



**MHCS v Nyambega (Civil Suit 42 of 2018) [2021] KEHC 87 (KLR)
(Commercial and Tax) (23 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 87 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 42 OF 2018
MW MUIGAI, J
SEPTEMBER 23, 2021**

BETWEEN

MHCS APPLICANT

AND

ONDIEKI MOSE NYAMBEGA RESPONDENT

RULING

NOTICE OF MOTION

1. The Applicant filed a notice of Motion Application dated 29th January 2021 for orders that
 1. The Applicant be granted leave to file and serve a Notice of Appeal out of time against the Ruling of this Court dated 13th March 2020.
 2. The Applicant be granted leave to file and serve the record of appeal within such extended time.
2. Which application was supported by the sworn Affidavit of Philip Kisaka Sikolia dated 29th January 2021 and based on the grounds that;
 - a. On 13th March 2020 the Court disallowed the Defendant's application for leave to amend his Defence and Counterclaim to include a claim for defamation.
 - b. The Defendant being dissatisfied by the said ruling applied for a Certified Copy of the Ruling and leave to Appeal against the said decision which leave was granted.
 - c. Before the Defendant could obtain the Ruling and/or file the Appeal the Court operations were closed down as part of the Government containment measures following the outbreak of the Covid-19 pandemic.



- d. On 13th October 2020 the Applicant formally requested for a copy of the Ruling despite having paid for the same it remained difficult for us to make a follow up on the ruling since the court premises were closed to the public with all court proceedings conducted virtually.
- e. Following the court directions issued on 20th January 2021 the Applicant managed to get a Certified Copy of the Ruling but since time for filing and serving the Notice of Appeal and lodging the record of appeal was already spent it is imperative that the Court grants extension of time to enable the filing of the Appeal.
- f. The Defendant is desirous of pursuing the intended Appeal and the issues raised in the intended Appeal are of great public importance thus necessary to be adjudicated upon by the Appellate Court.
- g. The Application has been made promptly and without any undue delay on the part of the Applicant.

REPLYING AFFIDAVIT

3. The Application was opposed vide the sworn Affidavit of Paul. W. Wafula dated 16th March 2021 and stated that; -
 1. Contrary to the Applicant's averments, the Respondent stated that even after the scaling down of court operations sometime in March 2020 Court and registry services were being availed to advocates and their clients albeit electronically.
 2. The Applicant could have filed its Notice of Appeal within the statutory timeline which timeline lapsed on 27th March 2020 but failed to do so.
 3. The Applicant contended that it could not file the Notice of Appeal on time as it had not procured a copy of the ruling it intended to Appeal against. It is trite law that a copy of the Ruling is not required to file a Notice of Appeal.
 4. This Court's discretion to invoke the orders sought in the absence of any and/or sufficient explanation why the Applicant failed to file the Notice of Appeal has not been properly invoked.
 5. The present Application was filed after attempts by the Respondent to fix this matter for hearing. The said Application has been filed to delay the expeditious hearing of this matter. The Application has been filed over 10 months since the delivery of the Ruling.
 6. The Respondent prays that the Application be dismissed with cost.

APPLICANT'S SUBMISSIONS

4. The Applicant submitted that the High Court may extend time for giving notice of intention to appeal from a judgment of the High Court as provided under Section 7 of the [Appellate Jurisdiction Act](#) as follows: -

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.



5. The Applicant submitted that its notice of appeal and application for certified copies of proceedings ought to have been filed within fourteen (14) and thirty (30) days from 13th March 2020, which fell on 27th March 2020, for the filing of the Notice of Appeal and 12th April 2020, for the lodging of the letter bespeaking certified copies of proceedings. Before the Applicant could obtain the ruling and/ or file the Notice of Appeal, the court operations were closed down as part of the Government containment measures following the outbreak of the Covid-19 pandemic.
6. It was the Applicant's submission that the closure of the courts across the country following the outbreak of Covid-19 is not only a plausible but also a satisfactory explanation as to the failure by the Applicant to file his Notice of Appeal on or before 28th April 2020.
7. The Applicant urged the Court to consider whether the it has offered a "plausible and satisfactory explanation for delay ...that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercised."

