



**ICEA Lion General Insurance Co Limited v St Elizabeth Academy-Karen Limited (Miscellaneous Civil Application E092 of 2022) [2023] KEHC 21811 (KLR) (Civ) (10 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21811 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
MISCELLANEOUS CIVIL APPLICATION E092 OF 2022**

**CW MEOLI, J  
AUGUST 10, 2023**

**BETWEEN**

**ICEA LION GENERAL INSURANCE CO LIMITED ..... APPLICANT**

**AND**

**ST ELIZABETH ACADEMY-KAREN LIMITED ..... RESPONDENT**

**RULING**

1. For determination is the Notice of Motion dated 18<sup>th</sup> February, 2022 (hereafter the Motion) brought by Icea Lion General Insurance Co. Limited (hereafter the Applicant) seeking leave to file an appeal out of time against the ruling delivered by the trial court on 22<sup>nd</sup> December, 2021 in Milimani MCCC No. 7998 of 2016 and a further order that the memorandum of appeal annexed thereto be deemed duly as filed upon payment of the requisite fee. The motion is expressed to be brought under Sections 3A, 79G & 95 of the Civil Procedure Act (CPA) and Order 50, Rule 6 and Order 51 of the Civil Procedure Rules (CPR) *inter alia*.
2. The grounds on the face of the Motion are amplified in the supporting affidavit sworn by advocate Amos Wandago, who averred that upon delivery of the impugned ruling on 22<sup>nd</sup> December, 2021 dismissing the Applicant's suit against St. Elizabeth Academy-Karen Limited (hereafter the Respondent), the Applicant's advocate was only able to peruse the lower court file on 16<sup>th</sup> February, 2022 since the file had previously gone missing from the registry and that by the time they obtained a copy of the impugned ruling, the timelines for filing a memorandum of appeal had lapsed.
3. The advocate further averred that the intended appeal raises arguable grounds; namely that the trial court did not consider the replying affidavit and submissions filed by the Applicant in delivering its ruling and further, that the trial court erroneously found that the Applicant's pleadings were not on



record. That no prejudice will be visited upon the Respondent if the order sought in the Motion is allowed.

4. The Respondent opposed the Motion through a replying affidavit sworn by its Director, Anne Wanjiku Munene on 22<sup>nd</sup> March, 2022. Therein, she deposed that the Motion is purely a delaying tactic and that the intended appeal has no chances of success. The deponent further deposed that the Applicant did not tender any evidence to demonstrate that the lower court file went missing or to demonstrate the efforts; if any; undertaken towards tracing and/or perusing the court file as claimed. The deponent therefore urged the court to dismiss the Motion.
5. The Applicant rejoined with the supplementary affidavit sworn by the advocate Amos Wandago essentially reiterating the averments made in his supporting affidavit but also exhibiting copies of letters to support his assertions that the delay in filing the appeal was the result of delay in obtaining copies of the trial court ruling and typed proceedings.
6. The Motion was canvassed by way of written submissions. To support the prayer for leave to appeal out of time, the Applicant through its counsel invoked the provisions of Section 95 of the *CPA* and Order 50 of the *CPR* granting the court unfettered discretion to extend the stipulated timelines. And relied in that regard on the case of *Joyce Njeri Kariuki (Suing as the Administrator of the estate of Joseph Kariuki Josephat Marima (Deceased) v Joreth Limited & 3 others* [2021] eKLR in which the Court of Appeal held that:-

