to be as specific as possible as to the time of the occurrence of particular events or actions taken to mitigate any further delays; nothing should be left to conjecture or presumptions.

One of the annexes on the Lillian Munyiri's affidavit is a letter dated 17th August, 2012 by the Applicant's advocates addressed to the Respondent's advocates and marked as "LM1". Due to its relevance in determination of the Applicant's Motion, it is necessary to quote it verbatim:

Mwangi Wahome & Company

Date 17th August, 2012

Advocates,

**Sonalux House, 8th Floor,
Moi Avenue
P.O. Box 16574-00100
Nairobi.**

Dear Sir,

RE: YOU'RE (SIC) CLAIM NO. 030/070/9/28017/1010

1. SPMCC NO. 268 OF 2010-MURANGA

BEATRICE WACHERA MAINA

2. SPMCC NO. 269 OF 2010-MURANGA

BEATRICE WACHERA

3. SPMCC NO. 271 OF 2010-MURANGA

LUCY MUTHONI GICHIRI -VS- DICKSON MUTUMA KIRUTHU

We refer to the above matters and write to inform you that judgment was delivered in our absence as we were not notified of the same, we accordingly sought a stay of execution for 45 days which was granted by the court on 15th August, 2012.

We confirm we are in receipt of your letter dated 6th August, 2012 and have forwarded the same to our clients for payment.

**Yours sincerely
GACHANJA & COMPANY**

ZAHIRA A. SAJAN

It is clear from this letter that firstly, that as at 17th August, 2012 the Applicant was already aware of the judgement in Murang'a Senior Principal Magistrates Court Civil Case No. 269 of 2010; secondly, as of that same date the Applicant had even made an application in the magistrates' court and succeeded in obtaining stay of execution of the judgement for forty-five(45) days and thirdly, the Applicant's counsel who in reality had been instructed by the Applicant's Insurance Company, had advised the insurance Company to settle the decretal sum.

It follows that, contrary to what is stated in ground five of the Notice of Motion, the Applicant was aware of the magistrate's judgment before 17th August, 2012. Indeed it has been demonstrated in the Respondent's Replying Affidavit that the Applicant was notified of the judgment as early as 9th August, 2012 and by 20th November, 2012 when a reminder of this notice was delivered to the Applicant no action had been taken yet. Secondly, it was the opinion of Applicant's legal representatives who are also the insurance company's legal advisers that the decretal sum should be paid and apparently it is for this reason that they sought and obtained stay of execution of forty-five days in preparation for payment and not to appeal.

Against the background of this letter, it would appear, as counsel for the Respondent submitted, that this Motion is an afterthought and it is borne out of bad faith.

One other ground upon which this Motion is based and which merits consideration in this ruling is the Applicant's contention that his intended appeal is meritorious and the only reason why the Applicant believes it is so is because, he was informed by his advocates which information he believes to be true that the damages awarded by the learned magistrate were inordinately high. The only document the Applicant has filed in support of this contention is a draft memorandum of appeal which is annexed to his affidavit and marked as "LMS3". A copy of the judgment from which the Applicant intends to appeal or any of the pleadings filed in the magistrates' court, whether copies of the plaint or defence, or the submissions filed are not part of the annexes to the affidavit in support of the Motion. There is no evidence on record to demonstrate that any attempt had been made to secure a copy of the judgment or of the pleadings. In the absence of any of these documents or any explanation for their omission I am unable to assess the intended appeal's potential to succeed or whether it is even arguable. The court is left to speculate and, unfortunately for the Applicant, his motion cannot be granted on the basis of speculation of the likely outcome of his intended appeal.

In the course of making both oral and written submissions counsel for the Applicant and Respondent furnished the court with court decisions on this issue of leave to file appeal whenever one is caught out by time. These decisions are all consistent that, ordinarily leave to file appeal outside the limitation period will be granted if the Applicant can satisfy the court that, first, the delay is not inordinate not only in filing the appeal but also in filing the application for leave to file an appeal out of time; second, there is sufficient reason or reasons for the delay; third, the applicant has an arguable appeal and finally, the Respondent will not be prejudiced in any way if time to file the appeal is extended.

