



REPUBLIC OF KENYA



**Nyagilo v South Nyanza Sugar Co. Ltd (Miscellaneous Civil Application
E045 of 2023) [2023] KEHC 20773 (KLR) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20773 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
MISCELLANEOUS CIVIL APPLICATION E045 OF 2023**

**PN GICHOHI, J
JULY 26, 2023**

BETWEEN

JONES O. NYAGILO APPLICANT

AND

SOUTH NYANZA SUGAR CO. LTD RESPONDENT

RULING

1. Through the firm of Oduk & Co Advocates, the Applicant filed a Notice of Motion dated February 13, 2023 seeking orders that:-
 1. The Applicant be granted leave to appeal out of time against the whole judgment of Hon SN Shiundu dated September 26, 2018 in Kisii CMCC No 806 of 2005.
 2. The Memorandum of Appeal annexed thereto be deemed as duly filed upon payment of the requisite fees.
 3. The costs of this application be provided for.
2. The grounds are on the face of the application are that:
 - a. The judgment in respect of CMCC No 806 of 2005 was entered in favour of the defendant on September 26, 2019 in the absence of the of the proposed appellant.
 - b. The advocate for the Applicant on learning the same did on numerous occasions request for copies of the judgment to no avail.
 - c. The said judgment has now been released to the advocate after numerous requests and wishes to appeal against it.
 - d. The application is made in good faith , without unreasonable delay and at the earliest opportunity.



3. In support is the affidavit sworn by Ezekiel Oduk on February 13, 2023 to which he has attached two copies of request of copies of the judgment, a receipt and a copy Memorandum of Appeal. He states that upon perusal of the proceedings and the judgment, he prepared the memorandum of appeal but the time had lapsed hence this application.
4. He states the delay was beyond the control of the Applicant and that no prejudice will be suffered by the Respondent if the application is allowed

Determination

5. No copy of the judgment was annexed to this application. Further, though the Memorandum of Appeal filed on February 13, 2023 indicates that appeal is against the judgment and decree of the Senior Resident Magistrate, Kisii dated September 26, 2018 Hon. N. S. Shiundu in CMCC No 806 of 2005, the it further indicates that the Appellant is aggrieved by the judgment of the Senior Resident Magistrate S.K. Onjoro.
6. Further, presuming that indeed the judgment was delivered on September 26, 20218 as alleged by whichever magistrate, this application was filed on February 13, 2023 which is a delay of almost Four (4) years and Five (5) months.
7. The Court has discretion to grant application for extension of time under Sec. 79G of the [Civil Procedure Act](#) if the Applicant satisfies the court that he had good and sufficient cause for not filing the appeal on time. Regarding extension the Supreme Court in [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others](#) [2015] eKLR held:

“...it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.”
8. The explanation given by counsel for the Applicant is that counsel was in conduct of the suit but the judgment was delivered in his absence. However, he does not state when he learnt of the said judgment. The annexure EO (1(a) is a letter dated September 2, 2019 to the Executive Officer Kisii Chief Magistrates Court which is annexure EO 1 (b) seeking certified copies of the decree, proceedings and judgment and a receipt of payment of Kshs 575/= dated September 5, 2019.
9. The next letter is dated April 1, 2022 also addressed to the Executive Officer where there are remarks that the file had gone for typing. Though attached, this document is not marked as an exhibit. It states:

“Our letter of September 2, 2019 refers.

We note that with regret that in spite of paying for the proceedings and judgment in this matter on May 5, 2019, we are yet to receive the same.

Kindly please look into the same and expedite as our client’s instruction are to appeal the decision.”
10. The reason for his failure to attend court for the judgment is not indicated. There is no indication as to why the party did not attend either and it is not expected that parties file or are served with pleadings and they ignore the process kicked off by such pleadings. The [Civil Procedure Act](#) holds the party, the



Advocate and the court to take deliberate steps towards expeditious disposal of civil disputes. To be specific, the Act provides under Section 1A:

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.”

11. Their failure to attend court would not in the circumstances stop the court from delivering judgment even in the absence of all parties duly notified of the date. Further, though counsel talks of several requests made, there is no proof of the same. The only request annexed is dated September 2, 2019 which was one year after the alleged judgment . The payment was made on September 5, 2019. After that, the only follow up was by the Applicant on April 1, 2022 which was a period of about Two (2) years and Four (4) months. That letter was referring to the letter dated September 2, 2019.

12. In Nyaigua Farmers Co- Operative Society Limited v Ibrahim Nyambane & 3 others [2016] e KLR, Musinga JA had this to say regarding application to file appeal out of time;

“The principles that guide this Court in considering an application of this nature are well known. They are the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, and lastly, the degree of prejudice to the respondent if the application is allowed.”

13. Other than the casual manner in which this application was filed making it incompetent, I am satisfied that there are no extenuating circumstances exhibited by the applicant and his counsel in the circumstances. The delay herein is inordinate and reasons given for delay unjustifiable. There is even no point of going to the issue of whether, if application is allowed, the appeal has high chances of success in the circumstances herein.

14. Further, it is needless to say that after this Court gave directions on March 7, 2023 that this application be served on the Respondent within 14 days and that the Respondent files his response within 14 days of service and parties to appear for further directions on May 25, 2023, there was no attendance by the Applicant or the Respondent causing this Court to issue a Notice under Section 1A and 1B of the Civil procedure Act for the parties to show cause on July 19, 2023 as to why the application herein should not be marked as abandoned. Such is an escalation of indolence on the part of the Applicant geared towards creation of case backlog in the judicial system. The application is therefore devoid of merit and dismissed forthwith . The Applicant to bear his own costs.

Dated, signed and delivered through Microsoft Teams at Kisii this 26th Day of July 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:



N/A for the Applicant

N/A for Respondent

Isindu, Court Assistant

