



**Shikuku v Palak International Limited (Miscellaneous Application
E029 of 2022) [2023] KEHC 82 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 82 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS APPLICATION E029 OF 2022
RB NGETICH, J
JANUARY 19, 2023**

BETWEEN

VINCENT JONATHAN SHIKUKU APPLICANT

AND

PALAK INTERNATIONAL LIMITED RESPONDENT

RULING

1. This is a ruling on application dated February 18, 2022 seeking leave to appeal out of time against the judgment of Honourable Mr G Onsarigo Senior Resident Magistrate Kikuyu delivered on December 22, 2020.
2. The grounds are that the applicant had challenge obtaining the trial court's judgment which caused the delay in filing the intended appeal and further, the e- filing system frustrated the applicant's efforts to pay for the certified copies of the judgment; that the intended appeal has serious triable issues with overwhelming chances of success and the delay is not inordinate.
3. The application is supported by the annexed affidavit of Vincent Jonathan Shikuku sworn on February 18, 2022. He averred that he is dissatisfied with the judgment of the trial court delivered on December 22, 2020 for failure to award damages for pain and suffering and loss of amenities; that the trial magistrate failed to appreciate the applicant was injured in the course of his employment.
4. In response to the application, Marselus Ojowi K'Teya filed a replying affidavit sworn on June 21, 2022. He deposes that the applicant has not raised any plausible reasons to warrant extension of time to file appeal; that the delay of one year is inexcusable and inordinate; that the respondent will be greatly prejudiced by having to open a file that has already been closed. Respondent contend that the court should not aid the indolent party as the applicant had more than sufficient time to file the appeal.
5. The application proceeded by way of written submissions.



Applicant's Submissions

6. Ms Njenga filed submissions on behalf of the applicant on September 20, 2022. She submitted that the applicant was employed on a casual basis earning a daily wage of Kshs 500/= and on August 1, 2017, the applicant was involved in an industrial accident while on duty and sustained serious injuries leading to termination from employment.
7. She submitted that the applicant is aggrieved by decision of the trial court and delay in filing the appeal was due to the fact that he relocated to Kakamega after losing his employment with the respondent and there was delay in moving from Kakamega to Nairobi.
8. He further stated that during the period when judgment was delivered on December 22, 2020 the country was in total lockdown due to covid 19 pandemic.
9. She submitted that the delay is not inordinate considering the circumstances of the matter and the respondent will not suffer prejudice if the orders sought are granted. Counsel urged the court to find the applicant has adduced sufficient reasons to warrant granting the orders sought.

Respondent's Submissions

10. Ms Gitonga filed submissions on behalf of the respondent on October 13, 2022. She submitted that the respondent will be prejudiced greatly in the event the applicant is allowed to file an appeal out of time. She submitted that the respondent has already closed their file as there was no notice of appeal filed within 30 days.
11. Counsel further submitted that the delay is inordinate; the applicant slept on his rights. Counsel urged court not to aid an indolent person and submitted that allowing the application will amount to an abuse of the court process.
12. Counsel submitted that the applicant has neither filed a memorandum of appeal nor filed a notice to appeal and urged this court to dismiss the application with costs to the respondent.

Analysis And Determination

13. I have considered the application, the replying affidavit and the submissions for and against the application. The issue for determination is whether the applicant has sufficiently explained reason for delay in filing appeal.
14. Section 79G of the [Civil Procedure Act](#) provide 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”
15. From the above provision, anyone who desires to appeal from the judgment of the subordinate court to the High court should do so within thirty (30) days.



16. Record show that judgment was delivered on December 22, 2020. The intended appeal ought to have been filed by 13th February considering the computation of time as per order 50 rule 4 of the [Civil Procedure Rules](#) 2010 which provides as follows: -

“Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act.”

Provided that this rule shall not apply to any application in respect of a temporary injunction.

17. The factors to consider in determining an application to appeal out of time are well spelt in the Court of Appeal in [Thuita Mwangi v Kenya Airway Ltd](#) [2003] eKlr. They include the following:
- i. The period of delay;
 - ii. The reason for the delay;
 - iii. The arguability of the appeal;
 - iv. The degree of prejudice which could be suffered by the if respondent the extension is granted;
 - v. The importance of compliance with time limits to the particular litigation or issue; and
 - vi. The effect if any on the administration of justice or public interest is involved.
18. It is trite law that the court should determine matters expeditiously; every party should be granted an opportunity to be heard. Enlargement of time to file an appeal is an unfettered discretionary remedy which should be exercised judiciously. The court should balance the interest of both parties and it should be seen as just justice to all parties in the case.
19. The application seeking to enlarge the time to file the intended appeal was filed on March 21, 2022 but dated February 18, 2022. The period between the delivery of the judgment and the filing of the current application is 1 year 2 months 7 days.
20. Explanation given by the applicant for the delay was logistic in travelling from Kakamega to Nairobi and the covid -19 pandemic; they also attribute the delay to the failure of the e-filing system that delayed the generation of receipts.
21. However, in view of availability of e-filing system, the applicant did not need to travel from Kakamega to Nairobi in order to facilitate filing of appeal. He would have also talked to his advocate on phone or file memorandum of appeal from where he was in view of technology put in place by the judiciary.
22. That aside, even if the court was to believe that the applicant indeed faced the said challenges, delay of over a period of over a year in my view is inexcusable. There is no doubt that allowing this application will greatly prejudice the respondent

Final Orders:

1. Application dated February 18, 2022 is hereby dismissed.
2. Costs to the respondent.



3. The orders will apply in the file miscellaneous application No E30 of 2022.

**RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 19TH DAY OF
JANUARY, 2023**

.....

RACHEL NGETICH

JUDGE

In the presence of:

Martin – Court Assistant

Ms. Njenga for Applicants

Mr. Wesonga holding brief for Ms. Gitonga for Respondent

