



**Ng'ang'a & another v Okwaro (Miscellaneous Civil Application  
E307 of 2021) [2022] KEHC 10757 (KLR) (Civ) (24 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10757 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL**

**MISCELLANEOUS CIVIL APPLICATION E307 OF 2021**

**CW MEOLI, J**

**JUNE 24, 2022**

**BETWEEN**

**HELLEN NJERI NG'ANG'A ..... 1<sup>ST</sup> APPLICANT**

**CHARLES MWORIA MBUI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**LIYENGWA FRANCIS OKWARO ..... RESPONDENT**

**RULING**

1. For determination is the motion dated June 30, 2021 by Hellen Njeri Ng'ang'a and Charles Mworio Mbui (hereafter the 1<sup>st</sup> & 2<sup>nd</sup> applicant/applicants) seeking that the applicants be granted leave to file out of time an appeal from the judgment in Nairobi Milimani CMCC No. 1060 of 2017. The motion is expressed to be brought under section 79G of the Civil Procedure Act (CPA) and order 42 rule 6 of the Civil Procedure Rules (CPR) inter alia. On grounds, among others that, the Applicants being dissatisfied with the judgment and decree of the lower court desire to to appeal albeit out of time.
2. The motion is supported by the affidavit sworn by the 1<sup>st</sup> applicant, in her own behalf and on behalf of the 2<sup>nd</sup> applicant. The gist of her affidavit is that judgment in Nairobi Milimani CMCC No. 1060 of 2017 was delivered in the absence of both parties and without notice to the parties and advocates on record. She explains that upon the judgment date was initially reserved for February 28, 2020 but on the said date, the court was not sitting as the trial magistrate was bereaved and the pending judgments before him were to be delivered on notice. That a notice was issued listing ready judgment before the trial magistrate to be delivered between March 16<sup>th</sup> – April 30<sup>th</sup> 2020 via email; that with the onset of the COVID-19 pandemic the court downscaled operations; that efforts to follows up were unsuccessful as the file could not be traced and it was not until June 3, 2021 that counsel informed her that judgment had been delivered on May 29, 2020.



3. That having perused the judgment the applicants are aggrieved and wish to file an appeal against the said decision. The deponent further avers that the intended appeal is merited, and the Respondent stands to suffer little or no prejudice if the court grants the leave sought.
4. The motion was opposed through the replying affidavit of Liyengwa Francis Okwaro (hereafter the respondent) dated September 28, 2021. He asserts that the motion is filed in bad faith for the sole purpose of denying him the enjoyment of the fruits of the judgment delivered on May 29, 2020. He takes issue with the fact that the motion was filed more than one and half years after judgment was delivered and no satisfactory reasons had been advanced for the delay; that nothing has been attached to the motion to show that the applicants made any follow up with the lower court registry; and that applicants have filed the instant motion in order to defeat the outcome of Civil Suit No. E9606 of 2021 a declaratory suit relating to the lower court's decision. Like the applicants, the respondent made depositions relating to a non-existent prayer for stay of execution.
5. In her further affidavit dated October 5, 2021 the 1<sup>st</sup> applicant deposed that the respondent's eighteen (18) months delay in commencing execution of the judgment lends credence to the fact the judgment was delivered without notice. In conclusion she asserts that contrary to the respondent's averments, the declaratory suit no. E9606 of 2021 was filed by the respondent in an attempt to defeat the outcome of the instant motion.
6. The motion was canvassed through written submissions. Counsel for the applicant cited several decisions in support of the proposition that a successful applicant must demonstrate that he or she has an arguable appeal. Concerning the issue of delay, he cited the decision in *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR to submit that the delay was not unreasonable given that the lower court's judgment was delivered in the absence of both parties and without notice. And further that, judgment having been delivered on May 29, 2020 it is not until June 3, 2021 when a copy of the judgment was obtained, and the present motion filed.
7. Counsel for the respondent emphasized the delay of over one year in bringing this motion and asserted that the applicants had not given a satisfactorily explanation and the motion ought to fail. Once more, both the applicants and the respondent made submissions on a non-existent prayer for stay of execution pending appeal, which in any event is not available where no appeal has been filed. See *Abubaker Mohamed Al-Amin v Firdaus Siwa Somo* [2018] eKLR and *Equity Bank -Vs- Westlink MBO Limited* [2013] eKLR.
8. The court has considered the rival affidavit material and submissions in respect of the motion. 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.”
9. 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.”

