



**Sori Lakeside Hospital v Omondi t/a Arkcraft Digital Systems (Miscellaneous Civil Application E096 of 2024) [2024] KEHC 13499 (KLR) (30 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13499 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
MISCELLANEOUS CIVIL APPLICATION E096 OF 2024**

**E OMINDE, J  
OCTOBER 30, 2024**

**BETWEEN**

**SORI LAKESIDE HOSPITAL ..... APPELLANT**

**AND**

**BRIAN HUMPHREY OMONDI T/A ARKCRAFT DIGITAL  
SYSTEMS ..... RESPONDENT**

**RULING**

1. The Applicant approached this court vide a Notice of Motion dated 26/02/2024 filed through the firm of Messrs Mauwa & Company Advocates seeking the following orders;
  - i. Spent
  - ii. That this Honourable court be pleased to grant the Applicant leave to file appeal out of time from the Ruling delivered by the Honourable Adjudicator/Resident Magistrate, at the Magistrates Court in Eldoret on the 23<sup>rd</sup> November 2023.
2. Before delving into the facts pertaining directly to the Application at hand, let me state that my perusal of the Replying Affidavit of the the Respondent and his submissions have even gone into the merits and demerits of the intended appeal which the Applicant seeks to file out of time even before the Court has made a decision on the leave sought.
3. For this reason, I will in this Application simply confine this Ruling to the facts and submissions relevant to the orders sought in the instant Application. The Application is premised on the grounds set out on the face of it and the deponents in the supporting affidavit sworn by Okello Godrick Kennedy, an advocate of the High Court of Kenya.



### **Applicants' Supporting Affidavit**

4. The deponent avers that the Applicant was the Respondent in the subordinate court vide Homabay Chief Magistrate's Court Civil Case No. 73 OF 2017 (which the Court allowed him to amend to read Eldoret SCCComm Claim No. E952 Of 2023, for reasons that the initial citation was an error) while the Respondent was the Claimant, having sued the Respondent for recovery of a sum of Kshs. 236,640/- with interests. The claim and was opposed vide a Notice of Preliminary Objection dated 24<sup>th</sup> October 2023 to which a ruling was delivered on 23<sup>rd</sup> November 2023. He stated that in the said ruling, the trial magistrate found in favour of the Claimant and dismissed the Preliminary Objection with costs. He urged that the trial magistrate, in so doing, arrogated herself jurisdiction going against the law and established judicial authorities, thereby arriving at an absurd determination.
5. The deponent averred that the delay to file the Applicant's appeal arose due to the fact that the firm only got to know of the ruling on 13<sup>th</sup> February 2024 when they were informed of the hearing of the same without notice. However, they informed the Applicant on the same who then issued its instructions to appeal against the said Ruling.
6. Counsel deponed that the appeal has an overwhelming chance of success and further, that this application ought to be granted in the interest of equity and justice

### **Respondents' Replying Affidavit**

7. The Application was opposed vide a Replying Affidavit dated 15/03/2024 deponed by Brian Humphrey Omondi and sworn through the firm of Messrs Chepseba Lagat & Co. Advocates. The deponent averred that the Application is an afterthought, brought with malice and with the intention to abuse the court's process.
8. He stated that he filed a Claim at the Eldoret Small Claims Court vide Eldoret Scccomm Claim NO. E952 of 2023, on 9/10/2023 seeking judgment against the Appellant herein in the sum of Kshs. 236,640/- being compensation for goods that he supplied to the Applicant between 18/9/2018 and 25/9/2023. The Applicant raised a Notice of Preliminary Objection dated 24<sup>th</sup> October, 2023, disputing the jurisdiction of the Eldoret Small Claims Court to entertain the said claim.
9. The deponent filed the grounds of opposition to the said Preliminary Objection, in which he affirmed the court's capacity to handle his claim, based on the fact that the course of action arose in Eldoret, within the jurisdiction of the court since the goods forming the subject matter of the claim were ordered via email and supplied from Eldoret to Migori.
10. The Preliminary Objection did not capture the existence of another suit as alleged by the Appellant, being Homabay Chief Magistrate's Court Civil Case No. 73 of 2017. He stated that it is clear that the cause of action prompting the claim arose in Eldoret, within the jurisdiction of the Eldoret Small Claims Court.
11. The deponent averred that the matter is for a claim of Kshs. 236, 640/- which falls within the pecuniary jurisdiction of the Eldoret Small Claims court, pursuant to Section 12(3) of the Small Claims Act, 2016. Further, that the Appellant's Preliminary Objection was consequently dismissed with costs in his favour and the court affirmed its jurisdiction to entertain the claim.
12. He urged that the Appellant's Counsel on record was duly notified of the delivery of the said Ruling and was served with a Ruling Notice on the 18<sup>th</sup> of November 2023 via the firm's official email He annexed and marked as "BHO-3(a), (b) and (c)" copies of the Ruling Notice, message printout and the Certificate of Service.



