



Ochieng & another v Otieno t/a Odongo Investment (Miscellaneous Civil Application E008 of 2022) [2023] KEHC 19477 (KLR) (25 May 2023) (Ruling)

Neutral citation: [2023] KEHC 19477 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
MISCELLANEOUS CIVIL APPLICATION E008 OF 2022**

RPV WENDOH, J

MAY 25, 2023

BETWEEN

JOSEPH OCHIENG 1ST APPLICANT

RUSHING W JUDITH 2ND APPLICANT

AND

OSCAR OTIENO T/A ODONGO INVESTMENT RESPONDENT

RULING

1. The applicants filed an application dated 18/3/2022 seeking the following orders:-
 1. Spent.
 2. The court be pleased to grant leave to the applicants to appeal out of time against the ruling by the Hon Raymond Lagat, Senior Resident Magistrate Rongo in Misc Application 26 of 2021, delivered on 10/2/2022.
 3. The court be pleased to stay execution of the exparte / application entered on November 16, 2021 in Rongo Misc Application 26 of 2021 pending the hearing and determination of the application.
 4. That the costs of this application abide the outcome of the intended appeal.
2. The application is supported by the grounds found on the face of the application and the supporting affidavit of Billy Mumo Ndolo an Advocate of the High Court of Kenya. He deposed that an ex-parte taxation of auctioneer's costs was entered on November 16, 2022; that the applicants filed an application to have the ex-parte taxation set aside but the same was dismissed vide a ruling dated 10/2/2022 without notifying the parties; that the respondent took warrants of attachment and proclamation in execution of the said ex-parte taxation; that the time for filing an appeal against the ruling lapsed on 12/3/2022; that the intended appeal is merited and it raises pertinent points of law



- thus it has an overwhelming chance of success. The applicants asked this court to extend the time and be granted leave to file the appeal out of time; that the mistake was not on the part of the applicants and they should not be penalized for mistake of their Counsel.
3. The respondent swore a replying affidavit opposing the applicants' application dated 18/3/2022. The respondent deposed that he is a Licensed Auctioneer practising under the name and style of M/S Odongo Investment Auctioneers; that he filed and served his application to assess/tax his bill against the applicants on 3/11/2021; that the applicants failed to file a response and neither did they attend court for the hearing of the same on November 16, 2021; that upon the assessment/taxation, the applicants filed an application dated November 16, 2021 seeking to set aside the ex-parte assessment the same day when the application came for hearing; that the said application was heard and dismissed on 10/2/2022.
 4. It was further deposed that the applicants filed an application dated 21/2/2022 seeking the same orders as the application dated November 16, 2022; that the application dated 21/2/2022 is still pending before the Rongo Principal Magistrate's Court; that the applicants fixed Rongo PMC Misc Application No 26 of 2021 for hearing on 12/4/2022 an application with the same subject matter as the one before this court; that the filing of the instant application during the pendency of the application dated 21/2/2022 to set aside the ex-parte proceedings is an abuse of the court process; that the orders being sought herein cannot be granted since the applicants have not issued and/or explained the sufficient ground to seek leave to appeal out of time. The respondent asked this court to dismiss the application with costs.
 5. The applicants filed a further affidavit dated 26/4/2022. In response to paragraphs 8, 9, 10, 11, 12 and 13 of the replying affidavit, the applicant deposed that the application dated 21/2/2022 has been withdrawn with no orders as to costs and there is no application in the lower court in regard to this subject matter; that the applicants have also provided sufficient security by depositing the taxed costs as ordered by court.
 6. The application was canvassed by way of written submissions and both parties complied.
 7. The applicant referred the court to the case of *Edith Gichugu Koine vs Stephen Njagi Thoiti* (2014) eKLR where the Court of Appeal outlined the principles to be considered in an application seeking leave to appeal out of time which are:-
 - (i). On whether the period of delay is unreasonable, it was submitted that the application is dated 18/3/2022 the same day when the instructions to appeal were issued and there is a nine (9) days delay when this application was brought to court that is, on 21/3/2022. The applicant relied on the case *Imperial Bank Limited (In Receivership) & Another vs Alnashir Popat & 18 Others* where the court held that a delay of 10 days was not inordinate.
 - (ii). On the reasons given for the delay, it was submitted that the ruling date of 10/2/2022 dismissing the applicant's application dated November 16, 2021 was delivered in the absence of the parties; that the applicants got a copy of the ruling on 18/3/2022 having been aggrieved by the said ruling and the applicants issued instructions to appeal on 18/3/2022; that the application was filed on 21/3/2022. The applicants relied on the case of *Samuel Mwaura Muthumbi vs Josephine Wanjiru Ngugi & Another* (2018) eKLR where the court found that delay in availing the proceedings was sufficient cause.
 8. On whether the respondent will be prejudiced if the application is granted; the applicants stated that they are willing to furnish security. The applicants submitted that the court should consider the



