



Juma v Mark & another; National Police Service & 2 others (Third party) (Miscellaneous Civil Appeal 43 of 2021) [2022] KEHC 10211 (KLR) (28 June 2022) (Judgment)

Neutral citation: [2022] KEHC 10211 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
MISCELLANEOUS CIVIL APPEAL 43 OF 2021
RPV WENDOH, J
JUNE 28, 2022**

BETWEEN

SUSAN BURURE JUMA APPLICANT

AND

OJWANG JOHN MARK 1ST RESPONDENT

NATIONAL INDUSTRIAL CREDIT BANK 2ND RESPONDENT

AND

NATIONAL POLICE SERVICE THIRD PARTY

THE INSPECTOR GENERAL OF POLICE THIRD PARTY

THE HON, ATTORNEY GENERAL THIRD PARTY

JUDGMENT

- 1 Susan Burure Juma (the applicant) through the firm of Kerario Marwa Advocates, filed the Notice of Motion Application dated 28/5/2021 on 17/6/2021 seeking the following orders: -
 - a. That the court be pleased to grant leave to the applicant to file her appeal out of time.
 - b. Costs be provided for.
- 2 The application is premised on grounds found in the body of the application and the supporting affidavit of the applicant sworn on 28/5/2021. The applicant deponed that on 24/11/2020, the trial court delivered a ruling dismissing her case for non-attendance; that being dissatisfied with the ruling, she instructed the firm of Kerario Marwa to file an appeal on her behalf; that her advocates did a letter to court requesting for typed proceedings in January 2021 but they were only received in April 2021; that she has been advised by her advocates that this application has been brought without delay after



receipt of the proceedings; that her appeal has a high chance of succeeding; that it is in the best interest of justice that this application be allowed.

- 3 The application was opposed. The 1st respondent through the firm of Kimondo Gachoka & Co. Advocates, filed grounds of opposition dated 23/10/2021. The grounds are that the application is fatally defective, unnecessary, vexatious and an abuse of the court process; that the application is an afterthought; that the delay is inordinate, intentional, contumelious and therefore inexcusable; that there is a substantial risk to fair trial and cause serious prejudice to the 1st respondent; that it will be in the best interest of justice to dismiss the application.
- 4 There is no evidence that the 2nd respondent and the 3rd parties have ever been served in these proceedings. Directions were taken on the application and the court directed that it be canvassed by way of written submissions.
- 5 The applicant filed submissions dated 26/1/2022 on 1/2/2022. The applicant submitted that Section 75G of the *Civil Procedure Act* gives this court discretion to admit an appeal out of time if there are good and sufficient reason; that her Counsel requested for the typed proceedings in the trial court and it was not until April 2021 that the same were supplied to them; that the reasons for the applicant to seek extension of time to file appeal out of time are good and sufficient. It is trite law that mistakes of counsel should not be visited upon the client.
- 6 It was further submitted that the applicant was seriously injured in a Road Traffic Accident and she filed this suit in the lower court seeking compensation for the injuries sustained. The applicant submitted that Article 159 (2) (d) could cure that default for the ends of justice to be met when faced with an application to file suit out of time. The applicant relied on several precedents.
- 7 The 1st respondent filed submissions dated 11/2/2022 on 17/2/2022. He submitted that the applicant has not demonstrated any justifiable cause to warrant the court to exercise its discretion of extending time to lodge an appeal; that the annexed ruling (SB1) shows that the ruling was delivered on 24/11/2020 and the magistrate granted a right of appeal within 30 days; that it is a matter of procedure that one has to file a notice of appeal before one obtains typed proceedings; that the applicant moved the court 7 months after the said ruling was delivered.
- 8 It was further submitted that the explanation for the delay to file an appeal out of time because of typed proceedings was lame; that even from the ruling of the court, it was clear that the applicant had been indolent in prosecuting his case hence the dismissal.
- 9 I have considered the application, the grounds of opposition and the rival submissions.
 - a. Whether there was unreasonable delay in bringing this application.
 - b. Whether leave should be granted to file appeal out of time.
 - c. Whether the applicant has an arguable appeal.
- 10 In determining whether leave to appeal out of time should be granted, I am guided by the binding decision of the Court of Appeal in *Edith Gichungu Koine vs Stephen Njagi Thoithi* (2014) eKLR Odek JA rendered himself thus:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision 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.”



- 11 From the above decision the court has to consider the period of delay, reasons for delay and degree of prejudice to the respondent if the application is granted.
- 12 The first and second issues will be determined concurrently. Section 79G of the *Civil Procedure Act* provides that the time for filing an appeal from the Subordinate court to the High Court is 30 days. The same provision gives the High court discretion to enlarge time for a party to file the appeal out time if there are good and sufficient reasons for doing so. This court has wide discretion to enlarge time for filing of appeal out of time. The said discretion has to be exercised judiciously.
- 13 On the period of delay, the impugned ruling was delivered on 24/11/2020. The instant application was filed on 28/5/2021. This is a period of approximately six months later. The applicant's reason for the delay was that she had to instruct the present counsel to file an appeal and there was delay occasioned in getting the typed proceedings from the registry.
- 14 Going by the applicant's explanation, it seems she gave the present counsel instructions on or about 28/1/2021 when a request for the typed proceedings was made (SB-2). This was already a delay of 3 months which the applicant has not explained to this court. There was also a delay in delivering the letter requesting for the typed proceedings to court. The letter was received on 10/2/2021.
- 15 The applicant states that the proceedings were ready in April 2021. This application was filed in May 2021. If at all the proceedings are now ready as the applicant would want this court to believe and also taking into account the time lapse of six months; it would have been prudent for the applicant to file a complete record of appeal to avoid further time wastage. The courts have the duty to ensure that they enhance the overriding objectives of solving civil disputes justly, expeditiously and proportionately. I find that there are no proper reasons advanced by the applicant to warrant enlargement of time for filing appeal out of time.
- 16 Whether the applicant has an arguable appeal: I have also considered the ruling that is appealed against. The reasons why the suit was dismissed was for want of prosecution. The learned Magistrate observed that on 30/7/2020, the day for hearing of the applicant's suit, she was not present and neither did she send a representative. In addition, the suit had not taken off since 2015. The applicant argues that the court's reasoning is wrong use of discretionary powers by the learned Magistrate. This in my humble view is not arguable. There is evidence that the applicant has been indolent and equity does not aid the indolent.
- 17 In the end, I find that the application dated 28/5/2020 is devoid of merit and is hereby dismissed with costs to the 1st respondent.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 28TH DAY OF JUNE 2022

R. WENDOH

JUDGE

Ruling delivered in the presence of:-

N/A for the Applicant.

Mrs. Ondieki h/b for Ms. Okwoyo for the 1st Respondent.

Nyauke Court Assistant.

