



REPUBLIC OF KENYA



**Muchiri v Musyimi (Miscellaneous Civil Application E556 of 2021)  
[2022] KEHC 16756 (KLR) (Civ) (22 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16756 (KLR)

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

**CIVIL**

**MISCELLANEOUS CIVIL APPLICATION E556 OF 2021**

**CW MEOLI, J**

**DECEMBER 22, 2022**

**BETWEEN**

**PETER MUCHIRI ..... APPLICANT**

**AND**

**RICHARD NDONGA MUSYIMI ..... RESPONDENT**

*(Being an application for leave to file an appeal out of time against the whole judgment and decree in Nairobi Milimani SCC No E103 of 2021 delivered on September 23, 2021.)*

**RULING**

1. For determination is the motion dated November 16, 2021 by Peter Muchiri (hereafter the applicant) expressed to be brought under section 1A, 1B & 3A of the *Civil Procedure Act* (hereinafter CPA) and orders 50 rule 6 & 50 rule 1 of the *Civil Procedure Rules* (hereafter CPR). The applicants' primary prayer seeks leave to file an appeal out of time against the whole judgment and decree in Nairobi Milimani SCC No E103 of 2021. The motion is premised on grounds *inter alia*, that the applicant being dissatisfied with the judgment of the lower court intends to appeal against the whole judgment whereas the time allowed to file an appeal has run out.
2. The motion is supported by the affidavit of Donald B Kipkorir, counsel having conduct of the matter on behalf of the applicant, competent, and authorized to depose. The gist of his affidavit is that judgment in Nairobi Milimani SCC No E103 of 2021 was delivered on September 23, 2021; that the applicant being aggrieved and dissatisfied with the said judgment intends to file an appeal; however that the time within which to lodge an appeal lapsed on October 23, 2021. He states that the instant motion has been made without inordinate delay and expresses the applicant's willingness to offer such security as the court may deem necessary for due performance of the decree.



3. The motion is opposed through the replying affidavit sworn by Richard Ndonga Musyimi (hereafter the respondent). He deposes that the motion has not been made *bona fides* and is an abuse of the court process. He asserts that an appeal from the small claims court to the high court can only be on matter of law; that the affidavit in support of the motion is defective for having been deposed by a person who is not a party to the suit; and that the applicant has not explained why it took over two months to file the application which ought therefore to be dismissed with costs.
4. The motion was canvassed by way of written submissions. Counsel for the applicant anchored his submission on the provisions of section 79G of the *Civil Procedure Act* and the decisions in *Nicholas Arap Korir Salat v IEBC & 7 others* [2014] eKLR, *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR, *Joseph Gitahi Gachau & another v Pioneer Holdings (A) Limited & 2 others* [2009] eKLR and *Stanley Kangethe Kinyanjui v Tony Ketter & others* [2013] eKLR. It was contended that the motion was brought without unreasonable delay and that an arguable appeal is not one which must succeed but one which raises even a single bona fide issue. That the degree of prejudice likely to be suffered by the respondent if the motion is allowed would be far less than that likely to befall the applicant if the motion is denied.
5. The respondent despite being given ample opportunity to file submissions failed and or neglected to do so.
6. The court has considered the rival affidavit material and the applicant's submissions in respect of the motion. What has specifically been sought for by the applicant is leave to file an appeal out of time against the whole judgment and decree in Nairobi Milimani SCC No E103 of 2021. Despite having raised the issue of stay of execution pending hearing and determination of the intended appeal in his motion and having submitted on the same, the specific relief was not sought in the motion.
7. Before considering the live prayer for leave to appeal out of time, the court will briefly address itself first on the preliminary point whether the motion before it is fatally defective as argued by the respondent. The objection arises from the undisputed fact that the motion was supported by an affidavit sworn by counsel whom the respondent view as a stranger, not being party to the instant proceedings. The applicant on his part did not rebut and or address the preliminary issue raised by the respondent.
8. The motion is support by the affidavit of Donald B Kipkorir, who specifically deposes that

“I am an advocate of the High Court of Kenya and practicing in the firm of KTK Advocates, who have the conduct of this matter on behalf of the applicant and thereby competent and duly authorized to swear this affidavit”.

