



**Kipkales & another (t/a Kale Maina & Bundotich Advocates) v Heritage Insurance Co. Limited
(Civil Appeal E146 of 2021) [2023] KEHC 21703 (KLR) (Appeals) (4 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21703 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
APPEALS
CIVIL APPEAL E146 OF 2021
AN ONGERI, J
AUGUST 4, 2023**

BETWEEN

**AMOS KIPKALES 1ST APPLICANT
STEPHEN BUNDOTICH 2ND APPLICANT
T/A KALE MAINA & BUNDOTICH ADVOCATES**

AND

HERITAGE INSURANCE CO. LIMITED RESPONDENT

RULING

1. The application coming for consideration in this ruling is the one dated March 17, 2021 seeking the following orders;
 - i. That this application be certified as urgent and heard *ex parte* in the first instance and service thereof be dispensed with.
 - ii. That this application be certified as urgent and a priority hearing date be allocated.
 - iii. That the honourable court be pleased to issue an order for enlargement of time within which the intended appellant/applicant be granted leave to appeal and to file memorandum of appeal out of time against the judgment of the court delivered on April 30, 2020.
 - iv. That the judgment entered on April 30, 2020 and the consequent decree issued in this case be set aside and the Applicant be granted an unconditional leave to appeal.
 - v. That the annexed memorandum of appeal be deemed as duly filed.
 - vi. That the costs of this application abide by the outcome of the appeal.



2. The application is based on the grounds on the face of it and supported by the affidavits of Amos Chetalam Kale and a further affidavit dated February 14, 2022 in which he deposed that on April 30, 2020 judgement was delivered dismissing the suit on grounds that the plaintiff had not established a case on a balance of probabilities. The applicant is dissatisfied by the judgement of the court and wished to appeal the same in the High Court.
3. He deposed that both the applicant's offices as well as those of their advocates had closed shop owing to the Covid 19 pandemic that had hit the country. Judgement was delivered on notice which the applicants and their advocate were unable to access and this caused a delay in filing the appeal.
4. He averred that on September 23, 2020 they filed an application seeking leave to appeal out of time but the court directed that a date should be picked at the registry and the said date has not been granted since despite several follow ups. They learnt however that their application had been erroneously given case number HCCC Misc E125 of 2020 instead of HCCC Misc E253 of 2020 making it impossible for the file to be traced at the registry to assign a hearing date.
5. The respondent filed grounds of opposition dated May 17, 2022 as follows;
 - a. The application dated March 17, 2021 does not meet the test for grant of extension of time as set out in *Karny Zabrya & another v Shalom Levi* (2018) eKLR and *Samvir Trustees Limited v Guardian Bank Limited* (Civil Application No. Nai 54 of 2000) for the following reasons:
 - i. The judgment the applicant intends to appeal was delivered on April 30, 2020. The initial application to extend time for filing an appeal was filed on September 23, 2020. It took the applicant 4 months and 10 days to make the initial application to extend time. This delay in applying to extend time is inordinate.
 - ii. The reason provided by the applicant for the delay is the Covid-19 pandemic. The Chief Justice issued *Practice Directions on Electronic Case Management* on April 4, 2020 (before the judgment was delivered by the Chief Magistrate's court) which provided for e-filing and e-service system to be adopted by courts. The Covid-19 pandemic did not at any time lead to absolute closure of Courts. Although service delivery was scaled down, services were still offered, and urgent applications prioritized. The Covid-19 pandemic is therefore not a justifiable reason for the delay in making the application to extend time for filing an appeal.
 - b. There is no reasonable justification why it took the applicant 4 months and 10 days to file the application to extend time for filing an appeal dated September 23, 2020. The applicant has not conducted itself in a manner that would entitle it to the discretion of the court.
 - c. It is unfair and unjust to allow an application to extend time for filing an appeal when the application was made over four months after the judgment of the Chief Magistrate's Court was delivered. There must be an end to litigation.
6. The parties filed written submissions as follows; the applicant submitted that there was no inordinate delay because judgement was delivered in April 30, 2020 at the start of the Covid 19 which caused the applicant and their advocates to close shop. Judgement being delivered on notice and communication breakdown between the judiciary and advocates meant that they were unable to obtain a copy of the judgement on time. Upon reopening the firm sometime in July 2020 the advocates for the applicant followed up on the matter and expeditiously filed the application dated September 23, 2020.



