



**Murai v Mwangi & another (Civil Miscellaneous Application
E005 of 2021) [2022] KEHC 10543 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 10543 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL MISCELLANEOUS APPLICATION E005 OF 2021
GWN MACHARIA, J
JULY 27, 2022**

BETWEEN

GRACE WAMBUI MURAI APPLICANT

AND

ESTHER WAIRIMU MWANGI 1ST RESPONDENT

COOPHOLDING COOPERATIVE SOCIETY LTD 2ND RESPONDENT

RULING

1. The application for consideration is the Applicant's Notice of Motion dated the 25th day of February, 2021 brought under section 1A, 1B of the *Civil Procedure Act*, order 22 rule 22, order 42 rules 4, 6 and 7 and order 50 rules 1&3 of the *Civil Procedure Rules* seeking that:
 - a. The Honourable Court be pleased to grant leave to the applicant/Intended appellant to file an Appeal out of time against the decision delivered on the 6th day of November, 2020 in Naivasha Civil Case No. 448 of 2017.
 - b. Upon grant of leave to appeal out of time, the memorandum of appeal lodged herein be deemed as duly filed.
 - c. This Honourable Court be at liberty to issue such or further/other orders it deems just and expedient to do so in the circumstances.
 - d. The costs of the application abide in the intended appeal.
2. The application is based on the grounds on the face of it and supported by the Affidavit of Grace Wambui Murai.
3. The Respondent filed an affidavit sworn on the 5th day of July, 2021 in which it vehemently opposed the Application.



4. The Applicant filed a further affidavit in support of the Application as well as in response to the Respondent's opposition to the application. The same was sworn on 5th day of August, 2021.
5. Directions were taken that the parties canvass the application by way of written submissions.

The Applicant's/ Intended Appellant's Case

6. The applicant's case is that it was aggrieved by the decision of the trial court not to award damages under the header of future medical expenses despite the evidence in support of the same being overwhelming.
7. The applicant further urged the court that the draft memorandum of appeal filed raised an arguable issue which ought to be considered on merit.
8. The applicant filed its submissions on the 22nd day of October, 2021 in support of the Application.
9. It was the applicant's submissions that the Honourable Court was vested with the discretionary powers to enlarge the time for appeal.
10. The applicant submitted that the length of delay of close to three (3) months was not inordinate. The delay in filing the appeal had been brought about by the anomalies brought about by Covid-19 pandemic.
11. The applicant urged the court to find that the appeal had high chances of success and the respondent would not suffer any prejudice.
12. The applicant relied on the case of *Joseph Schmadevev v Serah Njeri Ngen* (2020) eKLR, where the court allowed an application that was four months delayed on grounds, inter alia: the fact that the judgment was delivered in September 2020, when the corona virus pandemic had slowed down the court's activity, resulting in a 6-month delay.

The Respondent's Case.

13. The respondent in opposing the said application vide a replying affidavit sworn on the 5th day of July, 2021 averred that the Applicant's damages as awarded by the Trial Court as well as costs were settled on the 16th day of November, 2020 and 18th March, 2021 respectively. The respondent averred that the applicant was well aware of the existence of the judgment and even proceeded to accept the sums awarded and the decision to prefer an appeal was an afterthought.
14. It was further averred by the respondent that the applicant had failed to offer any explanation as to what caused the delay in filing of the appeal.
15. Further that the respondent having satisfied the decree would be greatly prejudiced should the application be allowed and the parties go back to litigating.
16. The respondent further urged the Honourable Court to have the applicant deposit the sums already paid to him in a joint interest earning account for purposes of security for costs.
17. The Court of Appeal case of *Paul Musili Wambua v Attorney General & 2 others* [2015] eKLR was relied on by the respondent in urging the Honourable Court to dismiss the Application.

Analysis and Determination

18. I have carefully considered applicant's application, the affidavit in support thereto, the replying affidavit in response to the application, the further affidavits and the rival submissions on record. I find



that the issue for determination is whether the applicant has met the threshold for grant of extension of time to file an appeal.

19. 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.”

20. The principles in considering whether to grant leave to file an appeal out of time were well set out in the case of *First American Bank of Kenya Ltd vs. Gulab P Shab & 2 Others* Nairobi (Milimani) HCCC No. 2255 of 2000 [2002] 1 EA 65 as:

- (i) the explanation if any for the delay;
- (ii) the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;
- (iii) Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.”

