



REPUBLIC OF KENYA



KENYA LAW
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Rasna v Titus Karithi Zakayo also known as Titus Kirea Karithi (Miscellaneous Civil Application 27 of 2022) [2023] KEHC 18216 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18216 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS CIVIL APPLICATION 27 OF 2022**

SM GITHINJI, J

MAY 31, 2023

BETWEEN

WARAH RASNA APPLICANT

AND

**TITUS KARITHI ZAKAYO ALSO KNOWN AS TITUS KIREA
KARITHI RESPONDENT**

RULING

CORAM: Hon. Justice S. M. Githinji

Murimia, Ndumia, Mbago & Muchela Advocates for the Applicant

Anne M. Kiusya & Co. Advocates for the Respondent.

1. The applicant herein filed a notice of motion application dated the 18th day of May, 2022 brought under sections 3A, 63(e) and 79G of the *Civil Procedure Act* seeking the following orders;
 1. Spent.
 2. Spent.
 3. That the Honourable court be pleased to grant leave to the Applicant to lodge / or file an appeal out of time.
 4. That the costs of this application be in the cause.
2. The application was supported by the grounds on the face of the affidavit and the affidavit of Rovina Koske sworn on the 18th day of May, 2022. He deposed that judgment in the primary suit, Malindi CMCC No. 219 of 2019 was pronounced on 12th April, 2022. That the applicant's advocates at the time failed to file the requisite Memorandum of Appeal within the prescribed time as instructed. He contended that the applicant and his insurer are dissatisfied with the Judgment of the trial court and



therefore wish to prefer an appeal. He asserted that the proposed appeal is arguable with chances of success and that the delay in lodging an appeal within the prescribed time was neither intentional nor inordinate but excusable in view of the circumstances aforementioned. Further, that the Respondent will suffer no prejudice if the applicant is granted leave to file the appeal out of time.

3. The respondent in response filed a replying affidavit sworn on the 7th day of October, 2022. Counsel argued that the said application was brought in bad faith as the alleged instructions to appeal the judgment are not annexed to the affidavit sworn by Rovina Koske. She asserted that the extension of time to lodge an appeal is not a right to a party but an equitable remedy that is available to a deserving party and that the applicant has not demonstrated sufficient reasons for the delay in filing appeal and has failed to explain any predicament that was beyond his control.

Disposition

4. This court has considered the application, the affidavit in response on record and the submissions of counsel.
5. To grant leave to a party to lodge an appeal out of time the court is guided by section 79G of the [Civil Procedure Act](#) that provides thus;

“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. In [Karny Zaharya & another v Shalom Levi](#) CA No. 80 of 2018 Koome JA stated:

“In considering whether to grant leave to a litigant to file his or her appeal out of time, the Court will have regard to factors such as: the reasons for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the Court exercises its discretion; the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party’s opportunity to fully agitate it’s dispute, against the need to ensure timely resolution of disputes, the public interest issues implicated in the appeal or intended appeal and whether prima facie, the intended appeal has chances of success or is a mere frivolity.”

7. In exercising this discretion, the court must consider if the applicant has a good cause that made him fail to file the appeal within the stipulated time. Courts have considered some factors which may be good and reasonable as; the period of delay, the reason for the delay, if the respondent will be prejudiced and whether the intended appeal is arguable as was held in the decision of [Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another](#) (2019) eKLR).
8. The applicant contended that failure to file the appeal within time was due to the inadvertence on the part of the applicant’s erstwhile advocates and it was his submission that a mistake by an advocate ought not be visited upon an innocent litigant. The respondent on their part argue that the applicant has not given any substantive reason that is supported by evidence as to the cause of delay in filing of the appeal.



9. The copy of the judgement annexed shows that judgment was delivered on the 12th day of April, 2022 and the instant application was filed on May 19, 2022 which is more than a month later.
10. On the other hand, upon perusal of the file, I note that the applicant has not attached a draft memorandum of appeal which ought to inform this court whether it raises substantial grounds to justify good prospects of a prima facie on appeal. In the circumstances of this case, I come to the conclusion that the notice of motion dated on May 18, 2022 as to grant of leave for an extension of time to file an appeal out of time is not merited and the same is dismissed.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT GARSEN THIS 31ST DAY OF MAY, 2023.

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S.M. GITHINJI

JUDGE

In the Presence of; -

1. Mr Amani holding brief for Mr Baraka for the Applicant
2. Mr Mutete holding brief for Anne Kizia for Respondent

