



**Aoko Otieno & Associates v Jumwa (Miscellaneous Civil Application
E058 of 2021) [2023] KEHC 25807 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25807 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS CIVIL APPLICATION E058 OF 2021
SM GITHINJI, J
NOVEMBER 23, 2023**

BETWEEN

AOKO OTIENO & ASSOCIATES APPLICANT

AND

AISHA JUMWA RESPONDENT

RULING

CORAM: Hon. Justice S. M. Githinji

Miss Aoko for the Applicant in person

Firm of Musyoki Mogaka Advocates for the Respondent

1. The applicant herein filed a notice of motion dated May 29, 2023 seeking the following orders
 1. That this honourable court be pleased to grant leave to appeal from ruling delivered on March 23, 2023.
 2. That costs of this application be in the cause.
2. The application is founded on the grounds set out on its face and the supporting affidavit of Aoko Otieno the applicant who deponed that she is aggrieved by the ruling delivered on March 23, 2023 which she intends to appeal. Ms. Aoko stated that the delay in filing the appeal was occasioned by the unavailability of the impugned ruling which was only accessed on April 24, 2023 as the said file was not available in the registry.
3. The respondent filed a replying affidavit stating that the application for leave to appeal out of time is devoid of merit as the applicant was physically present during the delivery of the ruling. Further that the application is an afterthought having been filed 68 days after the delivery of the ruling.



Analysis and Determination

4. The application was canvassed by way of written submissions which I have taken into account as well as the authorities relied upon. The issue for determination is whether the Applicant has met the threshold for granting leave to appeal out of time.
5. Section 79G of the *Civil Procedure Act* is the operative provision in answering the question whether the prayer to enlarge time to file an appeal is merited. Section 79G of the *Civil Procedure Act* provides 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.”
6. From the provision above, it is noteworthy that the phrase used is “an appeal may be admitted out of time”. This therefore means that an appeal may indeed be admitted out of time. However, the intended appeal ought to have already been filed before or together with an application seeking leave to extend time for filing an appeal. In *Mugo & others v Wanjiru & anor* [1970] EA 482 the court stated as follows:

“Clearly, as a general rule the filing and service of the notice of appeal ought to be regularised before or at least at the same time as an application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused.”
7. I have perused the file and noted that the applicant did file her notice of appeal together with the present application dated April 3, 2023 and lodged it on April 27, 2023. The decision whether or not to grant leave to appeal out of time or to admit such an appeal, is an exercise of discretion by the court. Some of the factors that aid Courts in exercising the discretion were suggested by the Court of Appeal in *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR. 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 Respondent if 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.
8. The instant application was filed about 68 days from the date of delivery of the ruling. The applicant explains that the said delay was occasioned by the unavailability of a copy of the ruling and typed proceedings. She annexed a copy of a letter requesting to be furnished with the same. In my view, the applicant has demonstrated sufficient cause as to why the delay was occasioned. Other factors for consideration are as well in favour of granting the application. I therefore find the application merited and is allowed as prayed with no order as to costs.



RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 23RD DAY OF NOVEMBER, 2023.

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S.M. GITHINJI

JUDGE

In the Presence of; -

1. Ms Aoko Advocate for Applicant
2. Mr Zadrack Wambui for the Respondent – (absent)