“It is trite that this Court has discretion to extend time but that the discretion must be exercised judicially. It has also been said time and again that the reason for the delay, the length of the delay, the degree of prejudice to be suffered by the respondent and the possible chances of the intended appeal succeeding, are all relevant factors in the exercise of such discretion.”
7. The Applicant echoed the averments made in the affidavits supporting the Motion explaining the delay; the strength of the intended appeal including the argument that despite filing a preliminary objection to oppose the suit for want of jurisdiction, the Respondent by previously filing a statement of defence had submitted to the jurisdiction of the trial court. Here citing the case of *Gourmet Meats Producers & Importers Ltd v Paul Lainan Nkina* [2021] eKLR. The Applicant further submitted that no evidence was tendered to show the manner in which the Respondent stands to be prejudiced if the order sought is granted. The Applicant therefore pleaded with the court to allow the Motion.
8. On the part of the Respondent, it was argued by counsel that the Applicant did not give sufficient reasons for its failure to attend court for the delivery of the impugned ruling or to explain the delay in filing a memorandum of appeal within the stipulated timelines. The Respondent’s counsel further argued that the Applicant’s letter purportedly requesting a copy of the ruling and certified copies of typed proceedings was not copied or served upon them.
9. In conclusion, he asserted that the Applicant is not deserving of the discretion of the court, citing the authority of *Patrick Njuguna Kariuki v Delmonte Kenya Limited* [2020] eKLR. Counsel stating that the Applicant’s failure to avail itself of a copy of the impugned ruling made it impossible for the court to ascertain whether the intended appeal is arguable or not. Moreover, that the advocate who swore the affidavits in support of the Motion had no authority to do so since the matters raised are contentious. For these reasons, the court was urged to strike out the Motion with costs.
10. The Court has considered the rival affidavit material and submissions in respect of the Motion. Before delving into the substance of the Motion the court will address the issue raised by the Respondent regarding the competency of the affidavits sworn in support of the instant Motion. As



earlier mentioned, the affidavits in question were sworn by the Applicant’s advocate, Amos Wandago. Rule 8 of the *Advocate (Practice) Rules* which states that:

“No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear: Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.”

11. Considering the contents of the supporting affidavits, the court cannot find any matter in respect of which counsel was precluded from deposing to. Ex facie, the matters deposed to were within the personal knowledge of the said advocate as counsel seized of the conduct of the matter on behalf of the Applicant. The depositions are related to matters which in my view are non-contentious. While it is always desirable that the parties themselves swear affidavits in support of their applications, in this instance, the court is not persuaded by the Respondent’s objection.

12. The above position was reaffirmed by the Court of Appeal in *Hakika Transporters Services Ltd v Albert Chulab Wamimitaire* [2016] eKLR citing its decision in *Salama Beach Ltd v Mario Rossi*, CA. No. 10 of 2015 thus:

“As regards the appellant’s objection regarding the affidavit supporting the application, it is clear that Mr. Muniyithya has deposed only to matters within his personal knowledge as counsel acting in this matter both in the High Court and in this Court. Ordinarily counsel is obliged to refrain from swearing affidavits on contentious issues, particularly where he may have to be subjected to cross examination (See *Pattni v Ali & 2 Others*, CA. No. 354 of 2004 (UR 183/04). Rule 9 of the Advocates (Practice) Rules however permits an advocate to swear an affidavit on formal or non-contentious matters.”

13. The key prayer is for leave to appeal out of time. The power of the court to enlarge the time for filing an appeal out of time is expressly donated by Section 79G, as well as generally, by Section 95 of the *CPA*. Section 79G of the *CPA* provides that:

“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 principles governing leave to appeal out of time are settled. The successful applicant must demonstrate “good and sufficient cause” for not filing the appeal in time. In *Thuita Mwangi v Kenya Airways* [2003] eKLR, the Court of Appeal while considering Rule 4 of the *Court of Appeal Rules* which was in pari materia with Section 79G of the *Civil Procedure Act*, reiterated its decision in *Mutiso v Mwangi* [1997] KLR 630 as follows:

“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 general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of



delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

15. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court’s discretion in his favor. On the question of the exercise of judicial discretion, the Supreme Court observed in the case of *Telkom Kenya Limited v John Ochanda And 996 Others* [2015] eKLR that:

“In instances where there is delay in filing the notice of appeal, this Court has inherent jurisdiction to admit such appeal, provided sufficient explanation is proffered for the cause of delay. The design and objective of the Supreme Court Rules is to ensure accessibility, fairness and efficiency in relation to this Court. Parties should comply with the procedure, rather than look to the Court’s discretion in curing the pleadings before it. This Court’s position is that the circumstances of each case are to be evaluated, as a basis for arriving at a decision to intervene, in instances where full compliance with procedure has not taken place....”

