



Mburu & another v Gatheca & another (Miscellaneous Civil Application E240 of 2021) [2022] KEHC 15635 (KLR) (24 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15635 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS CIVIL APPLICATION E240 OF 2021
MM KASANGO, J
NOVEMBER 24, 2022**

BETWEEN

MERCY WAMBUI MBURU 1ST INTENDED APPELLANT

MBURU GITAU 2ND INTENDED APPELLANT

AND

JOSEPH KIMANI GATHECA 1ST RESPONDENT

PAUL NJENGA KIMANI 2ND RESPONDENT

(Being an application for leave to file an appeal out of time from the judgment of the Chief Magistrate's Court At Gatundu (Hon. L.M. Wachira) dated 23rd August, 2021 in Civil Case No. 227 of 2017)

RULING

1. The applicants have filed a notice of motion application dated November 3, 2021 and the substantive prayer in that application is for leave to be granted to file an appeal out of time of the judgment in Gatundu Chief Magistrate's Court Civil Case No 227 of 2017.
2. Judgment in that matter where the applicants seek to appeal out of time was delivered on August 23, 2021. Section 79G of the *Civil Procedure Act* prescribes that an appeal should be filed within 30 days of the Judgment or order. Section 79G provides thus:-

“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 a good and sufficient cause for not filing the appeal in time.”

3. The applicants in accordance with the provision of the Section ought to have filed their appeal on September 22, 2021.
4. The Supreme Court has provided guiding principles applicable when the courts consider application for leave to file appeal out of time in the case *Nicholas Kiptoo Arap Korir Salat v Independent Electoral And Boundaries Commission & 7 others* [2014] eKLR. The court in that case set out the principles as follows: -

“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
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time”.

5. The applicants by their affidavit in support of the application acknowledge that the subject judgment was delivered on August 23, 2021. Although they state that they instructed their then advocate W. Gichio & Co. Advocates to file an appeal, there is no written communication to that effect provided in this matter. More importantly there is no indication on which date such instructions to appeal were given to that advocate. The applicants then deponed thus:-

“That after waiting for a while without progress, I visited the said firm of advocates who then informed me that no appeal had been filed.

That failure to file an appeal within the period stipulated by law was occasioned by the negligence of our advocates then on record.”

6. The respondents opposed the application through their replying affidavit. The respondents provided copies of communication whereby their advocate sent a letter on September 1, 2021 to the applicants’ then advocate and informed that advocate the decretal sum payable. The applicants’ advocate responded on that very day by email and stated: -

“We are in receipt of your email and the enclosed letter dated 1/9/2021.



Allow us to tabulate the costs and thereafter shall revert back to you.”

Analysis

7. The Supreme Court in the case of *Nicholas Kiptoo Arap Korir* (*supra*) plainly stated that extension of time is not a right of a party. It is only available to deserving party. The applicants by that jurisprudence had a burden to provide evidence which would lead the court to exercise its unfettered discretion in their favour.
8. The court in as far as the case of the applicants is concerned, is faced by ‘double speak’. The applicants deponed they instructed their then advocate to file an appeal. Their then advocate on the other hand on the relevant period was communicating to the respondents’ advocate that once the costs were tabulated, the judgment amount will be paid.
9. From the above, it becomes obvious that the applicants are not deserving in this Court exercising its discretion in their favour. They are not candid. The application for that reason fails.

Disposition

10. The orders of the court are that:-
 - (a) The Notice of Motion dated November 3, 2021 is dismissed with costs.
 - (b) The file shall henceforth be closed.

RULING DATED AND DELIVERED AT KIAMBU THIS 24TH DAY OF NOVEMBER, 2022

MARY KASANGO

JUDGE

In the presence of

Coram:

Court Assistant: Julia

No appearance:- Instructed by Jospeter & Co. Advocates for the applicants:

Mr. Mathenge:- Instructed by Wokabi Mathenge & Co. Advocates for the Respondents

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE

