



**Williamson Tea (K) Limited v Odaya (Miscellaneous Application
E025 of 2022) [2023] KEHC 1757 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1757 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
MISCELLANEOUS APPLICATION E025 OF 2022
AN ONGERI, J
FEBRUARY 23, 2023**

BETWEEN

WILLIAMSON TEA (K) LIMITED APPLICANT

AND

KENNEDY OTIENO ODAYA RESPONDENT

RULING

1. The Application coming for consideration in this ruling is dated July 5, 2022 seeking the following orders;
 - i. That the Application herein be certified urgent and be heard on a priority basis.
 - ii. That this Honorable Court be pleased to grant leave and extend time to the Applicant to file their Appeal out of time in respect to the Judgment delivered Kericho Civil Suit No277 of 2017;
 - iii. That costs of the Application be costs in the cause.
2. The Application is supported by the affidavit of Hillary Ongori Tom, advocate for the Applicant of even date in which it is deposed as follows;
3. That the judgement in Kericho CMCC No 277 of 2017 was delivered on May 17, 2022 against the Applicant whereby the Applicant instructed them via an email to file an appeal but the said email was spammed inadvertently and that he only got to know about the said email when the time to file an Appeal had already lapsed hence the intended appeal could not be filed without leave of the court extending time.
4. The Applicant urged the court to grant leave and extend time for the Applicant to file its appeal out of time since its intended appeal has overwhelming chances of success and that the respondent was unlikely to suffer any prejudices.



5. The Respondent opposed the Application and filed a Replying Affidavit sworn by the Respondent Kennedy Otieno Odaya dated November 4, 2022 in which it is deponed as follow;
6. That the Application is made in bad faith, mere afterthought, an abuse and misuse of judicial process to deny him the fruit of his judgement since the Applicant Advocate was present in court during the delivery of the said judgement hence was at all material times aware of the existence of the judgement.
7. The Respondent contends that the applicant has not given any good or sufficient cause for the delay in filing the appeal within the timelines provided under section 79G of the *Civil Procedure Act*, and that there is no clear indication that the Applicant stands to suffer substantial loss if leave is not granted but in the unlikely event that the said leave is granted, then the same should be dismissed as the Draft Memorandum of Appeal annexed to the Application raised no arguable ground.
8. The Respondent states that the intended appeal challenged the jurisdiction of the trial court and not the fact that the Applicant sustained grievous and serious injuries and that the Applicant actively participated during the trial and never raised a preliminary objection to question the jurisdiction of the trial court.
9. The Respondent contends that he stands to suffer irreparable harm if the application is granted since he has incurred tremendous expenses such as the cost of prosecuting the lower Court suit.
10. The parties filed submissions as follows;
11. The Applicant submitted that the delay in filing the Appeal in time was not inordinate, intentional as it had nothing to do with the Applicant but rather an inadvertent mistake of the Applicant's advocate on record and that the Applicant only missed to file the intended Appeal only by 3 days outside the 30 days contemplated in section 79G of the *Civil Procedure Act*.
12. The Applicant further submitted that the Applicant had advanced a plausible reason for the delay in filing an Appeal in the matter as the Applicant's advocate moved swiftly to file this application on Wednesday 6/7/2022 after becoming aware of the instructions to appeal on Friday 1/7/2022. He cited the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR, Eldoret Civil Application 91 of 2017.
13. The Applicant contended that the Applicant's intended appeal had high chances of success as the annexed draft Memorandum of Appeal raised pertinent legal and factual issues that they sought to air out in the intended appeal and that an arguable appeal does not necessarily mean one which will succeed. He cited the case of *Kenya Commercial Bank Limited v Nicholas Ombija* [2009] eKLR, Nairobi Civil Appli 153 of 2009 (UR 105/09).
14. The Applicant submitted that the Respondent stands to suffer no prejudice which cannot be compensated by way of damages if the extension of time to file the intended appeal is granted while the Applicant will suffer irreparably by being condemned to satisfy a judgement from a court without jurisdiction.
15. The Respondent submitted that the Applicant failed to file any substantive appeal seeking the court's permission to admit the appeal out of time, rather they annexed an undated and unsigned draft memorandum of Appeal for the courts perusal and that the same was an abuse of the courts process and an afterthought meant to forestall execution of the decree.
16. It was the Respondent's submissions that even though the discretion to enlarge time was unfettered, there were underlying principles which a court should consider in the exercise of such discretion and that in the matter at hand the delay was unreasonable and no attempt had been made at all to explain



the unwarranted delay since the application seeking for leave to file an Appeal out of time was filed after a period of close to 3 months after the impugned judgement was delivered which delay is manifestly inordinate and/or unreasonable and should not be countenanced.

17. The Respondent submitted that the intended appeal lacked merit as it raised no triable issues, and that the same was a sham and consisted of mere denials purely intended to deny the respondent enjoyment of the fruits of the judgement and that the Respondent was likely to suffer extreme prejudice if the application was allowed as the suit had been in court for 6 years since its inception and he continued to incur costs attending and filing documents in court.
18. It was the Respondent's submissions that the Applicant failed to meet the required principles for grant of leave to file appeal out of time such as the length of the delay, the reason for the delay. The chances of succeeding if the application is granted and the degree of prejudice to the Respondent if the Application is granted. He cited the case of *Gerald M'Limbine v Joseph Kangangi* [2009] eKLR, Meru Misc. Appli. 40 of 2007, *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, Supreme Court Application 16 of 2014 and *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR, Supreme Court Civil Application 3 of 2016
19. The Respondent submitted further that Applicant did not raise the issue of jurisdiction and object to the Trial court's jurisdiction. The Applicant undisputedly submitted to the trial court's jurisdiction and participated in the entire trial and thus the applicant was estopped from invoking the issue of jurisdiction at the appeal stage. He cited the case of *Owners of Motor Vessel 'Lillian S' Versus Caltex Oil (Kenya) Limited* (1989) e KLR and *Kirimi and Anotherversus Florence Thirindi* (2013) e KLR.
20. The sole issue for determination is whether the Applicant is entitled to extension of time to file the intended appeal.
21. The law governing the extension of time is section 79G of the *Civil Procedure Act* which states 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 good and sufficient cause for not filing the appeal in time.

22. In *Evans Kiptoo v Reinhard Omwoyo Omwoyo* [2021] eKLR, Eldoret Miscellaneous Civil Application 4 of 2021 it was held that:

“It is plain therefore that the Court, when considering an application such as the instant one, has unfettered discretion; and therefore, need only concern itself with whether justifiable cause has been shown to warrant such exercise of discretion.”

23. The conditions for grant are as follows;
 - i. whether there is a good and reasonable explanation for the delay;
 - ii. whether the application has been brought without undue delay;
 - iii. whether the proposed appeal is arguable, and



- iv. whether any prejudice will be suffered by Respondent.
24. In *Leo Sila Mutiso V. Rose Hellen Wangari Mwangi* - Civil Application No NAI 255 of 1997 (unreported), the Court of Appeal held that:
- “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.”
25. I find that the delay is not inordinate. There is also sufficient reason for the delay.
26. It is not in dispute that the judgement in Kericho CMCC No 277 of 2017 was delivered on May 17, 2022 and that the Applicant instructed their Advocate via an email to file an appeal but the said email was not received by the Advocate or it may have been inadvertently lost and that he only got to know about the said email when the time to file an Appeal had already lapsed.
27. The Respondent did not disprove those facts and I find that it is not in the interest of justice to punish the Applicant for the mistakes or omissions of his Advocate.
28. I also find that the Respondent will not be prejudiced by the granting of the Application.
29. In *Stecol Corporation Limited v Susan Awuor Mudemb* [2021] eKLR, Siaya Miscellaneous Civil Application E024 of 2021 it was held that:
- “There is no evidence that the application is an afterthought or how the same is intended to abuse court process. Further, it is not uncommon for clients to instruct their counsel who procrastinate on filing court processes and only wake up when time for such filing has elapsed. Courts have over time excused parties where such delay is not inordinate as is in this case and even in cases where there is inordinate delay, depending on the circumstances of each case and reasons for the delay, courts have accorded parties an opportunity to be heard on appeal. Furthermore, there is no evidence to demonstrate what prejudice the Respondent will suffer if the applicant is granted extension of time.”
30. I allow the Application and extend the time for filing the appeal by 30 days.
31. The costs of this Application to abide the appeal.

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

A. N. ONGERI

JUDGE

