



REPUBLIC OF KENYA



**KENYA LAW**  
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**Khushi Motor Limited v Obuya (Civil Appeal E313 of 2023)  
[2023] KEHC 27246 (KLR) (15 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27246 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E313 OF 2023  
DKN MAGARE, J  
DECEMBER 15, 2023**

**BETWEEN**

**KHUSHI MOTOR LIMITED ..... APPLICANT**

**AND**

**JULIUS OMONDI OBUYA ..... RESPONDENT**

**RULING**

1. This is a Ruling over an Application dated 3/11/2023. The prayers sought are as follows: -
  - a. Spent
  - b. Leave be granted for the Applicant to appeal out of time.
  - c. The court be pleased to admit the Memorandum of Appeal filed herewith on 2<sup>nd</sup> November 2023 out of time to be deemed properly on record.
2. The grounds upon which the Application is made is that the Applicant intends to appeal against the judgement of the Small Claims Court.
3. Further, it was stated that the Applicant had variously requested for the copy of Judgment to enable it lodge appeal but it was not forthcoming until 19<sup>th</sup> October 2023.
4. It was also pleaded that the Intended Appeal had high chances of success.
5. The Respondent filed a Preliminary Objection in opposition to the Application.
6. It was averred that the Memorandum of Appeal was fatally defective for being lodged out of time.
7. Further, that the Application was defective as was not premised on any valid Appeal.



## Submissions

8. The Applicant submitted that it was proper to file Appeal and seek to validate it. Reliance was pegged on the case of *Gerald M'limbine v Joseph Kangangi* (2009) eKLR to canvass the point that under section 79g of the *Civil Procedure Act*, the Applicant would file Memorandum of Appeal out of time and seek it to be admitted vide an Application as in this case.
9. Counsel also submitted that there was no inordinate delay in filing the Application as it was filed only 18 days after the delivery of the Judgement.
10. On the preliminary objection, it was submitted that the same was not hinged on a pure point of law and ought to be dismissed.
11. On the part of the respondent, it was submitted in support to the preliminary objection that the Memorandum of Appeal was incompetently lodged out of time and should be struck out.
12. Counsel relied on the case of *Gilbert Mwangi Njuguna =Vs= Judicial Service Commission & Another* [2020] eKLR, where the Supreme Court of Kenya observed that:-

.....As was stated in Nick Salat - “where the law provides for the time within which something ought to be done, if that time lapses, one needs to first seek extension of that time before he can proceed to do that which the law requires”
13. It was submitted that substantial loss would occur to the Applicant as stipulated under order 42 rule 6 of the *Civil Procedure Rules* of execution were to be levied in the absence of stay order and as such the Application ought to be allowed.
14. The Applicant also urged the court to apply discretion in its favour not to prevent an Appeal which was as of right. Reliance was placed on the case of *Nicholas Kiptoo Arap Salat vrs the Independent Electoral & Boundaries Commission & 7 others* (2014) eKLR.
15. It was thus submitted that as no leave was sought, there was no appeal.
16. I was urged to disallow the Application.

## Analysis

17. The issue before me is whether the delay in lodging a memorandum of appeal has been satisfactorily explained. if so, whether i should strike out the memorandum of appeal file out of time.
18. Waki, JA in *Seventh Day Adventist Church East Africa Ltd. & Another vs. M/S Masosa Construction Company* Civil Application No. Nai. 349 of 2005 held that:

“As the discretion to extend time is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant; the period of delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with the time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors...In an application for extension of time, each case must be decided on its own peculiar facts and circumstances and it is neither feasible nor reasonable to lay down a rigid yardstick for measuring periods of delay as explanations for such delays are as many and varied as the cases themselves...The ruling striking out the appeal is not only necessary for exhibiting to the



application for extension of time but also for consultations between the applicant’s counsel and their clients and the fact that the ruling was returned to Nairobi for corrections is a reasonable explanation for the delay... Where the Respondent has already recovered all the decretal sum and costs attendant to the litigation, the right of appeal being a strong right which is rivalled only to the right to enjoy the fruits of judgement, no prejudice would be caused to the respondent who has enjoyed his rights in full if an opportunity is given to the applicants to enjoy theirs too, even if it is on a matter of principle.”

19. I have perused the reasons for the delay in the application and the supporting affidavit. The applicant states that there was delay in obtaining a copy of the Judgement from the Small Claims Court.

20. It is imperative to note the Supreme Court of Kenya decision (M.K. Ibrahim & S.C. Wanjala SCJJ) in Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others [2014] eKLR where the learned Judges held as follows: -

- “(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 for 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) Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.