13. Additionally, that at no given time has the Appellant's Counsel ever notified his advocates of the change in the firm's email address. The same email that was used to serve the Appellant's advocate with a Ruling Notice on 18<sup>th</sup> November 2023, is the same email that appears on all the Appellant's pleadings and it is also the one used to serve the Respondents' Advocates on record with the instant Application.
14. The Respondent deponed that the purported Memorandum of Appeal by the Appellants is defective due to the following pertinent reasons; it is not signed and dated and therefore does not constitute a valid court document in law, hence the same should be expunged from the court's records for want of form; it does not expose any valid grounds of appeal and is not specific on what issues that were not fully disposed of in the Ruling delivered on 23<sup>rd</sup> November, 2023; it does not disclose any chances of success as alleged by the Appellant since the same is based on mere allegations of fact, which constitute afterthoughts, it has been brought after inordinate delay, i.e. approximately 3 months after the delivery of the court's Ruling, contrary to the Small Claims Court Rules which provide for the right of Appeal within 14 days after delivery of the Ruling and, that the Appellant has not sufficiently demonstrated to the Honourable Court why he failed to appeal within The statutory time limitation of 14 days, rather than a mere allegation of lack of sufficient notice of the Ruling
15. He stated that he will suffer prejudice and great injustice if the instant Application is allowed and urged the court to dismiss the application with costs.
16. When the matter came up for mention, counsel for the Applicant indicated to the court that in his affidavit he had erroneously referred to a case in Homa Bay which was an inadvertent error. That they intended to refer to Eldoret SCCOM E952 of 2023. The court granted the Applicant 7 days to file a further affidavit and the Respondent was at liberty to respond to the affidavit. The parties were also directed to file written submissions on the application within 14 days of service of the affidavit(s).

#### **Applicants' submissions**

17. As at the writing of this ruling, there were no submissions for the Applicant on record

#### **Respondents' submissions**

18. Learned counsel for the Respondent filed submissions dated 25<sup>th</sup> September 2024. Counsel submitted that Section 79G of the [Civil Procedure Act](#) provides that

“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. ”
19. He cited the case of *Edith Gichungu Koine Vs Stephen Njagi Thoithi* [2014]eKLR where the court laid out the factors ought to be taken into when considering extension of time. He stated that the Court of Appeal further guided that there is also a duty imposed on courts to ensure that the factors considered are consonant with the overriding objective of civil proceedings litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court.
20. Counsel submitted that the discretion to extend time must be exercised within the principles of the law and factors to be considered when determining such an application. That these principles were set out in the Court of Appeal case of [Omar Shurie v Marian Rashe Yafar \(Civil Application No. 107 OF](#)



2020) UR where it was held: “It is now well settled that the decision whether or not to” extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the Respondent if the application is granted.”

