



**Mudibo & another (Suing as the Mother and Legal Representative of the Estate of Noor Mohamed Issa Deceased) v Ojian & another (Miscellaneous Application 126 of 2019) [2022] KEHC 10938 (KLR) (22 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10938 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
MISCELLANEOUS APPLICATION 126 OF 2019  
GMA DULU, J  
JUNE 22, 2022**

**BETWEEN**

**MONICA MERAB MUDIBO ..... 1<sup>ST</sup> APPLICANT**

**MOHAMMED ISSA ..... 2<sup>ND</sup> APPLICANT**

**SUING AS THE MOTHER AND LEGAL REPRESENTATIVE OF THE ESTATE  
OF NOOR MOHAMED ISSA DECEASED**

**AND**

**LEON OJIMBO OJIAN ..... 1<sup>ST</sup> RESPONDENT**

**BONIFACE WANJAU ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before me is an application brought by way of Notice of Motion dated 19<sup>th</sup> November 2019 and filed on 20<sup>th</sup> September 2019 under Order 51 Rule 1 of the *Civil Procedure Rules* 2010, and section 1A, 1B, 3A, 79G and 95 of the *Civil Procedure Act* (Cap.21), and Article 48, 50(1), 159 and 165 of the *Constitution* of Kenya 2010.
2. The application has three (3) prayers, one of which has been spent as follows –
  1. (Spent)
  2. That the court be pleased to extend the time limited for filing the Memorandum of Appeal and consequent Record of Appeal.
  3. That the costs of the application and of the appeal be provided for.



3. The application has grounds on the face of the Notice of Motion that both applicants are the administrators of the estate of Noor Mohammed Issa, and were plaintiffs in Makueni CMCC No. 149 of 2015 wherein they instituted suit against the 1<sup>st</sup> and 2<sup>nd</sup> respondents under the Law Reform Act and the Fatal Accidents Act, and that judgment was delivered on 20<sup>th</sup> February 2019 in the absence of counsel for both parties, and that counsel for the applicants only learnt of the judgment on July 31, 2022, that efforts to obtain certified copies of judgment and proceedings had not been successful to date, and that the respondents will not suffer prejudice if the orders sought are granted as the delay is not inordinate.
4. The application was filed with a supporting affidavit sworn by Mohammed Musa one of the applicants on 19<sup>th</sup> September 2019, in which the grounds of the application were reiterated, and it was further deponed that the intended appeal is arguable and with high chances of success. Annexed to the supporting affidavit are documents, including a Memorandum of Appeal dated 19<sup>th</sup> September 2019.
5. The application has been opposed through a replying affidavit sworn on 4<sup>th</sup> October 2019 by Isabela Nyambura, the Claims Manager of Directline Assurance Company Ltd, in which it was deponed that the application was without merit and an abuse of court process, that the failure to file appeal within the required 30 days was not well explained, and that the delay was inordinate. Additionally, it was deponent that the applicants' counsel deliberately failed to attend court on the scheduled date delivery for judgment, and that the applicants had already been paid the entire decretal amount of Kshs.743,358/= on February 20, 2019, and that they had not provided security for costs in case the appeal is not successful.
6. The application was canvassed through filing of written submissions. In this regard, I have perused and considered the written submissions filed by Kabue Thumi & company advocates for the applicants, and those filed by Kairu & McCourt advocates for the respondents.
7. This being an application for leave to extend time for filing an appeal, it is governed by the provisions of section 79G of the Civil Procedure Act (Cap.21), which provides as follows –

79G. 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 from 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 satisfied the court that he had good and sufficient cause for not filing the appeal in time.”
8. Requests for extension of time to file an appeal have been considered by courts over and over again. Granting such extension is basically an exercise of the court's discretion in order to do justice to litigants. In this regard, in the case of Edith Gichungu Koine v Judith Njagi Thoithi (2014) e KLR the Court reasoned as follows –

“Nonetheless, it (court) ought to be guided by considering factors stated in many previous decisions of this court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance among others ..”
9. The judgment herein was delivered on 20<sup>th</sup> February 2019 and this application filed on 20<sup>th</sup> September 2019, a period of six (6) months. The applicant has however explained, which is not disputed, that their counsel was not present in court when judgment was delivered, and that it took time for counsel to be informed of the contents of the judgment.



10. The respondent on the other hand, has said that the decretal amount of Kshs.743,358/= has been paid to the applicants' counsel. However, I note that the electronic payment slip from DTB Bank filed herein does not indicate the case number for which it was so paid. There is also no accompanying instructions from Directline Assurance Company to the bank to pay or settle the decretal amount herein.
11. In my view therefore, the delay in filing appeal has been sufficiently explained by the applicant as above.
12. It is also likely in my view, that payment for the decretal amount has not been made as alleged above, thus in my view, there will be no prejudice to be suffered by the respondent if the application is allowed.
13. Finally, in line with the provisions of Article 50 of the Constitution and Article 159 of the Constitution relating to right to fair hearing, I find no reason which would persuade me to deny the applicant the right to be heard in Court on Appeal, as from the grounds in the draft Memorandum of Appeal, the appeal herein is filed, is an arguable appeal.
14. I thus allow the application and order as follows –
  1. This court extends the time limited to file the Memorandum of Appeal and consequent Record of Appeal.
  2. The appeal will be filed within 30 days from today.
  3. As there is no appeal yet filed, the applicants will pay the respondents costs of this application.

**DELIVERED, SIGNED & DATED THIS 22<sup>ND</sup> DAY OF JUNE, 2022, IN OPEN COURT AT MAKUENI.**

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**GEORGE DULU**  
**JUDGE**

