



**Ojwaya v South Nyanza Sugar Co. Ltd (Miscellaneous Civil Application
E030 of 2021) [2022] KEHC 389 (KLR) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 389 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
MISCELLANEOUS CIVIL APPLICATION E030 OF 2021
RPV WENDOH, J
MAY 26, 2022**

BETWEEN

RONALD O. OJWAYA APPLICANT

AND

SOUTH NYANZA SUGAR CO. LTD RESPONDENT

(The applicant applied to be granted leave to appeal out of time against the whole of the judgment of Mr. Kamau C.M. dated 11/12/2019 in Rongo PMCC No. 197 of 2016.)

RULING

1. This ruling is in respect to the Notice of Motion Application dated 5/2/2021 filed by Ronald O. Ojwaya (the applicant) seeking the following orders: -
 1. That the applicant be granted leave to appeal out of time against the whole of the judgment of Mr. Kamau C.M. dated 11/12/2019 in Rongo PMCC No. 197 of 2016.
 2. That the memorandum of appeal annexed thereto and marked X be deemed as duly filed upon payment of the requested (sic) filing fees.
 3. Costs be provided for.
2. The grounds upon which the application is based, are found in the body of the application and the supporting affidavit of Mr. Ezekiel Oduk, learned Counsel for the applicant dated 5/2/2021. The counsel deponed that the applicant filed a suit which was heard and a judgement delivered on 11/12/2019 without notice and in the absence of both parties; the applicant came to know of this fact on 19/1/2019 when he visited the registry; that he has since communicated this information to the applicant who wishes to appeal against the judgement; that they have prepared the appeal but unfortunately the time for lodging the appeal had lapsed. Counsel further deponed that no prejudice



will be occasioned to the respondent in the circumstances of the delay being wholly beyond the control of the applicant.

3. The application was not opposed. Counsel for the respondent attended court all through but chose not to file any response.

4. In determining whether leave to appeal out of time should be granted, I am guided by the decision of the Court of Appeal in *Edith Gichungu Koine v Stephen Njagi Thoithi* [2014] eKLR Odek JA rendered himself as thus:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

5. On the period of delay, Section 79G of the [Civil Procedure Act](#) provides that appeals from the subordinate court should be filed within thirty (30) days from the date of the judgement and/or order. The applicant alleged that the impugned judgement was delivered on 11/12/2019 without notice to the parties but Counsel for the applicant came to learn of the judgement on 19/1/2021. The instant application was then filed on 5/2/2021. This is a period of approximately more than one year.

6. The applicant’s reason for the one-year delay was that the COVID pandemic in the year 2020, shut down court operations and restricted movements in different parts of the country including movement to and from Nairobi where he practices.

7. Without the lower court record, this court cannot confirm whether or not the judgment was read in absence of the parties. However, since the respondent did not respond, the court will assume the Respondent agreed with this averments by the applicant. Being the case, I find the explanation plausible. The COVID pandemic indeed changed the normal court operations. Before clear guidelines could be issued, most litigants lost track of that cases by being hindered from accessing court premises. When full court operations resumed in the year 2021, After discovering of the judgement in the beginning of the year, counsel followed up the matter and thereafter filed this application.

8. Section 79G gives the court powers to allow an appeal to be admitted out of time if the applicant has good and sufficient reasons for not filing the appeal in time. The delay has been explained and I find that there are proper reasons advanced by the applicant to warrant enlargement of time to file the appeal. There is no known prejudice that the Respondent will suffer if time is enlarged.

9. Whether the applicant has an arguable appeal: I have considered the draft grounds of appeal, the applicant is challenging the fact that the trial Magistrate disregarded the evidence which showed that he had a contract which was performed. The applicant also faulted the trial Magistrate for not finding that the respondent had breached the contract. The applicant also challenged the suitability of the respondent’s witness. I find that these grounds are arguable.

10 I find that the applicant’s application is merited and the following orders do issue: -

1. The applicant is hereby granted leave to file and serve the draft annexed memorandum of appeal upon payment of the requisite fees within 7 days hereof;
2. The applicant shall also file and serve the record of appeal within 60 days hereof;
3. Mention before Deputy Registrar on 27/9/2022 to confirm compliance.
4. Costs shall be in the cause.



DATED, DELIVERED AND SIGNED AT MIGORI THIS 26 TH DAY OF MAY, 2022

R. WENDOH

JUDGE

Ruling delivered in the presence of:-

No appearance for the Applicant.

Mr. Odhiambo for the Respondent.

Nyauke Court Assistant.

