



**Salim v Ndegwa & another (Miscellaneous Civil Application
E142 of 2023) [2023] KEHC 27591 (KLR) (24 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 27591 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION E142 OF 2023
F WANGARI, J
NOVEMBER 24, 2023**

BETWEEN

SALIM MOHAMMED SALIM APPLICANT

AND

STEPHEN NDEGWA 1ST RESPONDENT

**COLONELIUS MWANGI GITONGA ALIAS CORNELIUS MWANGI
GITONGA 2ND RESPONDENT**

RULING

1. This is a Ruling on an Application dated June 2, 2023 seeking to enlarge time for appeal. The Application is supported by the Affidavit of Mohamed Salim Salim and the Grounds stated *inter alia* as follows:
 - i. The Applicant instructed the Advocates to lodge appeal but inadvertently did not file within time.
 - ii. The Applicant is still desirous of filing the Appeal and the delay is not inordinate.
2. The Respondent opposed the Application *inter alia* on the ground that no plausible reason was given for failure to file the Memorandum of Appeal in time.
3. Parties filed submissions. I have considered the submissions.
4. I have perused the Application and the response thereto.
5. The issues for this Court's determination is whether the Applicant has met the legal threshold for an Order to extend time within which to Appeal.



6. The jurisdiction to extend time for filing appeal is set out under Section 79G of the *Civil Procedure Act* is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. Section 79G of the *Civil Procedure Act* provides as follows;

“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. This Court’s discretion in enlarging appellate time has also been set out in a number of judicial authorities. In the case of *Mombasa County Government v Kenya Ferry Services & Anor* (2019) eKLR, at paragraph 25, the Supreme Court held that;

25] Concerning extension of time, this Court has already set the guiding principles in the Nick Salat Case as follows:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

1. extension of time is not a right of a 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 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 on a case- to- case basis;
4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. whether there will be any prejudice suffered by the respondents, if extension is granted;
6. whether the application has been brought without undue delay; and
7. whether in certain cases, like election petitions, public interest should be a consideration for extending time” [emphasis supplied]

8. In the case relied upon by the Applicant, *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR, the court set out the conditions for grant of extension of time to be premises on 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 if Respondent the extension is 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.
9. I have perused the Application and the evidence attached in support thereof. I note that the impugned Ruling was delivered on 4th April 2023 and this Application was filed on 2nd June 2023. The Applicant is indeed out of time for the Appeal.
 10. The Memorandum of Appeal should have been filed by 3rd May 2023. There is thus a delay of 30 days before waking up to file this Application. The reason given is that the advocate did not inadvertently failed to lodge appeal within time.
 11. I revert to Article 48 of the Constitution which guarantees every person access to justice. Additionally, under Article 50(1) of the Constitution, every person has the right to have any dispute that can be resolved by the application of law decided in affair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. These Constitutional imperatives anchor the right to a fair hearing in our jurisdiction.
 12. The ultimate goal and purpose of the justice system is to hear and determine disputes fully. It follows that no person who has approached the court seeking an opportunity to ventilate their grievances fully should be locked out.
 13. I have perused the filed court pleadings and found no evidence that the application is an afterthought or how the same is intended to abuse court process. Further, it is the Applicant's case that delay was occasioned by the advocate's failure to lodge appeal in time. It is not uncommon for clients to instruct their counsel who procrastinate on filing court processes and only wake up when time for such filing has elapsed.
 14. However, such Applicant must demonstrate a plausible explanation for such conduct on the part of the advocate leading to delay. I note Asike-Makhandia J in Gerald Kitbu Muchanje v Catherine Muthoni Ngare & another [2020] eKLR stated that;

“There is no maximum or minimum period of delay set out in law. However, a prolonged and inordinate delay is more likely than not to disentitle the applicant of such leave. Likewise, the reason or reasons for the delay must be reasonable and plausible. In *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR this Court stated:-

“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.”
 15. Courts have over time excused parties where such delay is not inordinate as is in this case and even in cases where there is inordinate delay, depending on the circumstances of each case and reasons for the delay, courts have accorded parties an opportunity to be heard on appeal. Furthermore, there is no



evidence to demonstrate what prejudice the Respondent will suffer if the applicant is granted extension of time.

16. In the case of *Stecol Corporation Limited v Susan Awuor Mudemb* [2021] eKLR, the court stated as follows;

“

- “26. There is no evidence that the application is an afterthought or how the same is intended to abuse court process. Further, it is not uncommon for clients to instruct their counsel who procrastinate on filing court processes and only wake up when time for such filing has elapsed. Courts have over time excused parties where such delay is not inordinate as is in this case and even in cases where there is inordinate delay, depending on the circumstances of each case and reasons for the delay, courts have accorded parties an opportunity to be heard on appeal. Furthermore, there is no evidence to demonstrate what prejudice the Respondent will suffer if the applicant is granted extension of time.

Albeit the Respondent maintained that no sufficient reason was given for the one day lateness, in *Belinda Mural & 9 Others v Amos Wainaina* [1978] eKLR, the Court of Appeal – Law JA, citing other cases such as *Shah H. Bharmal & Brothers v Kumar* [1961] EA 679 where it was held that:

“Mistakes of a legal adviser may however amount to ‘sufficient cause under the East African Rule.’”

And in *Hamam Singh & Others v Mistri* [1971] EA 122 where it was held that:

“...in relation to applications to this court for leave to appeal out of time, it has been held that mistakes of a legal advisor may amount to sufficient cause but not inordinate delay on his part...”

17. Therefore, my object is to achieve justice for both parties. In *Kamlesh Mansukhalal Damki Patni v Director of Public Prosecution & 3 Others* [2015] eKLR, the Court of Appeal articulated that:

“It must be realized that courts exist for the purpose of dispensing justice. Judicial officers derive their judicial power from the people, or as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of the *Constitution* which succinctly states that “judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.” Judicial officers are also state officers, and consequently, are enjoined by Article 10 of the *Constitution* to adhere to national values and principles of governance which require them whenever applying or interpreting the *Constitution* or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity, are upheld.

For these reasons, decisions of the courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve. Such decisions may involve only parties inter se (and hence only parties’ interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the court in exercising its judicial authority to ensure dispensation of justice as this is what



lives up to the constitutional expectation and enhances public confidence in the system of justice.” (emphasis added).

18. I am persuaded that the Appeal is arguable per the attached draft Memorandum of Appeal. It seeks to challenge an award of damages on the ground that it was inordinately low. This cannot be said to be a frivolous appeal
19. The Court of Appeal in *Kamlesh Mansukbalal Damki Patni (supra)* agreed with the sentiments of the learned Judge of the High Court and I concur that:

“It suffices to comment that a court of law should be hesitant at closing the door to the corridors of justice prior to a litigant being heard on his complaint. So far the applicant did not have a chance to file a defence. He sought to set aside that default judgment and that application was dismissed on a date he contents the same was not due for hearing and when he had no notice...”

Determination

20. The upshot of the foregoing, the Notice of Motion dated 2nd June 2023 as follows:
 - i. The Appeal shall be filed within 14 days of the date hereof failure of which leave shall lapse.
 - ii. Costs in the cause

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 24TH DAY OF NOVEMBER, 2023.

.....

F. WANGAR1

JUDGE

In the presence of:

Achoka Advocate for the Applicant

M/S Githinji for the Respondent.

Barile, Court Assistant

