



**Micro Mobile Limited v Marquee Imports Limited (Civil Appeal
E691 of 2021) [2022] KEHC 16768 (KLR) (Civ) (22 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16768 (KLR)

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

CIVIL

CIVIL APPEAL E691 OF 2021

CW MEOLI, J

DECEMBER 22, 2022

BETWEEN

MICRO MOBILE LIMITED APPLICANT

AND

MARQUEE IMPORTS LIMITED RESPONDENT

RULING

1. For determination is the motion dated 22.10.2021 by Micro Mobile Limited (hereafter the Applicant) seeking that the court be pleased to admit out of time the appeal filed herein and deem it as properly filed. The motion is expressed to be brought under section 3A, 79G & 95 of the Civil Procedure Act (CPA) and Order 51 Rule 1 of the Civil Procedure Rules (CPR) inter alia. On grounds, among others that, the Applicant is aggrieved by the ruling of the lower court and appealed the decision after the time for lodging the appeal had since lapsed.
2. The motion is supported by the affidavit sworn by John Mbaluto counsel on record for the Applicant, who has personal conduct of the matter. The gist of his affidavit is that the ruling in Nairobi Milimani CMCC No. 3305 of 2018 was delivered on November 22, 2019 and the Applicant being aggrieved thereby has appealed outside the stipulated period. He explains that delay in filing the appeal was caused in part by delay in obtaining a copy of the ruling in time despite his request made on January 21, 2020 and that a copy of the ruling was received on October 19, 2021 whereupon the Applicant promptly filed the instant appeal. Counsel asserts that the appeal raises prima facie triable issues with reasonable prospects of success as such it is fair, just and in interest of justice the motion be allowed. In conclusion he deposes that the right of appeal is enshrined in the Constitution and Marquee Imports Limited (hereafter the Respondent) stands to suffer no prejudice if the motion is allowed.
3. The Respondent opposed the motion through the replying affidavit of Mahul Shah dated 18.01.2022 a director of the Respondent. He asserts that from the affidavit in support of the motion the Applicant



had time to request for a copy of the ruling and extract the impugned order. He asserts that no explanation has been proffered by the Applicant as to why it never bothered to apply for a copy of the ruling within the statutory period after delivery of the ruling; and that Applicant has not demonstrated by way of correspondence the efforts or endeavors made to obtain the impugned order for an entire twenty-two months before the appeal was subsequently filed.

4. In his view, the Applicant is guilty of laches, undeserving of the discretionary orders sought having intentionally, inexplicably, inordinately and inexcusably delayed pursuing the appeal. He goes on to depose that the instant motion is a mere afterthought and an abuse of the court process, and the Respondent would be prejudiced if the motion is allowed. That the Applicant's constitutional right of appeal is circumscribed by the corresponding obligation to comply with statutory timelines within which to file an appeal.
5. The motion was canvassed by way of written submissions. Counsel for the Applicant anchored his submissions on the provisions of section 79G & 95 of the *Civil Procedure Act* and the decision in *MFI Document Solutions Ltd v Paretto Printing Works Limited* [2021] eKLR to argue that the court has powers to enlarge time and that the Applicant has explained the delay herein. Concerning the arguability of the appeal counsel calling to aid the decisions in *Maureen Agutu v Paul Mboya* [2019] eKLR, *David Mithamo Gatitu v Boniface Karimi Nyamu* [2015] eKLR and *James Njenga & another v Samwel Ngetich* [2018] eKLR submitted that the memorandum of appeal raises triable issues to warrant this court's discretion to admit the appeal out of time. The court was thus urged to allow the motion.
6. Counsel for the Respondent while equally placing reliance on section 79G of the *Civil Procedure Act* contended that the appeal filed herein is time barred on account of the fact that the Applicant failed to offer a satisfactory explanation for the delay of twenty-two months. Citing *Mwangi S. Kimenyi v AG & another* [2004] eKLR and *Loldia Limited v Kariuki Waitihaka* [2004] eKLR counsel asserted that the long delay was intentional and designed to deny the Respondent its dues. That the motion is an excuse to cover up mistake of counsel ought to be dismissed with costs.
7. The Court has considered the rival affidavit material and submissions in respect of the motion. 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.”

- i. In court's measured view, the words that “an appeal may be admitted out of time” in Section 79G, appears to admit both retrospective and prospective applications. So that leave under this section may be sought before or after a memorandum of appeal is filed. In the instant matter an appeal has been filed and the Applicant seeks to regularize the same. It is trite that a successful applicant with respect to the foregoing 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.”

8. 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.

9. The same 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.

10. The Applicant has not refuted the fact that the ruling of the lower court was delivered on November 22, 2019(Annexure JMM-1) therefore construing time in accordance with Order 50 Rule 4 of the Civil Procedure Rules, the appeal as ought to have been filed on or about the 14.01.2020. A letter dated January 20, 2020(Annexure JMM-1) requesting for a copy of the ruling delivered in Nairobi Milimani CMCC No. 3305 of 2018 was received by the court on 21.01.2021. Subsequently, the appeal herein was filed on 22.10.2021, some twenty-two months after the ruling of the lower was delivered.
11. It is the court’s opinion that the explanation given by the Applicant appears limp because no material has been placed before the court indicating the Applicant’s attempt to follow up, on the request for a copy of the ruling by way of reminder letters to the court during the intervening twenty-two months. The delay in this case is about twenty-two months. In the circumstances of this case, the delay is inordinate and has not been sufficiently explained in any plausible manner. A party seeking extension of time must not be seen to presume on the Court’s discretion.
12. Regardless of the espoused potential of the proposed appeal, the Applicant has effectively forfeited its right of appeal through its own laxity. The Respondent cannot be made to pay the price of the laxity by extending the life of the litigation. That would be an affront to the overriding objective and the constitutional injunction that justice ought not to be delayed. The court agrees with the Respondent that indeed the Applicant has not demonstrated good and sufficient cause why it failed to file the memorandum of appeal within prescribed time. In the result, the justice of the matter lies in dismissing the motion with costs. It is so ordered.

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

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Ms. Mwangi

For the Respondent: Ms. Wangui h/b for Mr. Kazatu

C/A: Adika