21. In Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR Odunga J. observed that:-

“In an application for extension of time, where the Court is being asked to exercise discretion, there must be some material before the Court to enable its discretion to be so exercised. Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the court why the discretion should nevertheless be exercised in his favour and the rule is that where there is no explanation, there shall be no indulgence. See Ratman vs. Cumarasamy [1964] 3 All ER 933; Savill vs. Southend Health Authority [1995] 1 WLR 1254 at 1259.

22. It follows therefore that the Applicants explanation for the delay is key in guiding the Court’s exercise of discretion on the issue of leave to appeal out of time.

23. I note that this Application was filed about 18 days after the delivery of the impugned Judgment. The Applicant was under duty to show the reasons for delay. However short the period of delay, it must be explained. In Alfred Iduvagwa Savatia vs Nandi Tea Estate & another [2018] eKLR J. Mohammed JA. cited Aganyanya, JA in Monica Malel & Another V. R., Eldoret Civil Application No. Nai 246 of 2008 where the Learned Judge stated;-

“When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show .... the applicants are not quite sure of why the delay in filing the notice of appeal within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay.”



24. Further, section 79 G of the *Civil Procedure Act* provides as doth: -

“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.”

25. Therefore, in my view, without a valid reason, this court has no jurisdiction to extend time. It is not manna to dish out. It is exercise of discretion. Unless the court is properly moved, it has no power to exercise discretion. It is not by whim but through judicious consideration that such an Application is considered.

26. The factors to consider in dealing with such an application are: -

- a. The length of delay.
- b. The reason for delay.
- c. The animus of the applicant.
- d. The prejudice to the Respondent.

27. It is my considered opinion that the 4 factors above are sequential. Therefore, one must fulfil each as you move to the next. If the delay is inordinate, it may not be necessary to go to the reason for delay. When the delay is reasonable, there must be a real and genuine reason for delay.

28. Where there is doubt, either way, the court can then exercise discretion one way or another. The court cannot find that the delay is inexcusable, inordinate and no reason is given and then, out of sheer whims and fiat, extend time. That makes litigation unpredictable and unending.

29. In our court system, delay is usually documented. Without documentation, it never happened. For example, a lost file where there is no record of follow up, is not lost. When applying for proceedings, they must first be as of necessity, a letter bespeaking the proceedings and payment of deposit. Without such, proceedings were never requested. The *raison d'être* for payment is to enable the court prioritize according to payment and only serious applicants for proceedings. Without payment, there are no proceedings being sought. Further, proceedings must be formally sought, even where the same were requested for in court, the registry must be moved and follow ups be done.

30. In this matter, the reasons for the delay is doubtful. However, the length of delay and animus of the Applicant are not inordinate and doubtful in the circumstances.

31. The applicant delayed for over 18 days. I note that the Court in *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.”

32. The respondent raised a preliminary objection contesting the validity of the Appeal. the respondent however, did not challenge the reasons given for the delay and whether the delay was prolonged as to be prejudicial. Given the circumstances of the case, I have also to consider both parties. The Respondent is entitled to the fruits of the judgment while the Applicant has the right of Appeal which they had given away but seek the intervention of court to redeem it.
33. In my view the injustice to the Applicant if the Application is dismissed exceeds the prejudice to the Respondent if the Application is allowed. In the same measure, I am inclined not to strike out the Memorandum of Appeal having found that the delay was not inordinate and was explained. In *Harris Horn Senior, Harris Horn Junior vs. Vijay Morjaria* Nyeri Civil Appeal No. 223 of 2007 when confronted with similar arguments, the Court made observations therein inter alia as follows:
- (32) As for the need to do justice to the parties before it, we have no doubt that this is the core business of the Court. However, a court of law cannot ignore principles of substantive law or case law governing the particular aspect of justice sought from its seat. Its primary role is to ensure that the justice handed out is kept anchored on both the law and the facts of each case.”
34. This is a proper application to allow.

#### **Determination**

35. The upshot of the foregoing is that I allow the Notice of Motion dated 3<sup>rd</sup> November 2023 as follows:
- i. The Memorandum of Appeal filed on 2<sup>nd</sup> November 2023 is deemed as duly filed.
  - ii. The Appellant is directed to file and serve the Record of Appeal within 21 days.
  - iii. The Main Appeal shall be fixed before the Court for directions on 28/1/2024.

**DELIVERED, DATED AND AT MOMBASA ON THIS 15TH DAY OF DECEMBER, 2023.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

**In the presence of:-**

Mr. Yose for the Respondent

Mrs. Otuga for the Appellant

Court Assistant - Brian

