



Gateway Insurance Company Limited & another v Panga & another (Legal representatives of the Estate of Kahindi Kitsao Ndundi (Deceased)) (Miscellaneous Application 17 of 2022) [2022] KEHC 15718 (KLR) (23 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15718 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS APPLICATION 17 OF 2022
SM GITHINJI, J
NOVEMBER 23, 2022**

BETWEEN

GATEWAY INSURANCE COMPANY LIMITED 1ST APPLICANT

SANLAM GENERAL INSURANCE COMPANY LIMITED 2ND APPLICANT

AND

FREDRICK CHARO CHENGO 1ST RESPONDENT

TATU MWANGOLO PANGA 2ND RESPONDENT

**LEGAL REPRESENTATIVES OF THE ESTATE OF KAHINDI KITSAO NDUNDI
(DECEASED)**

RULING

1. For determination is the applicant's Notice of Motion dated March 1, 2022 seeking the following orders;
 1. Spent.
 2. That the honorable court be pleased to grant leave to lodge an appeal out of time against the whole judgment of Hon O Onalo in Malindi CMCC no 161 of 2019 delivered on October 29, 2021.
 3. That the leave be granted to the applicants to file their Memorandum of Appeal in terms of the draft memorandum of appeal dated February 28, 2022; annexed is the affidavit of Joan Oburu.
 4. That there be stay of execution of the judgment and decree in Malindi CMCC no 161 of 2019 pending the hearing and determination of this application.



5. That there be stay of execution of the judgment and decree in Malindi CMCC no 161 of 2019 pending the hearing and determination of the intended appeal.
 6. That the costs of this application be in the cause.
2. The application is supported by the sworn affidavit of Joan Oburu the legal manager of the 2nd applicant who stated on January 14, 2020, the trial court in the declaratory suit directed the application to strike out the defendant's statement of defence be disposed of by way of written submissions and gave a mention date for March 17, 2020 which was not realized due to closure of courts on March 15, 2020 due to Covid 19.
 3. It was stated that on January 26, 2022, the respondents' advocates served the applicants' advocates with a tabulation of their costs following the delivery of judgment on October 29, 2021 in Malindi CMCC no 161 of 2019. She further stated that on February 9, 2022, the applicants' advocates followed up on the judgment and realized that a ruling had been delivered striking out the applicants' statement of defence and entered judgment for the respondents against the applicants for a sum of kshs 1,333,498 plus costs and interests tabulated at kshs 2,426,557/=. Further that the applicants' advocates had not been notified of the ruling and were not aware of its delivery on October 29, 2021.
 4. Ms Joan Oburu further stated that the appeal raises triable issues and the same should be allowed to go to full trial. Further they are willing to deposit the entire decretal sum in a joint interest earning account.
 5. The respondents did not file a response to the application.

Analysis and determination

6. I have read the submissions by the applicant. The respondent did not file any submissions. The issue for determination is whether the application is merited.
7. Under section 79G of the *Civil Procedure Act*, time for filing an appeal from judgment of the subordinate court to the High court is 30 days.
8. In the case of *Charles Karanja Kiiru vs Charles Gitinji Muigwa* [2017] eKLR where the respondent had delayed for 41 days before filing an appeal and the High court enlarged time to enable the respondent file an appeal out of time, the appellant got aggrieved by the order enlarging time claiming that the learned Judge erred in law and fact by exercising his discretion and extending time for filing an appeal out of time yet no sufficient reason had been offered to justify the same. The Court of Appeal, relying on the case of *Wanjiru Mwangi & Another* [2015]eKLR and *APA Insurance Co Ltd vs Michael Kinyanjui Muturi*[2016]e KLR dismissed the appeal.
9. The Court of Appeal in the above case gave guidance that whenever an application for extension of time is before a court, the court ought to take into account several factors as observed by Odek JJA in *Edith Gichungu Koine vs Stephen Njagi Thoitih* [2014] eKLRthus:

Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”
10. The Court of Appeal further expressed that there is a duty imposed on courts to ensure that the factors considered are consonant with the overriding objective of civil proceedings litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court.



11. In this matter, judgment was delivered on October 29, 2021. The applicants contend that they only became aware that the same had been delivered on January 26, 2022 when they were served with a tabulation of costs. Further, a follow up was made on February 9, 2022 and the instant application filed on March 22, 2022.
12. From the above facts, it's my view that there is no sufficient explanation to justify the enlargement of time. From the time they were served with the said tabulation of costs to the time of filing this application, the applicants did not sufficiently account for the delay. I find that the application lacks merit and the same is hereby dismissed with costs to the respondents.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 23RD DAY OF NOVEMBER, 2022.

S M GITHINJI

JUDGE