7. The applicant submitted that it was directed that a hearing date be fixed at the registry but there was a mix up with the case number which made it difficult to trace the file. The confusion led to filing of a fresh file. That therefore the applicant had sufficient reason to warrant extension of time.
8. The applicant further argued that it has an arguable appeal as it faults the judgement of the learned magistrate which failed to consider that the applicant only signed a cover letter but a copy of the insurance policy to which had an exclusion clause that was subject of the indemnity which was never availed to the applicant hence violating the duty of disclosure. The learned magistrate also failed to call the respondent to demonstrate the applicant had been availed with a copy.
9. The applicant submitted that the respondent will suffer no prejudice if the application is allowed and in fact the applicant will suffer more prejudice if the application is denied as its right to be heard on the already initiated appellate process will be denied.
10. The respondent submitted that there was inordinate delay because the applicant filed an application to extend time for filing an appeal dated September 23, 2020. This was filed as a miscellaneous application 4 months and 10 days after the judgment was delivered. The applicant did not prosecute that application and instead filed the present appeal and an application dated March 17, 2021 also seeking extension of time to file an appeal.
11. The respondent argued that the reasons provided by the applicant is that the delay in filing the application to extend time was Covid 19 pandemic which is not sufficient because [Practice Directions on Electronic Case Management](#) were issued by the chief justice on April 4, 2020 before judgment was delivered April 30, 2020.
12. The respondent submitted that applicant filed suit on November 1, 2017. The case was heard, and judgment delivered on April 30, 2020 dismissing the applicants suit with costs to the respondent. It is now over 3 years since judgment was delivered and there has to be an end to litigation. This will only be achieved by the court dismissing the applicant's application with costs to the respondent to bring an end to this matter which has been in court for over 6 years.
13. The issues for determination in this application are as follows;
 - i. Whether the applicant should be granted enlargement of time to file an appeal.
 - ii. Whether the judgment entered on April 30, 2020 should be set aside.
 - iii. Who pays the costs of this application?
14. On the issue as to whether the applicant should be granted enlargement of time to appeal, the governing provision is Section 79G

“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against excluding from such period anytime which the lower court may certify as having been requisite for 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.”
15. The judgment was delivered by the trial court on April 30, 2020 when the courts were closed due to the Covid-19 Pandemic.



16. I find that this court has the discretion to admit an appeal out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal within the stipulated time.
17. The plaintiff's suit was dismissed on April 30, 2020 and the first Application seeking leave was made on September 23, 2020.
18. The averments by the Applicant that they were unable to access the Notice of delivery of judgment has not been controverted.
19. I find that the respondents did not also contest the Applicant's submissions that the application had been erroneously given case number HCCC Misc E125 of 2020 instead of HCCC Misc E253 of 2020 making it impossible for the file to be traced at the registry to assign a hearing date.
20. I find that in the circumstances, it would be in the interest of justice to allow the Applicant to exercise his right of appeal.
21. I allow the Application dated March 17, 2021 in the following terms;
 - i. That the Applicant be and is hereby granted enlargement of time within which to file the memorandum of appeal against the judgment of the court delivered on April 30, 2020.
 - ii. That the annexed memorandum of appeal be deemed as duly filed.
 - iii. That the same to be served within 30 days of this date.
 - iv. That the costs of this application abide by the outcome of the appeal.
 - v. That the intended appeal to be fully prosecuted within 90 days of this date.

Orders to issue accordingly.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
4TH DAY OF AUGUST, 2023.**

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A. N. ONGERI

JUDGE