21. Counsel urged that the reason given for the delay hence this Application to validate the appeal is that the advocate for the appellant got to know of the ruling on 13<sup>th</sup> February 2024. In his defence, the Respondent averred that he duly served counsel for the Applicant with the ruling notice on 18<sup>th</sup> November 2023 via the official email: mauwaassociates@gmail.com and therefore counsel cannot claim he was not aware of the ruling. The ruling notice, message printout and certificate of service was annexed and marked as BHO-2|(a), (b) and (c) respectively.
22. Counsel submitted that the importance of giving a sufficient reason for the extension of time to appeal was discussed in the Court of Appeal case of Susan Ogutu Oloo & 2 Others v Doris Odindo Omolo (2019) eKLR. Additionally, that the guiding principles on the issue of extension of time was laid out by the Supreme Court in Nicholas Kiptoo Arap Korir Salat v 1EBC (2014) eKLR Sup Ct. Application No 16 of 2014. The Supreme Court aptly stated extension of time is not a right of a party; a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court. Of paramount importance, the reason for delay must be explained to the satisfaction of the Court. Further, that the application for extension must be brought without undue delay and it must be demonstrated if the Respondent will not suffer prejudice if extension is granted”.
23. In conclusion, counsel urged that the Respondent Was the successful party in the small claim case and it is only fair that he be allowed to enjoy the fruits of his judgment, while the Applicant is keen to frustrate these efforts. Counsel prayed that the Notice of Motion dated 26<sup>th</sup> February 2024, be dismissed entirely with costs to the Respondent.

### **Analysis & Determination**

24. The following issues arise for determination;

SUBDIVISION - Whether the Applicant should be granted leave to file the appeal out of time

25. Section 79G of the Civil Procedure Act:

“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.”

26. Odek JJA (as he then was) in Edith Gichungu Koine Vs Stephen Njagi Thoithi [2014] eKLR expressed himself as follows:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but no 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.”



27. In the case of Paul Musili Wambua vs Attorney General & 2 Others [2015] eKLR, the Court of Appeal, in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-

“.....it is now settled by a long line of authorities by this court 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 whim or caprice. In general the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of 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 application is granted.”

28. Order 5 Rule 22B provides as follows;

1. Summons sent by Electronic Mail Service shall be sent to the defendant's last confirmed and used E-mail address.
2. Service shall be deemed to have been effected when the Sender receives a delivery receipt.
3. Summons shall be deemed served on the day which it is sent; if it is sent within the official business hours on a business day in the jurisdiction sent, or and if it is sent outside of the business hours and on a day that is not a business day it shall be considered to have been served on the business day subsequent.
4. An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the Electronic Mail Service delivery receipt confirming service.

29. With regards to proof as to whether service was effected according to the provisions of the law, the learned judge in Sifuna & Sifuna Advocates v Patrick Simiyu Khaemba [2021] eKLR expressed himself as follows;

(17) The law on service has not changed and did not in any way attempt to vary the law on evidence as provided for under Section 107(2) of the *Evidence Act*, Chapter 80 of the Laws of Kenya. The Section provides “When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.” In regard to service of documents, the burden bearer is the one who asserts that he effected service. It is not the other way round. That is why the Rule 22B (4) of the Civil Procedure Rules provides that the officer of the Court who effected service should file an Affidavit of Service accompanied with an attachment of “the Electronic Mail Service delivery receipt confirming service.” (emphasis added).

(18) In terms of Sub-rule 2, it is not enough for one to send documents to the last known email address of a party. The Sub-rule provides that the Sender must receive “a delivery receipt” as a confirmation that service has been effected. In my view, the Sub-rule was meant to cure the mischief of parties sending documents to emails of others, keeping quiet about it and taking advantage of others’ lack of knowledge of the activity in their email. It is in the current times that many a people in Kenya are getting used to communicating through email. It is not so common that people will check their emails day and night or on a daily basis as it usually happens in the Western nations.

30. In this case, the Respondent has annexed documentation to show that a notice of delivery if the Ruling the subject matter of the intended appeal was sent to the Applicant through the email that the parties



are interacting with even up to date and so the assertion that they were not aware of the delivery of the Ruling is not correct.

31. I note that this assertion has not been contradicted controverted and or denied by the Applicants in any way or at all. It follows therefore that the reason upon which their application to file an appeal and out of time has been demonstrated by the Respondents to be factually incorrect and therefore lacking in merit.
32. The entire application itself therefore lacks merit and I therefore dismiss it in its entirety with costs to the Respondent.

**READ DATED AND SIGNED AT ELDORET ON 30<sup>TH</sup> OCTOBER 2024**

**E. OMINDE**

**JUDGE**

