



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**MISC. CIVIL APPLICATION NO. E130 OF 2021**

**ABIRIA COACHES .....1<sup>ST</sup> APPLICANT**

**WILLIAM JANDI LUGANGALE.....2<sup>ND</sup> APPLICANT**

**-VERSUS-**

**BRIAN OMONDI OKOTH..... RESPONDENT**

**RULING**

1. By their motion dated 19<sup>th</sup> March, 2021 by **Abiria Coaches** and **William Jandi Lugangale** (hereafter the Applicants) seeks leave to appeal out of time against the judgment delivered on 22<sup>nd</sup> January 2021 in **Milimani CMCC No. 7536 of 2019**. The motion is expressed to be brought under Section 3A, 79G and 95 of the Civil Procedure Act, Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rule 1 & 3 of the Civil Procedure Rules. On grounds, among others that, judgment in **Milimani Commercial Courts CMCC No. 7536 of 2019** was delivered in favour of **Brian Omondi Okoth** (hereafter the Respondent) on 22<sup>nd</sup> January, 2021 and the Applicants were unable to trace a copy of the judgment in time however upon obtaining a copy of the same the Applicants are aggrieved and desire to file an appeal, but the time for appealing has lapsed.

2. The affidavit in support of the motion is sworn by **Pauline Waruhiu** who describes herself as the Head of Claims and Legal at Directline Assurance Co. Ltd, the insurers of the motor vehicle registration no. **KCC 801J** respecting which the lower court suit arose. The deponent states that she is duly authorized to swear the affidavit under the right of subrogation due to her company pursuant to the relevant policy of insurance; that judgment having been delivered on 22<sup>nd</sup> January, 2021 counsel on record embarked on attempts to trace a copy of the judgment but did not succeed in time, and that being aggrieved by the said judgment the insurer instructed the firm of **Kimondo Gachoka & Co. Advocates** to appeal by which event the time within which to appeal had expired. She deposes that delay in filing the appeal is not inordinate as to be inexcusable, is inadvertent and the Applicants should not be penalized for the mistake of their counsel. Finally, she avers that the appeal is merited, arguable as it raises pertinent points of law with an overwhelming chance of success, that the Respondent will not suffer any prejudice that is incapable of being compensated by costs.

3. The motion is opposed by way of a replying affidavit dated 22<sup>nd</sup> June, 2021 by the Respondent. He takes issue with the motion on grounds that; judgment was delivered in presence of the Applicants' representative; that the delivery of the judgment was duly communicated to the Applicants' counsel by the Respondent *vide* the letter dated 22<sup>nd</sup> January, 2021 and; that the Applicants have not exhibited any requests to the court seeking the court file to confirm the judgment. Thus, he swears that the Applicants have not given cogent reason for delay in filing the appeal within the statutory timelines, to warrant the court to exercise its discretion, that the delay is inexcusable, inordinate and not justifiable. The Respondent urged the court to dismiss the motion.

4. The motion was canvassed through written submissions. Counsel for the Applicants submitted on the principles undergirding a motion for leave to appeal out of time as set out in the Court of Appeal decisions of **Edith Gichugu Koine v Stephen Njagi Thoithi [2014] eKLR** and **Julius Kamau Kithaka v Waruguru Kithaka Nyaga & 2 Others CA. No. 14 of 2013**. About the period of delay, it was argued that delay of close to one and a half months is not inordinate, citing in support **Amal Hauliers Limited v Abdulnasir Abubakar Hassan [2017] eKLR**. It was further submitted that the delay has been satisfactorily explained and placing reliance on the case of **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & Another [2018] eKLR** that the Respondent would not be prejudiced if the motion is allowed. Finally, on the authority of **Athuman Nusura Juma v Afwa Mohamed Ramadhan CA. No. 227 of 2015** counsel asserted that *prima facie* the intended appeal is arguable and has a high chance of success and as such the motion ought to be allowed as prayed.

5. On the part of the Respondent counsel submitted that the Applicants have failed to sufficiently explain the delay in that they have failed to tender evidence of alleged attempts to trace the court file. It was further submitted that the intended appeal does not raise any arguable issues as the award by the trial court was not excessive. Finally, counsel submitted that the Respondent stands to suffer prejudice on account of the delay of his fruits of successful litigation, after waiting for two years. The court was thus urged to dismiss the motion with

costs.

6. The court has considered the application in light of the parties' respective affidavit material and submission. 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.”**

7. The successful applicant must demonstrate “good and sufficient cause” for not filing the appeal in time. In **Thuita Mwangi v Kenya Airways [2003] eKLR**, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in *pari materia* with Section 79G of the Civil Procedure Act, reiterated its decision in **Mutiso v Mwangi [1997] KLR 630** 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 the general matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent of the application is granted.”**

8. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court's discretion in his favor. The Supreme Court in the case of **Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others [2014] e KLR** enunciated the principles applicable in an application for leave to appeal out of time. The Court stated inter alia that:

**“(T)he underlying principles a court should consider in exercise of such discretion include;**

- 1. Extension of time is not a right of any 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 a case- to-case basis;**
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;**
- 5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;**
- 6. Whether the application has been brought without undue delay.**
- 7. ....”**

See also **County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] eKLR**.

9. It is not disputed that the judgment of the subordinate court was delivered on 22<sup>nd</sup> January, 2021 and the instant motion presented on or about 23<sup>rd</sup> March, 2021, as such the delay in this case is about one month, which is not inordinate. The Applicants have averred that the delay in filing the appeal arose due to inability of counsel to obtain a copy of the judgment within good time, but the Respondent has countered correctly, that the Applicants have not exhibited any requests to the court in that regard. In my view, however, the explanation offered by the seems plausible despite the absence of proof.

10. Parties have taken rival positions concerning the arguability of the intended appeal. From the language employed in **Mutiso v Mwangi** (supra) the requirement touching on the viability of the intended appeal, is neither mandatory nor stringently applied in an application of this nature. The draft memorandum of appeal attached to the Applicants' affidavit appears to raise issues serious enough to require the court's consideration on appeal or that are *prima facie* arguable. The Court of Appeal in **Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited (2020) eKLR** stated that such appeal:

**“... may not succeed as in law an arguable appeal need not succeed so long as it raises a bona fide issue for determination by the Court.”**

11. In **Vishva's** case, the Court emphasized the right of appeal in the following terms:

**“Turning to the request to allow the applicant to exercise his now undoubted constitutionally underpinned right of appeal, the position is.... crystalized .... in the case of Richard Ncharpi Leiyagu vs. IEBC & 2 Others (supra); Mbaki & Others vs. Macharia & Another [2005] 2EA 206; and the Tanzanian case of Abbas Sherally & Another vs. Abdul Fazaiboy, Civil Application No. 33 of 2003; for the holding *inter alia* that:**

**(i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;**

**(ii) the right to be heard is a valued right; and**

**(iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice...”**

12. In the circumstances, to facilitate the Applicant’s undisputed right of appeal, the court will allow the motion dated 19<sup>th</sup> March 2021. The Court directs the Applicants to file the appeal within 14days of this ruling. The costs of the motion are awarded to the Respondent in any event.

**DELIVERED AND SIGNED ON THIS 24<sup>TH</sup> DAY OF FEBRUARY 2022**

**C.MEOLI**

**JUDGE**

**In the presence of:**

**For the Applicants: Ms. Gichohi**

**For the Respondent: N/A**

**C/A: Carol**