



Mupeki Hauliers Limited v Ng'ang'a & another (Miscellaneous Civil Application E190 of 2021) [2022] KEHC 11130 (KLR) (27 July 2022) (Ruling)

Neutral citation: [2022] KEHC 11130 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS CIVIL APPLICATION E190 OF 2021
MM KASANGO, J
JULY 27, 2022**

BETWEEN

MUPEKI HAULIERS LIMITED APPLICANT

AND

ISAAC NJUGUNA NG'ANG'A 1ST RESPONDENT

MENENGAI OIL REFINERIES LTD 2ND RESPONDENT

(Being an application to file an appeal out of time from the judgment of 22nd June, 2021 at Limuru Senior Principal Magistrate's Court (Hon. Mugo, RM) in Civil Case No. 291 of 2017)

RULING

1. Mupeki Hauliers Limited, the applicant has filed a notice of motion application dated August 30, 2021. The applicant seeks by that application, leave to lodge an appeal out of time against the trial court's judgment of June 22, 2021. The applicant additionally by that application seeks stay of execution of the trial court's judgment pending inter partes hearing of that application. The later prayer will not be considered because on March 16, 2022, the application was heard inter partes and the ruling of the application was reserved for today. That prayer for stay of execution for that reason is spent. The only prayer in that application which remains for consideration in this matter is the prayer for leave to file an appeal out of time.

The Law

2. Section 79G of the *Civil Procedure Act* cap 21 provides the period within which a party desiring to appeal the subordinate court decision ought to appeal. That section provides:-

“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. (emphasis mine)

3. The Supreme Court, by its decision in the case of *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral And Boundaries Commission & 7 others* (2014) eKLR discussed the need to abide by timelines set in the law. This is what the Supreme Court stated in that case:-

“Time is a crucial component in dispensation of justice, hence the maxim: Justice delayed is justice denied. It is a litigants’ legitimate expectation where they seek justice that the same will be dispensed timeously. Hence, the various constitutional and statutory provisions on time frames within which matters have to be heard and determined...

Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse.

4. Section 79G of *cap 21* under its proviso requires a party seeking leave to file and appeal out of time, to satisfy the court he has a good and sufficient cause for not filing the appeal out of time. The Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat* (*supra*) gave guidelines on the principles that should be considered by a court in determining an application for leave to file an appeal out of time. This is what the Supreme Court stated as those guidelines:-

“This being the first case in which this court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a court should consider in exercise of such discretion:

1. Extension of time is not a right of a 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 on 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 respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and...”

5. I will bear those guidelines as I consider the evidence presented by the parties.

The Application

6. The application is supported by the affidavit of Peter Mulei the company director of the applicant. By that affidavit, the applicant confirmed the trial court’s judgment was delivered on June 22, 2021. The applicant’s said director referred to a letter written by the applicant’s advocate, to the court administrator of the trial court, dated August 16, 2021.



7. By that letter, the advocate requested trial court's judgment delivered on June 22, 2021. Without any documentary support, the applicant's director deponed, in his affidavit that the trial court's file was "deemed to have been lost" in the court's registry. The deponent further deponed:-

"That the applicant after subsequent follow ups (sic) physically, at the registry, the file was traced and a copy of the said judgment was issued.

That the delay in instructing my advocate to lodge an appeal out of time is inadvertent and not intentional.

That it is therefore my prayer that this court grants me leave to appeal against the judgment that was delivered on July 22, 2021 (correct date is June 22, 2021) and pardon the delay in instructing my advocate to lodge an appeal."
8. Isaac Njuguna Nganga, the 1st respondent opposed the application on the grounds that the trial court's judgment was delivered in the presence of the advocates of the parties; that a 30 days stay of execution was granted by the trial court when that judgment was delivered; that on June 24, 2021 the advocate for the 1st respondent wrote to the applicant's advocates and demanded settlement of the decretal sum; and that in all that time, the applicant failed to lodge the appeal in time. The 1st respondent therefore, stated that the applicant had not provided sufficient reason why it failed to lodge the appeal in time.
9. The 2nd respondent, Menengai Oil Refineries opposed the application on the grounds that the applicant's director were not authorized by a company resolution to swear the affidavit by the applicant which applicant is a limited liability; and that the application is premised on a non-existing appeal.

Analysis

10. The applicant interchangeably argued that it did not file the appeal within time because the judgment of the trial court and the court file were not availed within time and also argued that it inadvertently failed to instruct its advocate to file the appeal. Those two reasons are divergent they both cannot apply at the same time.
11. If the applicant's first reason to the effect that the trial court's judgment and the file were not availed to the applicant in time applies, then the applicant should have obtained a certificate from the trial court as provided under section 79G of *cap 21*. The relevant part of that Section provides that, the period the trial court will certify as being requisite for the preparation and delivery of decree or order, is excluded from the calculation of 30 days within which the appeal should be filed. No such certificate was obtained by the applicant from the trial court.
12. The second reason the applicant gave for not filing the appeal in time is very vague and does not meet the threshold set by the Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat (supra)*. The applicant failed to lay a basis for this court to grant leave to file an appeal out of time.
13. Additionally, the 2nd respondent correctly submitted that the application fails because it was made when the appeal does not exist. That was the holding in the case *Gerald M'limbine vs Joseph Kangangi (2009) eKLR* as follows:-

"My understanding of the proviso to section 79G is that an applicant seeking "an appeal to be admitted out of time" must in effect file such an appeal and at the same time seek leave of court to have an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the court's permission to admit a non-existent



appeal out the stipulated period. To do so would actually be an abuse of the court's process under section 79B".

14. The above holding finds favour with me. The applicant should have filed an appeal and in that appeal ought to have sought the appeal to be admitted out of time. A close look at section 79G *cap 21* will reveal that the section allows an appeal to be "admitted out of time", when the appellant does satisfies the court he has a good and sufficient cause for failing to file within time.
15. The 2nd respondent erred to argue that the applicant's director had no authority to swear the affidavit in support of the application. The requirement for directors of companies to provide evidence of authorization to swear document or represent a company is no longer good law, that law was overturned and was the subject of the decision in the case *Bethany Vineyards Limited & another vs Equity Bank Limited & 2 others* (2020) eKLR as follows:-

"The Court of Appeal approved that decision of the High Court, that is Fubeco China (*supra*), in the case *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* (2015) eKLR as follows:-

"44. The submission that there ought to have been a resolution to authorize the filing of the suit in the name of the company appears to have emanated from a decision of the Uganda High Court which has been followed and applied in this country for a long time; *Bugerere Coffee Growers Ltd v Sebaduka & anor* (1970) 1 EA 147. The court in that case held:-

"When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in this case. Where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action." ...

The Uganda Supreme Court endorsed the decision of the Court of Appeal that the decision in the Bugerere Case was no longer good law as it had been overturned in the case of *United Assurance Co. Ltd v Attorney General*: SCCA no.1 of 1998. The latter case restated the law as follows:-

'... it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company.'"

Disposition

16. For the reasons set out above, the ruling of this court is that the notice of motion dated August 30, 2021 is without merit and is dismissed with costs.
17. The file shall henceforth be closed.

RULING DATED AND DELIVERED AT KIAMBU THIS 27TH JULY, 2022.

MARY KASANGO

JUDGE

In the presence of:-



Coram:

Court Assistant:- Mourice

For Applicant:- Mr. Kiplagat

For 1st Respondent:- Mr. Itonga

For 2nd Respondent:-Ms. Mwangangi

Court

Ruling delivered virtually.

MARY KASANGO

JUDGE

