



**Kibisu v Njuguna & another (Miscellaneous Civil Application 468 of 2019)
[2022] KEHC 16757 (KLR) (Civ) (22 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16757 (KLR)

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

CIVIL

MISCELLANEOUS CIVIL APPLICATION 468 OF 2019

CW MEOLI, J

DECEMBER 22, 2022

BETWEEN

KELVIN LWANGU KIBISU APPLICANT

AND

ISAAC MUCHIRI NJUGUNA 1ST RESPONDENT

ONESMUS WAWERU 2ND RESPONDENT

RULING

1. For determination is the motion dated February 2, 2021 by Kelvin Lwangu Kibisu (hereafter the applicant) seeking that the time within which to file an appeal as ordered on May 7, 2020 be extended by seven (7) days. The motion is expressed to be brought under section 79G of the *Civil Procedure Act* (CPA) and order 50 rule 5 & order 51 rule 1 of the *Civil Procedure Rules* (CPR) inter alia. On grounds, among others that, the applicant's motion seeking leave to file an appeal out of time was allowed however efforts to access the ruling bore no fruit hence the instant motion.
2. The motion is supported by the affidavit sworn by the Nelson Kaburu counsel on record for the applicant, and duly authorized him to depose. The gist of his affidavit is that vide a motion dated June 17, 2019 the applicant sought leave to file an appeal out of time and upon hearing ruling was reserved for April 21, 2020. He explains that around the that date the Covid-19 pandemic struck, scaling down court operations, thus the ruling was not delivered as scheduled and no notice was issued by the court indicative of when the ruling would be delivered.
3. That a notice was subsequently issued listing the matter for ruling on May 7, 2020 and having arranged to attend the virtual court sessions his efforts to join the same failed. Counsel goes on to depose that vide emails dated June 3, 2020, June 23, 2020 and July 7, 2020 he made requests for a copy of the said ruling and to allow for perusal of the court file and on August 31, 2020 but his court clerk was denied



access to the court precincts on account of the ongoing Covid-19 pandemic. That efforts to follow up on the foregoing were unsuccessful as the court failed to respond to email correspondence and it was not until January 29, 2021 that he stumbled upon the said ruling thus necessitating the instant motion. In conclusion he deposes that the time within which to file the appeal has since lapsed whereas the applicant is desirous to appeal.

4. The motion was opposed through the replying affidavit of Wamae Ndegwa dated October 3, 2021 counsel on record and having conduct of the matter on behalf of Isaac Muchiri and Onesmus Waweru (hereafter the 1st and 2nd respondent/respondents) thus duly authorized to depose. He attacks the motion by asserting that counsel for the applicant was aware of the ruling date but failed to attend for reasons which have not been sufficiently placed before the court.
5. He further asserts that the applicant has shown disinterest in the matter noting that the earlier motion which is the subject of the ruling delivered on May 7, 2020 was filed pursuant to laxity on his part. That court business should not be handled in a cavalier manner as such the applicant ought to bear the consequences of his indolence. Counsel goes on to depose that the decretal sum has since been settled by his instructing client whereas the applicant having failed to comply with the outcome of the ruling delivered on May 7, 2020 should not be allowed to approbate and reprobate. In his view, it would be unjust to allow the motion as such urged the court to dismiss the same with costs.
6. The motion was canvassed through written submissions. Counsel for the applicant reiterated his affidavit material and urged that the court ought to enlarge time for filing of the appeal as no prejudice beyond costs will be suffered by the respondents.
7. Despite being given ample opportunity the respondents failed and or neglected to file written submissions with respect to the motion.
8. The court has considered all the matters canvassed in respect of the motions as well as the background thereto. The applicants' motion essentially seeks to invoke this court's power to enlarge time. In the circumstances of this case, order 50 rule 6 of the Civil Procedure Rules which has not been specifically invoked, is the provision applicable in an application for enlargement of time. Order 50 rule 6 of the Civil Procedure Rules provides that;-

' Where a limited time has been fixed for doing any act or taking any proceedings under these rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.'

9. What then are the applicable principles? In the case of *Nicholas Kiptoo Korir Salat v Independent Electoral and Boundaries Commission and 7 Others [2014] e KLR*, the Supreme Court stated 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:

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;



A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court

Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;

Whether there will be any prejudice suffered by the respondents if the extension is granted;

Whether the application has been brought without undue delay; and

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

10. The case of *John Tomno Cheserem vs Sammy Kipketer Cheruiyot [2018] eKLR* in which a motion was brought under rule 4 of the *Court of Appeal Rules* appears to have specific relevance to the matter at hand as rule 4 of the Court of Appeal Rules is in pari materia with the provisions of order 50 rule 6 of the Civil Procedure Rules. The application in that case was for enlargement of time or leave to file a record of appeal out of time. The court (Mohammed J) observed that:-

- ' 7. The principles guiding the court on an application for extension of time premised upon rule 4 of the rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is therefore upon an applicant under this rule to, explain to the satisfaction of the court that he is entitled to the discretion being exercised in his favour. In exercising my discretion I ought to be guided by consideration of the factors started in previous decisions of this court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and any interested parties if the application is granted, and whether the matter raises issues of public importance. In the case of *Fakir Mohammed v Joseph Mugambi & 2 Others*, Civil Appln No Nai 332/04 (unreported) this court rendered itself thus:-

'The exercise of this court's discretion under rule 4 has followed a well-beaten path since the structure of 'sufficient reason' was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors.'

- (8) The matters to be considered are not exhaustive and each case may very well raise matters that are not in other cases for consideration. In *Mwangi v Kenya Airways Ltd*, [2003] KLR 48, the court having set out matters which a single judge should take into account when exercising the discretion under rule 4, went on to hold:-



'The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered.'

11. As asserted in the applicant's affidavit material, the ruling with respect to the motion seeking leave to file an appeal out of time was not delivered as scheduled on account of Covid-19 pandemic that led to scaling down of court operations. A review of the record of proceedings reveals that the ruling on the applicant's motion dated June 17, 2019 was scheduled for April 21, 2020 however the same was not delivered on the foresaid date but rather on May 7, 2020. Further on the latter date, neither the applicant nor the respondent were present when the ruling was delivered by the court. The court takes judicial notice of the fact that in or around March of 2020 the Covid-19 pandemic struck and the then Chief Justice issued practice directions on the online conduct of court business and limiting of physical access to court precincts.
12. As such it is plausible that during the transition period there may have been challenges pertaining to virtual court proceedings and counsel may have been unable to attend to the matter when the ruling was delivered. Further the applicant has also through (annexures A, B, C, D, E & F) demonstrated the efforts made through emails to obtain a copy of the court's ruling and or perusal of the court file. This court is convinced that the applicant exercised the requisite diligence to obtain a copy of the ruling of the court.
13. The respondents have argued that the intended motion has been overtaken by events because the respondents have settled the decretal sum in contention. Such event cannot override the applicant's right of appeal. The Court of Appeal in *Visbva Stone Suppliers Company Limited v RSR Stone (2006) Limited (2020) eKLR* 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;'
14. In the circumstances, the court allows the motion. Time allowed for the filing of the appeal will be reckoned in accordance with the provisions of order 50 rule 4 of the Civil Procedure Rules. The respondents are awarded the costs of the motion in any event.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 22ND DAY OF DECEMBER 2022



C MEOLI

JUDGE

In the presence of:

For the Applicant: No appearance

For the Respondents: No appearance

C/A: Adika

