



**M’Twamwari v Mburugu & another (Miscellaneous Civil Application  
E048 of 2023) [2023] KEHC 23002 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23002 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
MISCELLANEOUS CIVIL APPLICATION E048 OF 2023  
TW CHERERE, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**MUTWIRI M’TWAMWARI ..... APPLICANT**

**AND**

**JAMLECK MUCHUI MBURUGU ..... 1<sup>ST</sup> RESPONDENT**

**EZEKIEL MURIUNGI MUGAMBI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The notice of motion dated June 16, 2023 arises from the judgment (copy annexed) in MERU CMCC E250 OF 2022 which was delivered on March 30, 2022.
2. Applicant seeks leave to appeal out of time. The motion is supported by an affidavit sworn by Mutwiri M’Twamwari (Applicant) on June 16, 2023. The motion is premised on the grounds among others that the delay in filing the appeal was occasioned by down time in operations of the High Court registry between the last week of April, 2023 and better part of May, 2023. Jackline Mwendu avers that she visited the registry between April 25, 2023 and May 2, 2023 and was unable to file the memorandum of appeal due to down time in operations of the High Court registry.
3. Respondent opposed the application vide a replying affidavit by the Respondents on August 16, 2023 in which they deny that there was down time in operations of the High Court registry between April and May, 2023. They urge that they be paid costs in the event that the application is allowed.

**Analysis and Determination**

4. I have considered the notice of motion in the light of affidavits on record and the issue for determination is whether Applicant has made out a case for leave to appeal out of time.



5. The impugned judgment was delivered on March 30, 2022 and the instant application was filed on June 16, 2023 about 3 months after delivery of the impugned judgment.
6. Under Section 79G of *Civil Procedure Act*, an appeal from a subordinate court to the high court should be filed within a period of 30 days from the date of the decree or order appealed against provided that an appeal shall 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. Having approached about 3 months after the impugned judgment was delivered, the onus is on the Applicant to demonstrate that the delay was reasonable, justified and that the Respondent will not suffer any prejudice if the order is not granted.
8. The principles that govern the exercise of discretion in an application for extension of time are well known. In *Gitnaka v Nduriri [2004] 2 KLR* at page 68 and in the oft-cited case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi Civil Application No Nai 255 of 1997 [1999] 2 EA 231* which was a decision of the Court of Appeal in which the judge stated 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 in general, the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.'
9. In *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR*, the Court of Appeal stated that:
 

' The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.'
10. Although the Applicant in this matter has stated that there was down time in operations of the registry for close to a month, there was no evidence that any attempt was made to communicate to the Registrar of the Court who would have confirmed that the delay in filing the memorandum of appeal between April, 2023 and May, 2023 was caused by facts beyond Applicant's control.
11. From the foregoing, I find that the Applicant has not explained to the satisfaction of the court why no appeal was filed in time.
12. The foregoing notwithstanding, driving a party from the seat of justice without giving them a chance to ventilate their case is a draconian measure which should be exercised cautiously.
13. Consequently, I find that no prejudice will be occasioned if the orders sought are granted on the following terms:
  1. Applicant is granted leave to appeal the judgment in MERU CMCC E250 OF 2022 out of time
  2. The Applicant shall file and serve the appeal within 45 days from today's date
  3. Costs shall abide the outcome of the intended appeal

**DATED AT MERU THIS 28<sup>th</sup> DAY OF SEPTEMBER 2023**



**WAMAE. T. W. CHERERE**

**JUDGE**

**Appearance**

Court Assistant - Morris Kinoti

For Applicant - Mr. Kitheka for Kitheka & Ouma & Co. Advocates

For Respondent - Mr. Mwendwa for Tmm Advocates