21. The foregoing position was reiterated by the Court of Appeal in *Edith Gichugu Koine vs. Stephen Njagi Thoitih* [2014] eKLR, where the Court of Appeal set out the principles undergirding an Application for leave to file an appeal out of time as follows:

“Nevertheless, it ought to be guided by consideration of 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, amongst others...”

22. The Supreme Court in addressing the same issue in Civil Application No. 3 of 2016 - *County Executive of Kisumu –vs- County Government of Kisumu & 7 others* held as follows:

“... 23) It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the court. Further, this court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salatcase to which all the parties herein have relied upon. The court delineated the following as:-

“the underlying 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.”
23. The Respondent rightly pointed out that the applicant has failed to explain the reason for the delay. The Honourable Court has perused the affidavit in support of the application and notes that there has been no reason advanced by the applicant for the delay. The Applicant had the opportunity to file a further affidavit which it did and no reason for delay was advanced. The applicant has only raised the reason for delay being the prevailing Covid-19 challenges in its written submissions.
24. It is trite law that submissions cannot take the place of evidence. The applicant having failed to point out the reason for the delay in its affidavits cannot sneak in the same at the point of submissions.
25. The foregoing was the position taken by the Court of Appeal in *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another* [2014] eKLR:
- “Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”
26. The applicant having not advanced a reason for the delay in the Application, it would suffice to say that no reason has been advanced thus the condition has not been met.
27. As to whether the delay is inordinate, this court finds that the applicant took approximately three months before making known their intention to appeal. The intention was made upon the Respondent satisfying the judgment. The Applicant failed to also apply for proceedings on time as the annexed letter does not indicate whether it was ever received by the Court’s registry or any payments were made towards obtaining the typed proceedings.
28. The Applicant was well aware of the decision of the Honourable Court and even proceeded to receive the sums advanced to them by the respondent. The Honourable Court is of the informed opinion that the decision to appeal was an afterthought.
29. Indeed, there is no definition as to what amounts to inordinate delay and the practice has been that the same is gauged on a case to case basis. In the case of *Utalii Transport Company Limited & 3 Others vs. NIC Bank Limited & Anor* [2014] eKLR the Court held that:
- “Whereas there is no precise measure of what amounts to inordinate delay and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so, on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying court’s mind on the delay, caution is advised for courts not to take the word ‘inordinate’ in its dictionary meaning, but in the sense of excessive as compared to normality.”
30. On whether the annexed memorandum of appeal raise a triable issue, the court is of the opinion that the issue of awards under the header of future medical expenses is one that is arguable. The foregoing



is based on the holding of the Court of Appeal in the case of *Kenya Railways Corporation v Erdemann Property Limited* [2012] eKLR that an arguable appeal is not one which will necessarily succeed but is one that raises arguable grounds.

31. On whether the respondent will be prejudiced, the Honourable Court finds that the mere fact that the Respondent will be dragged back to litigation even after satisfying the judgment would be prejudicial cannot be good enough ground to shut out a party from accessing justice. This is because the same can be compensated by costs.
32. In *Chemwolo and Another vs. Kubende* [1986] KLR 492; [1986-1989] EA 74, it was held that:

“Unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs since the Courts exist for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”
33. On the whole therefore, I find that the prejudice that the Respondent is likely to suffer can be compensated by way of costs.

Disposition

34. In the premises, I lean in favour of allowing the application and order as follows:
 - i. That the application succeeds and the Applicant’s memorandum of appeal shall be deemed as duly filed upon payment of the requisite fees.
 - ii. That applicant shall cause to deposit Kshs. 100,000.00 being security for costs in a joint interest earning account in the name of the respective advocates within thirty (30) days of this ruling in default of which the leave granted shall be vacated.
 - iii. That the applicant files and serves its record of appeal within 45 days of this ruling.
 - iv. That the costs of the application shall abide the outcome of the appeal.
35. It is so ordered.

DATED AND DELIVERED AT NAIVASHA THIS 27TH DAY OF JULY, 2022

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

Mr.Owour for the Applicant/Intended Appellant.

Ms. Kimachia for the Respondent.

