



Tosanse Construction Limited v Kenya Commercial Bank & another (Miscellaneous Civil Application 12 of 2022) [2023] KEHC 22707 (KLR) (29 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22707 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
MISCELLANEOUS CIVIL APPLICATION 12 OF 2022
RPV WENDOH, J
SEPTEMBER 29, 2023**

BETWEEN

TOSANSE CONSTRUCTION LIMITED APPLICANT

AND

KENYA COMMERCIAL BANK 1ST RESPONDENT

OLIVER MUHONDA ALLIANGANA 2ND RESPONDENT

RULING

1. Tosanse Construction Limited “the applicant” filed the application dated 12/4/2021 on 19/4/2021 seeking the following orders:-
 1. Spent.
 2. The court be pleased to grant leave to the appellant to file an appeal out of time;
 3. That the annexed draft memorandum of appeal be deemed as duly filed within time upon payment of the requisite court fees;
 4. Costs be in the cause.
2. The application is supported by the grounds on its face and the supporting affidavit of John Marwa Chacha, the director of the applicant. He deposed that judgement in this matter was delivered on 3/3/2022 and the applicant was dissatisfied and wishes to exercise its right to appeal; that after the judgement was delivered, he instructed the firm of Kabiru & Co. Advocates to come on record and a consent was filed on 2/3/2022; that the applicant applied for the certified copies of judgement, decree and proceedings to enable it to file a record of appeal; that his Counsel prepared a memorandum of appeal but he could not file the same since it could not be assessed as he was informed that the court had reverted to filing of hard copies.



3. It was further deposed that the applicant's Counsel travelled to Migori on 6/4/2022 to file the Memorandum of Appeal by which date, the 30 days for filing an appeal had lapsed; that the applicant now prays that this court be pleased to extend the time and allow it to file its appeal out of time; that there has been no delay in filing the application for extension of time to file the memorandum of appeal and the applicant is likely to suffer substantial loss if the application is not allowed.
4. The application was not opposed. The respondents did not participate in these proceedings despite being served.
5. To further support its application, the applicant filed its written submissions dated 9/5/2022 which I have considered.
6. Section 79G of the *Civil Procedure Act* provides for enlargement of time to filing out of time of appeals. 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.”
7. 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 applicant if the extension is not 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.
8. Ordinarily, appeals from the Subordinate Court to the High Court should be filed within thirty (30) days from the date of the judgement. The judgement herein was delivered on 3/3/2022. The appeal ought to have been filed on or before 3/4/2022. The instant application seeking leave to file the appeal out of time was filed on 12/4/2022 a period of 9 days after the lapse of the appeal period.
9. 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 reason given by the applicant in delaying to file the memorandum of appeal was that the registry refused to accept soft copy assessment of the documents. There is evidence that the applicant did send to the registry the memorandum of appeal for assessment and filing via email on 2/4/2022. There is no evidence however, that the applicant was advised that the court could not assess the same. Be that as it may, the applicant's Counsel endeavoured to travel to Migori on 6/4/2022 to file the documents which period was beyond the 30 days timeframe for filing an appeal.



10. The applicant also proved that it wrote to the Executive Officer a letter dated 24/3/2022 asking to be furnished with certified copies of the judgement, proceedings and decree to enable them to prepare a record of appeal. This court is of the view that the reasons for the delay have been adequately explained and the delay in bringing this application was not inordinate. The applicant therefore deserves enlargement of time to file the appeal.
11. The applicant has also annexed a draft memorandum of appeal. The applicant is challenging the findings of the trial Magistrate that it did not engage in business with the 2nd respondent and the alleged monies that are irregularly withdrawn from its account; that while the 1st respondent owed it a duty of care. The appeal is therefore arguable.
12. The court finds that the applicant's application dated 12/4/2022 is meritorious and the same is allowed as prayed. The following orders do issue:-
 1. Leave is hereby granted to the Applicant to file appeal out of time against the judgement in SPMCC No. 14 of 2017.
 2. The Applicant's Memorandum of Appeal dated 12/4/2022 is hereby deemed as duly filed and properly on record upon payment of the requisite court fees within 7 days hereof.
 3. The Applicant to file and serve the Record of Appeal within sixty (60) days from the date of service of the Memorandum of Appeal.
 4. In default of complying with orders nos. (2), (3) and/or (4) the orders for filing the appeal shall lapse and the appeal will stand dismissed.
 5. Costs shall abide the outcome of the appeal.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 29TH DAY OF SEPTEMBER 2023

R. WENDOHO

JUDGE

Ruling delivered in the presence of:-

No appearance for the Applicant.

Ms. Magoma for the 1st Respondent.

No appearance for the 2nd Respondent.

Emma & Phelix Court Assistants.