In the Mombasa High Court Miscellaneous Application No. 310 of 2010, Gwalak Teim Muom versus Makupa Transit Shed Limited (2012) eKLR, Hon. Mr Justice Mohamed Ibrahim quoted the decision of **African Airlines International Limited versus East and Southern African Trade Development Bank (PTA) Civil Application No. 50 of 2002(unreported)** and said that in determining whether the court shall exercise discretion to extend time the following factors should be considered: the length of the delay; reasons for the delay; whether there is arguable appeal and the degree of prejudice to the defendant if time is extended. An application to file appeal out of time was allowed in this case; the applicant filed the relevant application just over a month after he discovered that judgment

had been delivered.

In the **Nyeri High Court Miscellaneous Application No. 56 of 2011 Francis Macharia & Another versus Muigai Chege (2011) eKLR** Hon. Mr Justice Sergon (as he then was) allowed the application to file the appeal out of time because he found that the court file went missing after judgment had been delivered and in those circumstances delay in filing of the appeal was bound to occur. The learned judge found the disappearance of the court file to be a satisfactory reason sufficient enough to explain the delay. The same finding and conclusions were made by Hon. Mr Justice Osiemo (as he then was) in **Nairobi High Court Miscellaneous Application No. 394 of 2006 Tabaki Freight Services International Limited Versus Aoko Midiwo Odembo t/a Binti Legacy Bookshop (2006) eKLR** where the learned judge attributed the delay in filing the appeal to court and accordingly allowed the extension of time. These two decisions suggest that where the circumstances occasioning delay are beyond the applicant's control the court is likely to exercise its discretion in favour of the Applicant, everything else being equal.

Justice E.O. O'kubasu allowed an application to file a notice of appeal out of time in **Nairobi Court of Appeal Civil Application No. 318 of 2003 Charles Gitonga Gakuu Air Travel & Related Centre & Another versus Lee Eun Hee (2003) eKLR** notably because the applicant made an attempt to file the notice of appeal soon after he became aware of the judgment and accordingly found that the delay was not inordinate. Similarly, in **Embu High Court Miscellaneous Application No. 53 of 2010 Winston Murithi Nyaga Versus Stephen Karuri Njagi (2010) eKLR** the court (Lady Justice W. Karanja) found that the applicant took less than a month to file the application for leave after he received typed proceedings and a certificate of delay from the court. The learned judge allowed the application because of the applicant's diligence in taking the appropriate steps and in any event the delay was found not to be inordinate.

In my opinion, the Applicant's Motion is lacking in all of the grounds or reasons upon which the applications for leave in the foregoing cases were allowed; there is no doubt that the Applicant was aware of the judgment before the elapse of the limitation period within which to file the appeal but never took any steps either to file the appeal or file the necessary application for leave to file the appeal out of time, once he ran out of time, until more than four months later. Considering the totality of circumstances in this case the delay of four months was not only inordinate but it has also not been sufficiently explained. Whether the intended appeal is arguable or not is an issue the court cannot make out with any certainty in the absence of any material which could have assisted it decide one way or the other. Lady Justice Koome rejected an application such as the Motion herein in **Nakuru High Court Civil Appeal No. 41 of 2006 Stephen Gitau & Another versus Muraguri Ndugire (2006) eKLR** for the same reason. The Applicant in that application contended, as the Applicant herein has, that the award made against him in the lower court was too high. In disallowing the application the court noted that a copy of the proceedings or judgment had been omitted from the application and in their absence the court did not have information upon which to make a determination as to whether the award was too high as claimed by the applicant.

There is no doubt that the court enjoys unfettered discretion to allow an application for leave to appeal out of time; however, the exercise of the court's discretion in all cases is neither whimsical nor capricious; it is judicious. It would be prejudicial to the Respondent if, in the face of all the deficiencies in this Motion, I exercised my discretion in favour of the Applicant and allowed his Motion. The applicant should not be rewarded for or be allowed to take advantage of his unexplained lethargy. I, accordingly, dismiss the Motion dated 10th December, 2012 with costs.

Dated, Read and Delivered in open in court on 5th Day of April 2013

NGAAH JAIRUS
JUDGE

In the presence of:

Court Clerk.....

Counsel for the Applicant.....

Counsel for the Respondent.....