



**Nyaga & another v Kavango & another (Miscellaneous Civil Application E064 of 2021) [2022] KEHC 14394 (KLR) (Civ) (21 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14394 (KLR)

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

**MISCELLANEOUS CIVIL APPLICATION E064 OF 2021**

**CW MEOLI, J**

**OCTOBER 21, 2022**

**BETWEEN**

**JESSE NJAGI NYAGA ..... 1<sup>ST</sup> APPLICANT**

**STELLA M NYAGA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JOSHUA MUTWII KAVANGO ..... 1<sup>ST</sup> RESPONDENT**

**NAIROBI CITY COUNCIL ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. For determination is the motion dated February 17, 2021 by Jesse Njagi Nyaga and Stella M Nyaga (hereafter the 1<sup>st</sup> & 2<sup>nd</sup> Applicant/Applicants) seeking leave to file an appeal out of time against the ruling in Nairobi Milimani CMCC No 4649 of 2008. The motion is expressed to be brought under Section 1A, 1B & 3A of the *Civil Procedure Act* (CPA) and Order 50 Rule 6 & Order 51 Rule 1 of the *Civil Procedure Rules* (CPR) *inter alia*. On grounds, among others that the ruling was delivered in the absence of the Applicants and or their counsel and that the Applicants being dissatisfied with the said ruling are desirous of filing an appeal.
2. The motion is supported by the affidavit of the 2<sup>nd</sup> Applicant, sworn in her own behalf and on behalf of the 1<sup>st</sup> Applicant. The gist of her affidavit is that by a ruling delivered on May 11, 2017 the subordinate court dismissed the Applicants' motion earlier brought to set aside orders dismissing their suit, Nairobi Milimani CMCC No 4649 of 2008 for want of prosecution; that the trial court had initially scheduled the said ruling for February 28, 2020, but on the said date the court was no sitting and the Applicants were informed that the ruling would be delivered on notice; that soon thereafter, the Covid-19 Pandemic broke out hindering movement on due to government restrictions ; and that the ruling notice from the court was not given.



3. Further she swears that, upon the lifting of restrictions and opening of the court, counsel on record learnt that the ruling had been irregularly delivered on March 5, 2020 without notice and in the absence of parties ; that the Applicants are aggrieved by the ruling and desire to file their appeal which has a high chance of success ; and that the Applicants stand to suffer great prejudice if the orders sought are denied. The deponent states that her motion was filed timeously expresses willingness to comply with any conditions that this court may impose.
4. The Nairobi City Council (hereafter the 2<sup>nd</sup> Respondent) opposes the motion through grounds of opposition dated July 12, 2021. It particularly takes issue with the motion on grounds; that the Applicants have not declared the whole period of delay; that the partial reasons advanced by the Applicants to cover a portion of the duration of the delay are not satisfactory; that the delay has been intentional and contumelious; that the 2<sup>nd</sup> Respondent will be prejudiced if the extension sought is granted; and that while the Applicants seek an equitable remedy, the Applicants themselves do not adhere to the doctrines of equity. Finally, that the application was brought almost ten months after the lapse of the stipulated period of filing appeal, which delay is inordinate.
5. The 1<sup>st</sup> Respondent did not participate in the instant proceedings despite being duly served.
6. The motion was canvassed through written submissions. Counsel for the Applicants addressed the court on two issues, namely, whether the delay has been satisfactorily explained; and whether prejudice will be occasioned to the 1<sup>st</sup> Respondent if the court grants the leave sought to file an appeal out of time. Concerning the first issue, counsel called to aid the decisions in *Roseline Mbugi & Another v Iron Art Ltd* – Nairobi HC Misc App No 446 of 2019 and *Bank of Africa Ltd v Put Sarajevo General Engineering Co Ltd & 2 Others* – Nairobi HCCC No 51 of 2017. He submitted that delay has been satisfactorily explained, as the ruling of the lower court was delivered without notice to the parties as evidence by the copy thereof placed before the court. Moreover, that the intended appeal is arguable and that it was undisputable that the onset of the Covid-19 pandemic had affected court operations, making it difficult for counsel obtain the outcome of the motion/ruling.
7. On the second issue, counsel argued on the strength of the decision in *Bank of Africa Ltd (supra)* that no prejudice is likely to be visited on the Respondent as proceedings in the subordinate court had already been obtained paving way for the expeditious processing of the appeal and the court ought to allow the motion as prayed.
8. In his submissions, counsel for the 2<sup>nd</sup> Respondent while placing reliance on the decision in *County Executive of Kisumu v County Government of Kisumu & 8 Others* [2017] eKLR argued that the Applicants have not met the requisite threshold for the grant of the order sought. That it is trite that in an application of this nature the whole period of delay should be declared and explained satisfactorily. Principally because, the grant of leave to file an appeal out of time is discretionary as held in the of-cited decision of *Nicholas Kiptoo Korir Arap Salat v IEBC and 7 others* [2014] e KLR. Counsel contended that the ruling was delivered before the court operations shut down on account of the pandemic and that operations resumed in July of 2020 whereas the Applicants only moved the court in late February of 2021. Thus, he urged that the motion ought to be dismissed with costs.
9. The Court has considered the rival affidavit material and submissions in respect of the motion. What is sought is enlargement of time within which to file an appeal against the ruling and order in Nairobi Milimani CMCC No 4649 of 2008. However, this court notes that the Applicants have failed to specifically cite the provisions of Section 79G of the *Civil Procedure Act* in the instant motion. That said, the omission in itself is not fatal. See - *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* [2013] eKLR.



