



**Mwaniki v UAP Insurance Company Limited (Civil Appeal  
14 of 2023) [2024] KEHC 10470 (KLR) (26 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10470 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL 14 OF 2023  
LM NJUGUNA, J  
AUGUST 26, 2024**

**BETWEEN**

**CLEMENT MWANIKI ..... APPLICANT**

**AND**

**UAP INSURANCE COMPANY LIMITED ..... RESPONDENT**

**RULING**

1. Through an application dated 15<sup>th</sup> February 2024, the applicant is seeking the following orders:
  - a. That this honourable court be pleased to grant leave to the applicant to appeal out of time against the orders of Hon. N. Nyakweba in Embu MCCC No. 175 of 2019 delivered on 19<sup>th</sup> July 2022;
  - b. The memorandum of appeal filed on 31<sup>st</sup> March 2023 be deemed as properly filed and on record; and
  - c. That the costs of this application abide the outcome of the intended appeal.
2. It was the applicant's case that the trial magistrate gave orders in Embu MCCC 175 of 2019 striking out the entire suit and terminating the proceedings therein. Time to appeal having passed, the applicant seeks leave to appeal out of time against this order of the trial court. The delay in appealing was attributed to misdirection by counsel who held his brief, who informed him that the matter had been stood over generally pending compliance under Order 11 of the Civil Procedure Rules. That the applicant became aware of the orders and he immediately sought the orders herein together with a memorandum of appeal. He urged the court to deem the memorandum of appeal as properly filed and on record even though it was filed prior to granting of leave to appeal. He relied on the overriding objective principle in administration of justice.



3. The respondent filed a replying affidavit deposed by its legal officer, opposing the application. He deponed that the reason for the delay is not compelling given that the order was issued one year and six months before the application was filed. That the application ought to have been filed before the memorandum of appeal was filed and not the other way around. That the application is made in bad faith and it is an abuse of the court process. He urged the court to dismiss it.
4. The court directed that the parties file their written submissions but only the applicant complied.
5. The applicant submitted that mistakes of counsel should not be visited on clients. He relied on the case of *Lucy Bosire v. Kehancha Div. Land Dispute Tribunal & 2 Others* (2013) eKLR, *Belinda Murai & Others v. Amoi Wainaina* (1978) LLR 2782 (CALL), *Philip Chemwolo & Another v. Augustine Kubede* (1982-88) KAR 103 at 1040 and *Branco Arabe Espanol v. Bank of Uganda* (1999) 2 EA 22 for this argument. He submitted that the court can exercise its discretion as provided under section 79G of the [Civil Procedure Act](#) and the overriding objective under sections 1A, 1B & 3A of the [Civil Procedure Act](#).
6. Further reliance was placed on the cases of *Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others* [2015] eKLR, *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2015] eKLR, *Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints* (2016) eKLR, among others. That it is in the interest of justice that the application be allowed.
7. The issue for determination is whether the court should grant the applicant leave to appeal out of time.
8. The timelines for filing of appeals are set out under Section 79G of the [Civil Procedure Act](#) as follows:
 

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.”
9. The court acknowledges that sometimes delay in filing the appeal may occur hence the proviso in the above-cited provision of the [Civil Procedure Act](#). The proviso creates lee-way but only to an extent where the court may apply discretion on the matter and grant such orders when it is satisfied of the reasons for the delay and other factors. In the case of *Edith Gichungu Koine Vs Stephen Njagi Thoithi* (2014) eKLR the court held thus:
 

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”
10. Being a discretionary relief, the circumstances of the case should guide the court in making its decision. The applicant stated that when the orders were made, he was indisposed and could not attend court and so an advocate held his brief. That the said counsel who held his brief misled him that the matter had been stood over pending compliance with Order 11 of the Civil Procedure Rules but the real status was that the proceedings had been terminated and his case struck out. That as soon as he learned about this position, he instructed his advocate to appeal against the decision and then file the application



herein. The respondent's position is that the memorandum of appeal was filed before leave was sought for and granted, thus the application is made in bad faith.

11. The impugned order was made on 19<sup>th</sup> July 2022, the memorandum of appeal was filed on 31<sup>st</sup> March 2023 and this application was filed on 23<sup>rd</sup> February 2024. There is a delay in filing the application for leave by 1 year 7 months from the date of the impugned order. The applicant explained that his advocate acted too ambitiously in filing the appeal before leave was granted but he urged the court to grant leave and deem the appeal as properly filed. The delay in both appealing and seeking leave cannot be ignored.
12. However, it is in the interest of justice that the applicant be allowed to make his case in the appeal. In any event, the court is satisfied that the inadvertence is on the part of the advocate and not the appellant, a position that has not been controverted by the respondent. The mistakes of counsel shall not be visited on the litigant as was stated in the case of *J.G. Builders vs Plan International* (2015) eKLR.
13. Therefore, I find that the application has merit and it is hereby allowed. The memorandum of appeal dated 15<sup>th</sup> August 2022 and filed on 31<sup>st</sup> March 2023 is hereby deemed as properly filed and on record. Cost of the application shall abide the outcome of the appeal.
14. The record of appeal to be filed within 14 days from the date of this ruling.
15. Upon compliance with the order on filing of the record of appeal, the appeal to be prosecuted within 90 days from the date of filing of the record of appeal, failing which the appeal shall stand dismissed.
16. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 26<sup>TH</sup> DAY OF AUGUST, 2024.**

**L. NJUGUNA**

**JUDGE**

..... for the Applicant

.....for the Respondent

