



**Nyamai v Kuchnadia & another (Miscellaneous Application
E012 of 2021) [2022] KEHC 11993 (KLR) (24 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11993 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
MISCELLANEOUS APPLICATION E012 OF 2021
SN MUTUKU, J
MAY 24, 2022**

BETWEEN

STEPHEN WAMBUA NYAMAI APPLICANT

AND

SAMAT JETHA KUCHNADIA 1ST RESPONDENT

AQUA DEEP DRILLING SOLUTIONS LITD 2ND RESPONDENT

RULING

1. This ruling relates to a Notice of Motion dated October 26, 2020. It is brought under section 79G of the [Civil Procedure Act](#) seeking orders that:
 - i. Leave be granted to the applicant/plaintiff to file appeal from the judgement of the Hon B M Cheloti (SRM) given on April 30, 2020.
 - ii. Time within which to appeal from the judgement of the Hon B M Cheloti given on April 30, 2020 be extended.
 - iii. The applicant be granted leave to file a Memorandum of Appeal out of time from the trial court's decision given on April 30, 2020.
 - iv. Cost be in the appeal.
2. The application is similar to the one in Kajiado High Court Misc application no E013 of 2021. The issues in both files are similar hence the same ruling. The grounds in support of this application are found on the face of it and in the Supporting Affidavit sworn by Stephen Wambua Nyamai (the applicant). He is seeking leave to appeal out of time from the decision of Hon B M Cheloti given on April 30, 2020 and has annexed a Memorandum of Appeal dated October 26, 2020.



3. The applicant states that the appeal is against refusal to award him costs and finding him 20% negligent; that there was no notice given for the date of delivery of judgement. That he became aware of the delivery of judgement on October 28, 2020 and that he got a copy of the same and forwarded it to his advocates. He further claims that his advocate was not aware of the delivery of the judgment and that he had not received any notice either.
4. It is his prayer that this court exercises its discretion and extend time to appeal and not to bar him because of miscommunication with the court or mistake of counsel. That he has been denied costs for no reason and that he did not cause the accident at all.
5. The application is opposed by the respondents through a Replying Affidavit dated February 15, 2022, sworn by Consolata Kiura, the assistant legal manager of the respondents' insurer Mayfair Insurance Company Ltd. The respondents claim that the application is misconceived, is an abuse of the court process and a waste of court's time and should be dismissed with costs.
6. It is the case for the respondents that judgement was entered on April 30, 2020 with a net award of 1,485,701/-; that the said sum was paid to the applicant's advocates on February 26, 2021 in fulfilment of the judgement; that giving notice for delivery of judgment is only required where there has been an *ex parte* judgment against a party who neither entered appearance nor filed defence and that in this case it was the plaintiff's case and it was their duty to be vigilant.
7. It is their case that the applicant is using Covid 19 as an excuse to cover up the indolence of the advocate and further that at that time the court's registries were not closed; that an extension of time is not a right, it is an equitable remedy available to deserving party and that equity does not favour the indolent; that the applicant occasioned inordinate delay in filing their appeal since judgement was delivered one and a half years ago and that the decretal sum was settled and that from the application, the intended appeal raises no triable issues and therefore pursuing the same is a waste of judicial time.

Submissions

8. In their arguments on April 25, 2022, counsel for the applicant relied on his application and the supporting affidavit and stated that the applicant has an arguable appeal as can be seen in the annexed Memorandum of Appeal. He submitted that there has not been undue delay in filing this application and that they have given an explanation as to this. He argued that the applicant was denied costs yet he succeeded in his claim; that it is not disputed that payment of the judgement sum has been made but that this was done after this suit had been filed. Further that no prejudice would be occasioned on the respondents if they are granted the orders.
9. It is the argument of the applicant that he had not been served with notice of delivery of judgment and hence he was not aware of the delivery of judgement.
10. In her submissions, counsel for the respondent argued that though the applicant's counsel had closed their offices on March 16, 2020 and opened on July 20, 2020 after judgement had been delivered, they should have been vigilant in following up. She argued that though the applicant found out about the judgement on October 28, 2020 the present application is dated October 26, 2020 and therefore the applicant was pre-empting the judgment.
11. Counsel argue further that they were served with the present application on September 8, 2021 after the applicant had been paid the judgement amount and that he did not raise the issue of costs. They argued that the delay was over one and a half years hence the present application is an afterthought and that the Applicant is therefore undeserving of the orders he seeks.



Determination

12. The application simply seeks extension of time within which to file an appeal. The main ground in support of the application is that the applicant was not aware of the date of the judgment for failure of service of notice to him and that by the time he became aware that judgment had been delivered time within which to appeal has elapsed. This is opposed by the respondents on the grounds that the applicant ought to have been vigilant in following up on when judgment was to be delivered and that the decretal sum has been paid in full.

13. The applicant relies on section 79G of the *Civil Procedure Act* provides. This section 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.

14. Further, Section 95 of the *Civil Procedure Act* provides that: -

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

15. The applicable principles in granting leave to appeal out of time were stated by the Supreme Court in *Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others* [2014] e KLR as follows:

“The underlying principles a court should consider in exercise of such discretion include:

- a. 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;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made a case to case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e. Whether there will be any prejudice suffered by the Respondent if the extension is granted;
- f. Whether the application has been brought without undue delay.

16. The same principles were enunciated in *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi*, where the Court of Appeal held that:

“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 in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the



appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

17. For an applicant seeking extension of time to succeed in his application, he must satisfy the court on the above principles. In this case, the judgement being challenged was entered on April 30, 2020. It follows therefore that an appeal challenging that decision ought to have been filed on or before May 30, 2020. If this court were to believe the applicant, then he ought to have brought this application immediately he became aware of the judgment sometimes on or soon after October 28 2020. The application bears the date of October 26, 2020, two days before the date the applicant claims he became aware of the judgment.
18. I have considered the explanation given by the applicant. It is true that during the Covid 19 pandemic the court practice rules were modified to take into account the downscaling of court’s operations. This modification of the practice rules gave rise to serving notices to parties through emails. But then the applicant does not explain why he did not move with haste and file the application and the intended appeal. Or why his application bears a date, two days before the date he says he became aware of the judgment.
19. Having given this application due consideration, and noting that the judgement sum has been settled, it is my view that the application has failed to explain to the satisfaction of the court the anomalies in the dates in his application and by extension he has failed to explain why he did not file the application immediately after October 28, 2020. This error is fatal to his application.
20. It is my finding therefore that the applicant has not met the threshold for granting leave to appeal out of time. His application dated October 26, 2020 and filed on March 17, 2021 must fail. It is hereby dismissed with costs to the respondents.
21. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 24TH MAY 2022.

S N MUTUKU

JUDGE