10. 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. On the question of the exercise of judicial discretion, the Supreme Court observed in the case of Telkom Kenya Limited v John Ochanda and 996 others [2015] eKLR that:

“In instances where there is delay in filing the notice of appeal, this court has inherent jurisdiction to admit such appeal, provided sufficient explanation is proffered for the cause of delay. The design and objective of the Supreme Court Rules is to ensure accessibility, fairness and efficiency in relation to this court. parties should comply with the procedure, rather than look to the court’s discretion in curing the pleadings before it. This court’s position is that the circumstances of each case are to be evaluated, as a basis for arriving at a decision to intervene, in instances where full compliance with procedure has not taken place....

It is this court’s position of principle that prescriptions of procedure and form should not trump the primary object of dispensing substantive justice to the parties. However, the court will consider the relevant circumstances surrounding a particular case and will conscientiously ascertain the best course. It is to be borne in mind that rules of procedure are not irrelevant but are the handmaidens of justice that facilitate the right of access to justice in the terms of article 48 of the Constitution....”

See also Patrick Wanyonyi Khaemba v Teachers service commission & 2 others [2019] eKLR.

11. The same 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.

12. It is undisputed that the initial reserved judgment date in Nairobi Milimani CMCC No. 1060 of 2017 was February 28, 2020 and that because the trial magistrate was not sitting on the said date, a notice was given that the judgment would be delivered on notice and was eventually delivered on May 29, 2020. It appears that the delivery was without notice to both parties; the Respondent has not furnished evidence to the contrary beyond affirming the date of delivery. The applicants claim that they made follow ups with the court but as the court file was reportedly missing, only learned of the delivery in June 2021. Although it is true that court operations were scaled down from March 2020, no evidence in support of the follow up allegation has been tendered. The delay in bringing the present motion is more than the year, which in the court’s views is inordinate, except for the undisputed extenuating circumstances.
13. Under section 79G of the *Civil Procedure Act* an applicant is obligated to demonstrate ‘good and sufficient cause’ for the court to exercise its discretion. Despite the lengthy delay, and lack of proof of follow up by the applicants and given the undisputed circumstances obtaining in the material period and the fact that the judgement was at first postponed and then delivered some three months later and without notice to the parties, the explanation offered by the applicants may well be plausible. Besides, the respondent has not demonstrated that beyond the postponement of his enjoyment of the fruits of his judgment, he will suffer undue prejudice, or that costs would not be adequate compensation for his inconvenience. The parties have in urging the instant motion traded accusations concerning their respective motivations and intentions regarding the respondent’s declaratory suit. That suit is yet to be heard and is independent of the present matter and its existence, without more, should have no bearing on the outcome of the present application.
14. As regards the merits of the appeal, the language employed in *Mutiso v Mwangi* (supra), suggests that the requirement 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.”

15. Further, 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 v 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...”

16. Considering all the foregoing, it is the court’s considered opinion that despite the delay involved, given the unique circumstances surrounding the delivery of the judgment of the lower court, the applicants cannot be held wholly to blame, and denying them the opportunity to be heard on appeal would amount to an onerous penalty. Accordingly, to facilitate the applicants’ undisputed right of appeal, the court will grant leave to the applicants to file their appeal within 14 days of today’s date. However, all the costs occasioned by the motion are awarded to the respondent in any event.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 24<sup>TH</sup> DAY OF JUNE 2022.**

**C.MEOLI**

**JUDGE**

**In the presence of:**

For the Applicants: Ms Wambua

For the Respondent: Ms. Kisiangani h/b for Mr. Wachira

**C/A: Carol**