As rightly asserted by the respondent, counsel is not a party to proceedings. However, he has expressly stated that he has conduct of the matter on behalf of the applicant and is therefore competent to depose.

9. No doubt counsel on record for the applicant is privy to certain pertinent facts and would be able to depose to non-contentious issues. Rule 8 of the *Advocate (Practice) Rules* states: -

“No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:



Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.”

10. As a matter of good practice advocates ought to refrain from giving evidence in contentious matters, but this does not bar them from deposing affidavits in non-contentious matters. The rationale behind the rule is to bar and shield the advocate from entering the fray or arena between his client and adverse parties. See *Nyamogo & Nyamogo Advocates v Kogo* (2001) EA 174 and *Simon Isaac Ngugi v Overseas Courier Services (K) Ltd* [1998] eKLR
11. Further order 19 rule 3(1) of the *Civil Procedure Rules* states that:
  - “(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove.”
12. The Court of Appeal in *Hakika Transporters Services Ltd v Albert Chulah Wamimitaire* [2016] eKLR citing its decision in *Salama Beach Ltd v Mario Rossi*, CA No 10 of 2015, expressed the principle as follows:
  - “As regards the appellant’s objection regarding the affidavit supporting the application, it is clear that Mr Munyithya has deponed only to matters within his personal knowledge as counsel acting in this matter both in the High Court and in this Court. Ordinarily counsel is obliged to refrain from swearing affidavits on contentious issues, particularly where he may have to be subjected to cross examination (See Pattni v Ali & 2 others, CA No 354 of 2004 (UR 183/04). Rule 9 of the Advocates (Practice) Rules however permits an advocate to swear an affidavit on formal or non-contentious matters.” (Emphasis added).
13. Equally in this case, counsel is not a stranger to the proceedings and the affidavit material appears to relate to issues within his personal knowledge, and which strictly speaking, may not qualify as contentious. That however is not license for counsel to enter into the shoes of his client as appears expedient to both, but the objection is not upheld, nevertheless.
14. On the merits of the motion, the power of the court to grant leave to file an appeal out of time is expressly donated by section 79G, as well as generally, under section 95 of the *Civil Procedure Act*. Counsel for the applicant generally swore that after delivery of the subject judgment on September 23, 2021, the applicant though aggrieved with the said judgment did not appeal within time.
15. The principles governing the grant of leave to appeal out of time are settled. The successful applicant must demonstrate “good and sufficient cause” for not filing the appeal in time. In *Thuitha 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 general the 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.”



16. 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 or her 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.

17. 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.”

18. The Supreme Court in the case of *Nicholas Kiptoo Korir Arap Salat v IEBC & 7 others* [2014] eKLR 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.

19. The delay in this case is about two months. The Court of Appeal in *Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 others* [2019] eKLR stated that:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained hence a plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour.”

20. In this case, the applicant did not give a concrete explanation for delay and the depositions in that regard appeared vague. A party seeking extension of time must not be seen to presume on the court’s discretion. The court therefore agrees with the respondent that indeed the applicant has not expressly stated the good and sufficient cause behind the failure to file the memorandum of appeal within prescribed time. General assertions that time for appeal had lapsed and that the delay is not inordinate, in the absence of concrete and sufficient explanation are not enough.
21. Nevertheless, given the brief period of delay involved and to facilitate the applicant’s right of appeal, the court will allow the motion on condition that the applicant shall deposit the entire decretal sum into court within 14 days. Time will be reckoned in accordance with the provisions of order 50 rule 4 of the *Civil Procedure Rules*. The court awards the costs of the motion to the respondent in any event.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 22<sup>ND</sup> DAY OF DECEMBER, 2022.**

**C MEOLI**

**JUDGE**

**In the presence of:**

For the applicant: Ms Anyango h/b for Kipkorir

For the respondent: Ms Gulenywa h/b for Ms Gichohi

C/A: Adika

