



**Ojendo v Geoscope Drilling (Miscellaneous Civil Application
E339 of 2022) [2023] KEHC 21812 (KLR) (Civ) (10 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21812 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E339 OF 2022**

CW MEOLI, J

AUGUST 10, 2023

BETWEEN

DOMINIC OJENDO APPLICANT

AND

GEOSCOPE DRILLING RESPONDENT

RULING

1. For determination before the court is the Notice of Motion dated 10th June, 2022 (hereafter the Motion) filed by Dominic Ojendo (hereafter the Applicant) expressed to be brought under Sections 79(g) and 95 of the *Civil Procedure Act* (hereinafter CPA). The Applicant primary seeks an order for leave to file an appeal out of time against the judgment in favour of Geoscope Drilling (hereafter the Respondent) in Nairobi Small Claims Court Case No. E055 of 2021 delivered on 31st April, 2022 and consequently, an order that the memorandum of appeal on record be deemed as duly filed.
2. The Motion is premised on the grounds inter alia, that the Applicant being dissatisfied with the judgment of the lower court intends to appeal against the judgment whereas the time allowed to file an appeal has run out and that the delay in lodging the appeal within the statutory timelines was occasioned by the time taken in obtaining the certified copies of the typed proceedings and the decree resulting from the impugned judgment.
3. The Motion is supported by the affidavit of advocate Mino Kimeu asserting that the Applicant being aggrieved and dissatisfied with the said judgment intends to file an appeal; however, that the time within which to lodge an appeal had already lapsed by the time his advocates managed to obtain the requisite documentation to enable them file a memorandum of appeal. Counsel further asserted that the instant Motion has been brought in good faith and without undue delay and that the intended appeal raises arguable grounds and has high chances of success. That Geoscope Drilling (hereafter the Respondent) will not be prejudiced in the circumstances.



4. The Motion is opposed through the Grounds of Opposition dated 13th July, 2022 wherein the Respondent raised the following grounds:
 - a. That the Applicant has inordinately delayed in filing the application;
 - b. That the Applicant has not given satisfactory and just reasons for the delay in the filing of the application; and
 - c. That the Respondent stands to suffer prejudice if the application is allowed.”
5. The Motion was canvassed by way of written submissions. Counsel for the Applicant anchored his submission on the provisions of Section 79G of the CPA and decisions inter alia, in *Edith Gichugu Koine v Stephen Njagi Thoithi* [2014] eKLR; *APA Insurance Limited v Michael Kinyanjui Muturi* [2016] eKLR; *Kamlesh Mansukhalal Damji Pattni v Director Of Public Prosecutions & 3 others* [2015] eKLR. Counsel contended that while delay is admitted, such delay is not unreasonable and is not attributed to any fault on the part of the Applicant or his advocates, as explained in the affidavit supporting the motion. Counsel further stated that the Respondent has an arguable appeal while no prejudice will be suffered by the Respondent if the Motion is allowed.
6. The Respondent through its counsel filed submissions contending that the extension of leave to file an appeal is purely within the discretion of the court and subject to the conditions laid out by the Supreme Court in the case of *Nicholas Kiptoo Korir Arap Salat v IEBC & 7 Others* [2014] eKLR. Counsel submitted that the material relied upon by the Applicant to explain the delay in filing the appeal was not shown as received by the Executive Officer of the Small Claims Court and cannot therefore offer a reasonable explanation for delay. Counsel further relied upon the case of *Francis Mwanza Mulwa v Kanji Vagjiani & 2 others* [2018] eKLR to submit that the Applicant has failed to prove that he is deserving of the exercise of the court’s discretion in his favour. To the Respondent, the Applicant has not met the threshold for an extension of time for the filing of the intended appeal. The court was therefore urged to dismiss the Motion with costs.
7. The court has considered the affidavit material, the Grounds of Opposition and the contending submissions in respect of the Motion. The Applicant seeks leave to file an appeal out of time against the judgment and decree in Nairobi Small Claims Court Case No. E055 of 2021.
8. The power of the court to grant leave to file an appeal out of time is expressly donated by Sections 79G of the CPA which stipulates 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.”
9. The principles governing the grant of 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 *Thuitta 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.”

10. 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 or her 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....

It is this Court’s position of principle that prescriptions of procedure and form should not trump the primary object of dispensing substantive justice to the parties. However, the Court will consider the relevant circumstances surrounding a particular case and will conscientiously ascertain the best course. It is to be borne in mind that rules of procedure are not irrelevant but are the handmaiden of justice that facilitate the right of access to justice in the terms of Article 48 of the Constitution....”

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

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

“The 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.

12. Regarding length of delay, it is apparent from the record that the delay in this case is close to two (2) months. The Court of Appeal in *Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 Others* [2019] eKLR stated that:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained hence a plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour.”

13. Reviewing the depositions in the supporting affidavit tending to explain the reason for the delay, the court finds that the Applicant tendered credible material to demonstrate that the delay was largely occasioned by the time taken in obtaining the proceedings from the Small Claims Court. The court is therefore satisfied that the reasons are reasonable in the circumstances.

14. As to whether the Applicant has an arguable appeal, the court has perused the draft memorandum of appeal and notes that the same seeks to challenge the impugned judgment on grounds inter alia, that the trial court did not take into account the totality of the evidence which was tendered before it and further erred in failing to take into account the law and legal principles on the subject matter in dispute. To the court’s mind, these constitute arguable issues for consideration on appeal.

15. In any event, all that is required is a demonstration that the appeal is worthy of consideration by the court, and not necessarily that it will succeed. This was the position stated by the Court of Appeal in *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited* (2020) eKLR when it rendered itself thus:

“...in law an arguable appeal need not succeed so long as it raises a bona fide issue for determination by the Court.”

16. In the just cited 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.... crystallized in the case of *Richard Ncharpi Leiyagu vs. IEBC & 2 Others* (supra); *Mbaki & Others vs. Macharia & Another* [2005] 2EA 206; and the Tanzanian case of *Abbas Sberally & Another vs. 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;...”

17. Furthermore, there is no indication that the Respondent will be prejudiced at all or to an extent that an award of costs would not be adequate compensation.
18. In the circumstances of this case, the court is persuaded to grant the prayer for leave to file an appeal out of time. The prayer for deeming the draft memorandum of appeal as duly filed is misplaced, because the pleading is a draft, and secondly, this is miscellaneous cause. The Court directs the Applicant to file the memorandum of appeal within 14 days from today’s date. The Respondent is awarded the costs of the motion in any event.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 10TH DAY OF AUGUST 2023.

C.MEOLI

JUDGE

In the presence of

For the Applicant: Mr. Minoos h/b for Mr. Ogola

For the Respondent: Mr. Maina h/b for Mr. Osiemo

C/A: Emily