RESPONDENT'S SUBMISSIONS

8. The Respondent submitted that the principles on which the court exercises its jurisdiction in extending time for filing time bound pleadings out of time are well settled. Some of the considerations guiding the court in such situations include the length of the delay, the reason of the delay, the chances of the Appeal succeeding if the application is granted and the degree of prejudice to the Respondent if the Application is granted. Including the need to do justice to the parties.
9. The ruling sought to be appealed against was delivered on 13th March 2020, the present Application was filed belatedly on 29th January 2021. The delay in filing this Application has not been explained and is thus undoubtedly inordinate and unreasonable in the circumstances.

DETERMINATION

10. After considering the Application, the Response and the submissions filed by the parties, issue for determination is whether to extend time for filing the Notice of Appeal out of time.
11. It is important to take note that the power to grant leave extending the period of filing an Appeal out of the statutory period is discretionary and must be granted on a case by case basis. The granting of the said leave is not a right, it must be exercised judiciously and only after the Applicant seeking the exercise of the discretion gives the Court sufficient reason(s) to persuade the Court that the discretion should be exercised their favour.
12. In the case of *Paul Musili Wambua versus Attorney General & 2 others* the Court of Appeal in considering an application for extension of time and leave to file Notice of Appeal out of time stated the following;

"...it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general, the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted."

Length of the delay



13. The present Application was filed on 29th January 2021 and the impugned ruling was issued on 13th March 2020. The Applicant stated that it formally requested for a copy of the ruling on 13th October 2020. Further, the Applicant argued that on 20th January 2021 it sought the Court's directions with regard to obtaining a copy of the Ruling following which the Applicant managed to get a Certified Copy of the Ruling. The present Application was filed on 21st January 2021. The delay in filing the application was for over nine months which amounts to inordinate delay.
14. In the case of *Gerald Kitbu Muchanje versus Catherine Muthoni Ngare & another* the Court of Appeal observed that; -

“There is no maximum or minimum period of delay set out in law. However, a prolonged and inordinate delay is more likely than not to disentitle the applicant of such leave. Likewise, the reason or reasons for the delay must be reasonable and plausible.”

The reason for the delay

15. The reason for the delay tendered by the Applicant was that before the Applicant could obtain the Ruling and/or file the Appeal the Court operations were closed down as part of the Government containment measures following the outbreak of the Covid-19 pandemic.
16. The Applicant gave the disruption caused by the COVID-19 pandemic as one of the reasons why it failed to lodge its Notice of Appeal within the statutory time frame.
17. The COVID-19 pandemic is unprecedented and it disrupted the court operations from March 2020 to the June 2020 as per the official documents availed by the Applicant. Therefore, there was scaling down of the Courts' activities. The Ruling was delivered virtually online in March 2020 but the physical Court file and Ruling enclosed were released on 5th May 2020 to the Registry.
18. In this case the Applicant argued that on 15th October 2020 it requested for a copy of the Ruling but did not explain the delay from June 2020 to the 15th October 2020 when the Courts' activities had resumed and documents were being filed and matters were being conducted through virtual hearings.
19. The Applicant filed its Application in January 2021 and this is a clear indicator that they were not keen on pushing forward with their appeal.

DISPOSITION

20. The Court finds that the reasons given for delay are not satisfactory hence there are no special circumstances to justify the grant an extension of time. The Application dated 29th January 2021 is dismissed with costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 23RD SEPTEMBER, 2021. (VIRTUAL CONFERENCE DUE TO CORVID 19 PANDEMIC MEASURES RESTRICTING OPEN COURT OPERATIONS AS PER CHIEF JUSTICE DIRECTIONS OF 17TH APRIL 2020)

M.W. MUIGAI

JUDGE

WALKER KONTOS FOR PLAINTIFF

P.S. KISAKA FOR DEFENDANT

