



**A Jiwa Shamji Limited v Elite Earthmovers Limited (Miscellaneous Civil Application 106 of 2021) [2023] KEHC 1465 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1465 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
MISCELLANEOUS CIVIL APPLICATION 106 OF 2021  
CW GITHUA, J  
FEBRUARY 23, 2023**

**BETWEEN**

**A JIWA SHAMJI LIMITED ..... APPLICANT**

**AND**

**ELITE EARTHMOVERS LIMITED ..... RESPONDENT**

**RULING**

1. The applicant, A Jiwa Shamji Ltd moved this court vide the Notice of Motion filed on November 12, 2021 seeking the following orders:
  - i. That this honourable court be pleased to enlarge time within which to lodge an appeal against the judgment of the Honourable PK Mutai, Senior Resident Magistrate delivered on September 20, 2021 in Kisii CMCC No 412 of 2019.
  - ii. That the attached Memorandum of Appeal be deemed duly filed and served upon payment of requisite court fees.
  - iii. That costs of this application do abide the outcome of the intended appeal.
2. The application is premised on grounds stated on its face and the depositions made in the supporting affidavit sworn on November 10, 2021 by Mr Amin Shamji, the applicant's director. The deponent averred that the applicant is aggrieved by the judgment delivered by the trial court in CMCC NO 412 of 2019 and that he had instructed the applicants advocates on record to proffer an appeal against the learned magistrate's decision but this was not done on time due to an inadvertent error by his advocates; that the applicants intended appeal is plausible as can be discerned from the draft memorandum of appeal annexed to the supporting affidavit and that it is in the interests of justice that the application is allowed.



3. The application is contested through a replying affidavit sworn on April 22, 2022 by the Respondent's Managing Director Mr Pravis Majui Patel.

In essence, the application is opposed on grounds that it is premature and misconceived as the trial court directed parties to reconcile their accounts and did not thus finally determine the dispute before it; that there is no judgment capable of being appealed against and that the reason given for delay in filing the intended appeal is not satisfactory. It is the respondent's case that the application lacks merit and ought to be dismissed with costs.

4. On the date the application was fixed for hearing, the respondent and his counsel though properly served did not attend the court. The application therefore proceeded for hearing *ex parte*.

In his oral submissions, learned counsel for the applicant, Mr Nyamurongi emphasized that the applicant was dissatisfied by the trial court's judgment and he should be facilitated to access justice by being allowed to be heard on appeal; that the mistakes of counsel should not be visited on the applicant; that the intended appeal was arguable and if the application was allowed, the respondent is not likely to suffer any prejudice.

5. I have duly considered the application, the affidavits sworn by the parties in support and in opposition to the motion as well as the oral submissions made by the applicant's learned counsel.

I find that the only issue arising for my determination is whether the applicant has demonstrated that he is deserving of the orders sought.

6. The law governing filing of appeals from decisions of subordinate courts to the High Court and enlargement of time to file such appeals is stipulated in Section 79 G of the *Civil Procedure Act* (the Act) which states as follows: -

' Every appeal of a subordinate court to the High Court shall be filed within a period of 30 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 good reason and sufficient cause for not filing the appeal in time.'

7. It is clear from the above provision that the law limits the time within which to file appeals to the High Court to thirty days from the date of delivery of the judgment or passing of the order sought to be challenged on appeal. The proviso to Section 79 G of the Act leaves no doubt that the court has power and wide discretion to allow the filing or admission of appeals out of time subject only to being satisfied that the applicant had good and sufficient cause for failing to file the intended appeal within the prescribed time.

8. The Supreme Court in *Nicholas Kiptoo Arap Salat V IEBC & 7 Others [2015] eKLR* discussed the court's mandate in determining applications for extension of time to file appeals and held, inter alia, that extension of time was not an automatic right of a party and that to deserve the relief, a party must demonstrate good cause for delay in filing the appeal.

9. The Court of Appeal in *Thuita Mwangi V Kenya Airways Limited [2003] eKLR* also gave guidance on the factors a court should consider in the exercise of its discretion in deciding whether or not to grant an application for leave to file an appeal out of time.

The court identified four factors namely;



- i. The length of delay
  - ii. The reason for the delay
  - iii. The chances of the appeal succeeding if leave was granted, and,
  - iv. The degree of prejudice to the respondent if the application was allowed.
10. In this case, there is evidence that the impugned judgment was delivered on September 20, 2021. The prescribed time for filing of an appeal therefore lapsed on or about October 22, 2021.
- The application was filed on November 10, 2021 about two weeks later. It is thus my finding that the application was filed without much delay.
11. Regarding reasons for the delay, learned Counsel Mr Nyamurongi was candid and took responsibility for failure to file the intended appeal within the prescribed time. He explained that the delay was not deliberate but was caused by inadvertence in failing to diarize the case for bringing up to remind him to draw and lodge the appeal on time.
12. In my considered view, the explanation given by counsel is plausible and satisfactory. Since the applicant had no part to play in the delay in filing the appeal, it would be unfair and against the interests of justice to deny him his constitutional and statutory right of appeal because of mistakes or omissions made by his advocates on record.
13. In any event, if the application was allowed, the respondent is not likely to suffer any prejudice which cannot be ameliorated by an award of costs.
- In view of the foregoing, I am persuaded to exercise my discretion in favour of the applicant. I consequently find merit in the application and it is accordingly allowed in terms of prayer I and 2.
14. Costs of the application are awarded to the respondent.
- It is so ordered.

**DATED, SIGNED AND DELIVERED AT KISII THIS 23<sup>RD</sup> DAY OF FEBRUARY 2023.**

**C.W. GITHUA**

**JUDGE**

**In the presence of:**

Ms Kebungo for the applicant

No appearance for the respondent