See also *Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 Others* [2019] eKLR.

16. The Supreme Court in the case of *Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The Court stated inter alia that:

“(T)he underlying principles a court should consider in exercise of such discretion include;

1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case- to-case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;
6. Whether the application has been brought without undue delay.
7. ....”

See also *County Executive of Kisumu v County Government of Kisumu & 8 Others* [2017] eKLR.

17. On the length of delay, it is not in dispute that the impugned ruling was delivered on 22<sup>nd</sup> December 2021 whereas the instant Motion was brought sometime on or about the 18<sup>th</sup> of February 2022. In my view, the delay of close to two (2) months is not inordinate.



18. Concerning the reasons for the delay, the deponent of the affidavits in support of the Motion asserted that delay in filing both the appeal and Motion was occasioned by the fact that there was some delay in part occasioned by the file in the lower court being unavailable and time taken to obtain the typed copy of the ruling and typed proceedings. The Respondent opposed the above assertions by submitting that the foregoing was not proved. On a review of the material tendered by the Applicant, one may well conclude that the Applicant did not tender any credible evidence to support the averments that the lower court file had gone missing from the registry.
19. The Applicant exhibited copies of the letters dated 10<sup>th</sup> January, 2022 and 12<sup>th</sup> January, 2022 addressed to the Executive Officer-Milimani Commercial Courts requesting for copies of the ruling and typed proceedings to enable it lodge an appeal against the impugned ruling. No response from the Executive Officer was sent to us. Nevertheless, overall, it is plausible at least that there was a delay in obtaining proceedings of the lower court. The court is therefore satisfied that the Applicant has given a reasonable explanation for the delay of about two months.
20. As to whether the intended appeal is arguable, the court has perused the draft memorandum of appeal and does not find it patently frivolous. All that is required is a demonstration that the appeal is worthy of consideration by the court, and not necessarily that it will succeed. Further, based on the language employed in *Mutiso v Mwangi* (*supra*) the requirement touching on the viability of the intended appeal, is neither mandatory nor stringently applied in an application of this nature. The Court of Appeal in *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited* (2020) eKLR stated that such appeal:
- “ ... may not succeed as in law an arguable appeal need not succeed so long as it raises a bona fide issue for determination by the Court.”
21. In *Vishva*'s case, the Court emphasized the right of appeal in the following terms:
- “Turning to the request to allow the applicant to exercise his now undoubted constitutionally underpinned right of appeal, the position is.... crystalized .... in the case of *Richard Ncharpi Leiyagu v IEBC & 2 Others* (*supra*); *Mbaki & Others v Macharia & Another* [2005] 2 EA 206; and the Tanzanian case of *Abbas Sherally & Another v Abdul Fazaiboy*, Civil Application No. 33 of 2003; for the holding *inter alia* that:
- (i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;
  - (ii) the right to be heard is a valued right; and
  - (iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice;...”
22. Finally, there is no indication that granting the application will so prejudice the Respondent that an award on costs would not be adequate compensation.
23. In the circumstances, the court is persuaded to grant the prayer for leave to appeal out of time. The prayer seeking that the draft memorandum be deemed as duly filed is misplaced for two reasons; this is a miscellaneous cause that will be spent upon determination of this application, and secondly a draft



pleading is just that. The Applicant is directed to file the memorandum of appeal within 14 days from this day. The costs of the motion are awarded to the Respondent in any event.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 10<sup>TH</sup> DAY OF AUGUST 2023.**

**C.MEOLI**

**JUDGE**

In the presence of

For the Applicant: Ms. Mungu

For the Respondent: N/A

C/A: Emily