- competing interests of the parties and find that the respondent will not be prejudiced in any way if the appeal is filed out of time. The applicants prayed that the application dated 18/3/2022 be allowed.
9. The respondent submitted that the application is subjudice as there is another similar application pending before the Rongo PM's Court dated 21/2/2022. The respondent submitted that the instant application has been prematurely filed and for these reasons, the present application is subjudice.
 10. On the reasons for the delay, the respondent submitted that they do not appear in the pleadings and the same are an afterthought; that the applicants are claiming that the ruling was delivered in their advocate's absence while they filed an application dated 21/2/2022 over the same ruling 11 days later.
 11. The respondent submitted that the draft memorandum of appeal is deficient of triable issues; that the applicants are not intended to appeal against liability but quantum; that in the draft memorandum of appeal, they have not stated the items which they feel are exaggerated should be re-assessed by the court. The respondent submitted that the applicants have not proved that they have an arguable appeal and the application should be dismissed with costs.
 12. I have considered the application, the response thereto and each parties' written submissions. The issue for determination is whether the applicants are deserving of the orders sought.
 13. Section 79G of the *Civil Procedure Act* provides for enlarging time to appeal. It provides:-

“ 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.”
 14. The Court of Appeal in *Thuita Mwangi vs Kenya Airways Ltd* (2003) eKLR outlined the factors which the court should consider before exercising its discretion in granting a party an opportunity to file its appeal out of time. 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 Respondent if 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 if any is involved.
 15. Ordinarily, appeals from the Subordinate Court to the High Court should be filed within thirty (30) days from the date of judgement/ruling. It is not contested that the impugned ruling was delivered on 10/2/2022. The applicants submitted that the ruling was delivered in the absence of both parties. The appeal ought to have been filed on or before 11/3/2022. The instant application seeking leave to file the appeal out of time was filed on 18/3/2022 a period of 7 days after the lapse of the appeal period.
 16. Section 79G of the *Civil Procedure Act* (supra), provides that an appeal may be admitted out of time. Therefore, it is the court's discretion to decide whether or not to admit the appeal out of time. The court will therefore go ahead and consider the principles given in the case of *Thuita Mwangi* (supra).



17. On the period of the delay: This application was filed seven (7) days after lapse of the time. I find that delay by seven (7) days is not unreasonable.
18. On the reasons for the delay, the applicants have not preferred particular reasons why they delayed in bringing this application. They have attributed the delay on mistake of Counsel which should not be visited upon innocent litigants. As I have held hereinabove, the delay period of 7 days is not unreasonable.
19. On the arguability of the appeal, the applicants have stated that the ruling they intend to appeal against was delivered on 10/2/2022 without notice to the parties.
20. The applicants have not disclosed the date of the application nor have they annexed it to their supporting affidavit in the application seeking to set aside proceedings which was taxed on November 16, 2022. There is also no copy of the proceedings in the trial court to confirm the allegations that the ruling was delivered in the absence of the parties. This court has also not been furnished with the copy of the impugned ruling.
21. Be that as it may, the respondent has annexed the application filed by the applicants before the lower court seeking to set aside the ex-parte taxation proceedings. The application (“OOO1”) is dated November 16, 2021 the same date when the ex-parte taxation ruling was entered. In the application, the applicants claimed that their Counsel was in the process of filing a notice of appointment when the application dated 2/11/2021 was allowed and taxation entered ex-parte. The applicants further alleged that the application was served upon them on November 12, 2021 and they issued instructions to their Counsel on November 15, 2021 the next working day.
22. The respondent on the other hand deposed that his application dated 2/11/2021 to assess/tax his bill against the applicants was served upon the respondents on 3/11/2021. However, there is no affidavit of service to confirm this position.
23. The grounds in the memorandum of appeal are that the trial court erred by dismissing the application for want of form that did not affect the substance of the application and dismissing the application dated November 16, 2021 on technicalities hence denying the appellant an opportunity to be heard.
24. The applicants raise issues being denied an opportunity to be heard. Looking at the annexures to the application dated November 16, 2021, it is evident that the applicants filed a notice of appointment of advocates the same date when the tax and/or assessment application was coming up for hearing. Since the respondent did not annex the affidavit of service indicating when the service was done upon the applicants on 3/11/2022 as alleged, this court cannot conclude that indeed the application was served on time to allow the applicants to defend it. It was not fair and in the best interest of justice to expect the applicants to respond to the taxed bill within a day of being served.
25. The appeal is therefore arguable and the court finds are good grounds to allow the application to allow the applicants to file their appeal out of time. The application dated 18/3/2022 is therefore merited and the following orders do issue:-
 1. Leave is hereby granted to the Applicant to file its appeal out of time against the ruling dated and delivered on 10/2/2022 by Hon R Lagat.
 2. The Applicant’s Memorandum of Appeal dated 18/3/2022 is deemed as duly filed and properly on record upon payment of the requisite court fees within 7 days hereof.
 3. The Applicant to serve the Memorandum of Appeal within 7 days of filing.



4. The Applicant to file and serve the Record of Appeal within thirty (30) days from the date of service of the Memorandum of Appeal.
5. In default of complying with orders nos (2), (3) and (4) the orders for filing the appeal shall lapse and the appeal stands dismissed.
6. Parties to appear before the Deputy Registrar on 5/7/2023 to confirm compliance.
7. Costs shall abide the outcome of the appeal.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 25TH DAY OF MAY, 2023

R. WENDOH

JUDGE

Ruling delivered in the presence of:-

No appearance for the Applicant.

No appearance for the Respondent.

Emma / Phelix Court Assistant.

