



REPUBLIC OF KENYA



KENYA LAW
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**Ndungu v Family Bank Limited (Miscellaneous Application
114 of 2020) [2022] KEHC 11560 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11560 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS APPLICATION 114 OF 2020**

MM KASANGO, J

JULY 27, 2022

BETWEEN

JOSEPH MUIRURI NDUNGU APPLICANT

AND

FAMILY BANK LIMITED RESPONDENT

(Being an application to file an appeal out of time from the judgment of 9th March, 2020 at Kiambu Chief Magistrate's Court (Hon. S. Atambo, SPM) in Civil Case No. 269 of 2018)

RULING

1. Joseph Murirui Ndungu T/A Blue Springs Farm (hereinafter The applicant) has moved this court by an application of notice of motion dated July 16, 2020. By that application, he seeks an order for this Court to enlarge time and grant the applicant leave to file an appeal out of time in respect to the judgment dated March 9, 2020, in Kiambu Chief Magistrate's Court Civil Case No. 269 of 2018.
2. The applicant deponed in his affidavit in support of the application that he was aggrieved by the aforestated judgment. He further deponed he instructed his advocate to file an appeal against that judgment "but the said advocate abandoned the matter before filing the appeal." The applicant further deponed:-

"That further, due to the COVID-19 containment measures, I was unable to travel to the designated Nairobi Metropolitan area and specifically to Kiambu to work on filing the appeal as he had been affected the cessation of movement order issued by the president since the same was issue while he was at Kinangop Nyandarua County."
3. The application is opposed by Family Bank Limited, the respondent on the grounds that the reasons advanced by the applicant did not show excusable reason why the appeal was not filed in time and on the ground that the applicant had not demonstrated that the appeal had arguable grounds.



Analysis

4. The applicant, as provided under section 79G of the *Civil Procedure Act*, should have filed his appeal within 30 days from the date of the trial court's judgment. This is what that section provides:-

“Time for filing appeals from subordinate courts:

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.”

5. As will be noted from the above section a party who wishes to appeal the decision of the subordinate court is required to file such an appeal within 30 days of the decision. Section 79G of cap 21 has a proviso which permits an appeal to be admitted out of time if the appellant does satisfy the court he has a “good and sufficient cause for not filing the appeal in time.”
6. The Supreme Court in the case *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission and 7 others* (2014) eKLR stated time is crucial in the dispensation of justice. The following is what the said court stated:-

“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.

7. The Supreme Court in that case gave guidance on the principle the court should be considered by a court when required to decide on an application for extension of time. The Supreme Court held that:-

“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 ...”
8. Bearing the above principles in mind, I am of the view that the applicant has approached this court as though the extension of time is a right. He did not present to this court a basis for extension nor did he exculpate himself by showing he was not at fault in failing to file his appeal out of time.
9. The applicant deponed that the following the delivery of the trial court’s judgment he instructed his un-named advocate to file an appeal but that un-named advocate failed to file the same. In a bizarre deposition in his affidavit the applicant stated he was unable to file his appeal because he could not travel to the “designated Nairobi Metropolitan area”. That statement does not assist this court at all in making determination of the present application. The applicant did not state where he was travelling from or to, in order to instruct his advocated to file his appeal. It follows that it is not clear whether he was indeed affected by the government COVID-19 directives on movement of persons. The burden was on the applicant to show basis to the satisfaction of this court that there was sufficient cause why he did not file the appeal in time. The applicant has also failed to show that he brought the present application without undue delay. The judgment the applicant wishes to challenge was delivered on March 9, 2020. The applicant filed the present application on July 17, 2020. The applicant needed to explain the four month’s delay, which he did not. More importantly, and is fatal to the application, is that the applicant failed to show draft grounds of appeal and this Court is unable to determine if he indeed had arguable appeal.
10. The application is without merit and it fails.

Disposition

11. For the above reasons, the notice of motion application dated July 16, 2020 is dismissed with costs.
12. 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:- N/A

For Respondent:- Ms. Kilonzi

Court

Ruling delivered virtually.

MARY KASANGO

JUDGE

