



**Moindi v Onywera (Miscellaneous Application 26 of 2021)
[2023] KEHC 1257 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1257 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
MISCELLANEOUS APPLICATION 26 OF 2021
CW GITHUA, J
FEBRUARY 23, 2023**

BETWEEN

RUSIAH MOCHECHE MOINDI APPLICANT

AND

WILFRED O MOINDI ONYWERA RESPONDENT

RULING

1. In the Notice of Motion dated April 19, 2021, the applicant, Rusiah Mocheche Moindi, seeks leave to file an appeal out of time against the ruling delivered by the lower court on January 22, 2021 in Succession Cause No 185 of 2019.
2. As can be discerned from the grounds premising the motion and the depositions in the supporting affidavit sworn by the Applicant, the application is based on grounds that though the Applicant applied for certified copies of the trial court's proceedings and ruling in good time on February 18, 2021, the same were not supplied to her advocates on record till March 2, 2021 by which time the prescribed time for filing appeals to the High Court had expired; that therefore failure to file the intended appeal on time was not deliberate but was caused by the trial court's delay in supplying the applicant's advocates with certified copies of the proceedings and the impugned ruling.
3. I have combed through the court record and I have not come across a response to the application filed by the respondent. However, in his written submissions filed on February 14, 2022, the respondent purported to oppose the motion mainly on grounds that the applicant was supplied with certified copies of the trial court's proceedings and ruling on February 18, 2021 and has not explained the delay in filing the current application; that the application is aimed at further delaying finalization of the succession dispute between the parties.



4. The Applicant in his written submissions re-iterated the explanation given in his supporting affidavit and in addition argued that the intended appeal is arguable and it is in the interest of justice that the same be allowed as prayed.
5. I have duly considered the application, the parties rival submissions and the authorities cited by the applicant.

The law governing the filing of appeals to the High Court against decisions made by the lower court is spelt out in Section 79G of the [Civil Procedure Act](#) (the Act) which provides as follows;

79G. "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 good and sufficient cause for not filing the appeal in time."

6. It is clear from the proviso to the above section that the law grants the High Court wide and unfettered discretion in deciding whether or not to grant a party leave to file an appeal out of time or to admit an appeal filed out of time. The only limitation to the court's discretion is that the court must be satisfied that the applicant had laid good and sufficient cause for failure to file the intended appeal on time.
7. However, just like any other judicial discretion, the discretion to determine applications such as the current one must be exercised judiciously and not arbitrarily or whimsically. The principles that guide courts in the exercise of that discretion have been enunciated in numerous authorities. For purposes of this application, it will suffice to cite two of those authorities.
8. In [Nicholas Kiptoo Arap Korir Salat V IEBC & 7 Others](#) [2014] eKLR cited by the applicant, the Supreme Court enumerated those principles as follows;
 - "a. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
 - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - f. Whether the application has been brought without undue delay; and
 - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."



- i. The Court of Appeal in *Thuita Mwangi V Kenya Airways Limited*, [2003]eKLR identified four factors a court determining such application should consider but gave a rider that the list was not exhaustive and other relevant factors could still be considered depending on the circumstances of each case. The factors identified by the court are as follows;
- ii. The length of the delay;
- iii. The reason for the delay;
- iv. The chances of the appeal succeeding if the application is granted; and
- v. The degree of prejudice to the respondent if the application is granted.

9. In this case, it is not disputed that the impugned ruling was delivered on January 22, 2021. This means that the time prescribed for filing of appeals expired on or about February 24, 2021 given the principles that govern computation of time.

10. As stated earlier, the applicant's explanation for the delay is that it was not deliberate but was caused by the trial court's failure to furnish his advocates with typed copies of the proceedings and ruling good time. I find this explanation plausible because it is supported by a letter annexed to the applicant's supporting affidavit marked 'RMM1' which shows that his advocates applied for a copy of the ruling on January 22, 2021 the same day it was delivered. There is also a court stamp on the copy of the ruling confirming that it was certified by the trial court on March 2, 2021.

11. The respondent has complained about alleged delay in the filing of the instant application but the record shows that the application was filed slightly over a month after supply of copy of the ruling which cannot be said to be inordinate delay.

12. Given the foregoing, I am persuaded to find that the applicant has laid reasonable and sufficient cause for not filing his intended appeal on time. In any event, the respondent has not demonstrated what prejudice, if any, he was likely to suffer if the application was allowed.

Consequently, I find merit in the application and it is hereby allowed on condition that the intended appeal shall be filed and served within 14 days of today's date.

13. Costs follow the event and are at the discretion of the court.

Having found that the applicant was not to blame for the delay in filing his intended appeal, I will not make any orders on costs.

It is so ordered.

DATED, DELIVERED AND SIGNED AT KISII THIS 23RD DAY OF FEBRUARY 2023.

C. GITHUA

JUDGE

In the presence of:

Ms. Nyaburi for the Applicant

Mr. T.M. Okemwa for the Respondent

Ms. Aphline Court Assistan