10. Section 79G of the [Civil Procedure Act](#) which specifically applies to the instant motion 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.”

11. 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.”

12. 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.

13. 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.

14. The Applicants have by way of explanation averred that that the ruling date in Nairobi Milimani CMCC No 4649 of 2008 with respect to their motion was reserved for February 28, 2020 but that on the said date the court was not sitting, and parties were advised by the court assistant that the said ruling would be delivered on notice. It was further contended that counsel would subsequently discover that the impugned ruling was delivered on March 5, 2020 without notice to the respective parties or counsel. And that subsequently court operations were scaled down due to the onset of the Covid-19 pandemic.
15. A perusal of the ruling attached to the Applicants motion as (Annexure SMN-2) lends credence to the Applicants averment that the impugned ruling was delivered in the absence of the respective parties. Unfortunately, the Applicants have not demonstrated to the court when exactly their counsel learnt that the ruling of the court had been delivered and or attempts made by him to confirm if the ruling had been delivered. The Applicants’ annexure marked SMN-4 is a copy of a letter from the Applicants’ counsel to the court dated August 28, 2020 from which it might well be deduced that counsel for the Applicants learnt of the ruling on or about the said date. The 2<sup>nd</sup> Respondent on its part only filed grounds of opposition and failed to tender evidence on whether prior notice of the ruling date was served upon the parties. However, it is apparent from the ruling that neither party attended the delivery of the ruling, giving some credence to the Applicants’ assertion that indeed no notice was given to the parties.
16. There can be no dispute as to the onset of and general effect of the Covid-19 pandemic and the court takes judicial notice that although the Government had issued limited restrictions by mid- February 2020, the official notice of the scaling down of court operations took effect on March 16, 2020 pursuant to National Council on Administration of Justice (*NCAJ*) directive. Further that, it was not until late July that court operations resumed in some semblance of normalcy. Even then, physical access to the courts was undeniably limited as most court operations and processes had been moved online.
17. The instant motion was filed on February 18, 2021, hence the delay is almost a year, which in this court’s views is significant, though not inordinate in the circumstances. Section 79G of the *Civil Procedure Act* states that a successful applicant ought to demonstrate ‘good and sufficient cause’ for the court to exercise its discretion. The court is willing to reluctantly accept the Applicants’ explanation. Moreso as no serious prejudice is shown as likely to be visited upon the Respondents, and in my view,



costs will be adequate compensation. In addition, the Court can impose conditions to ensure that the matter is expedited.

18. On the viability of the intended appeal, upon a review of the draft memorandum of appeal attached to the 2<sup>nd</sup> Applicant's affidavit, the court is persuaded that it appears to raise issues serious enough to deserve the court's consideration on appeal. The Court of Appeal in *Visbva Stone Suppliers Company Limited v RSR Stone (2006) Limited* (2020) eKLR stated that an arguable appeal is not one that will necessarily succeed "so long as it raises a bona fide issue for determination by the Court."

19. In that case, 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 vs. 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..."

20. Considering all the foregoing, the court is persuaded that, to facilitate the Applicants' undisputed right of appeal, it ought to allow the motion with costs to the 2<sup>nd</sup> Respondent in any event. The appeal is to be filed within 14 days of this ruling and reckoning from the date of filing of the memorandum of appeal, the record of appeal shall be filed and served within 45 days. In default of any of these conditions, the leave granted herein will lapse automatically.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 21<sup>ST</sup> DAY OF OCTOBER 2022.**

**C. MEOLI**

**JUDGE**

**In the presence of:**

For the Applicant: N/A

For the Respondent: N/A

C/A: Carol

