



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**MISCELLANEOUS CIVIL APPLICATION NO. E024 OF 2021**

**CORAM: HON. R.E. ABURILL J**

**STECOL CORPORATION LIMITED.....APPLICANT**

**VERSUS**

**SUSAN AWUOR MUDEMB.....RESPONDENT**

**RULING**

1. The Applicant herein is Stecol Corporation Limited, a limited liability company whereas the Respondent is Susan Awuor Mudemb. By an application dated 16<sup>th</sup> September 2021 by way of Notice of Motion, the applicant seeks for:

***(1) spent***

***(2) That this court be pleased to grant the applicant leave to appeal out of time against the judgment of Hon. M. Agutu. Senior Resident Magistrate in Ukwala PMCC No. 13 of 2019 delivered on 22/6/2021;***

***(3) That E026 of 2021 Stecol Corporation Ltd Vs Susan Awuor Mudemb suing as administrator of the Estate of Innocent Moses Oketch be deemed as duly filed and served;***

***(4) That costs of this application be provided for.***

2. That application is supported by 7 grounds on the face thereof among them, materially, that the appeal has good chances of success; that the delay in filing the appeal was inadvertent and excusable due to the problem with network filing system; that the delay was for only one day; that the application is brought in good faith and as such no prejudice shall be suffered by the Plaintiff if the application is allowed; that the applicant is willing to abide by any reasonable and just consideration that this court may impose in allowing this application; and that it is in the interest of justice to allow the application.

3. The supporting affidavit is sworn by Collins Orieyo advocate for the applicant wherein he reiterates the grounds in support emphasizing that the appeal No. E026/2021 was filed on 23/7/2021 one day late due to the problem with one line network issues and annexing copy of Memorandum of Appeal in E026 of 2021 dated 16<sup>th</sup> July 2021 and filed in court on 23/7/2021.

4. Opposing the application, the Respondent through her advocates MBLaw LLP filed 9 grounds of opposition dated 14<sup>th</sup> October 2021 on 19/10/2021 contending that the applicant has not given any good or sufficient cause for the delay in filing the appeal within the time provided under Section 79G of the Civil Procedure Act; that the application is an afterthought, an abuse and misuse of the judicial process; that the Respondent shall suffer great prejudice if an extension of filing of the appeal is granted or the application is allowed; that the applicant should not hide behind Article 159(2)(d) of the Constitution as Section 79G of the Civil Procedure Act is clear on filing of appeals from subordinate courts; That the applicant did not serve the Respondent with the Memorandum of Appeal within seven days of filing as provided for in Rule 12 of the Civil Procedure Rules; that the appeal was filed with the sole purpose of delaying execution proceedings in the lower court; that the appeal is mischievous, contemptuous and an abuse of and misuse of the judicial process; that the Memorandum of Appeal filed on 16<sup>th</sup> July 2021 is fatally defective, incompetent and nullity ab initio; and that the application and prayers sought are unmeritorious and ought to be dismissed with costs to the Respondent.

5. The application was argued orally before me on 19/10/2021 with Mr. Orieyo advocate submitting on behalf of the applicant whereas Mr. Mayende advocate submitted on behalf of the Respondent, opposing the application with vigour.

6. The submission by Mr. Orieyo mirror the grounds and affidavit in support of the Notice of motion as reproduced above and therefore it is

pointless to rewrite them here. Mr. Orieyo emphasized that the delay of one day in filing the appeal was not inordinate and that it was occasioned by the technical hitches of the internet network in that despite sending the Memorandum of appeal to court for virtual filing on 20/7/2021, the same only reached court on 23/7/2021 which was a day after the last day of filing of the appeal from Ukwala SRM CC No. 13 of 2019. Mr. Orieyo urged this court to exercise discretion and allow the Memorandum of appeal as filed to be deemed to be duly filed within time in order to accord the applicant an opportunity to be heard on appeal. He relied on the case of **Aviation Cargo Ltd Vs St. March Freight Services Ltd** rendered by this court explaining the discretion of the court in extending time for filing an appeal out of time.

7. Opposing the appeal, Mr. Mayende on behalf of his client entirely relied on his grounds of opposition which are reproduced hereinabove and insisting that no sufficient reasons had been advanced to explain the delay in filing of the appeal. He maintained that the filed appeal is incompetent and incurable. He relied on this court's decision in **APA Insurance Ltd Vs Nicholas Muturi [2016] eKLR** emphasizing that there was no evidence of any email sending the Memorandum of appeal to this court for filing on 20/7/2021 as alleged by the applicant and or that such email ever bounced.

8. Mr. Mayende further argued that the application is made in bad faith and is an afterthought as it was done after the Respondent filed an application to strike out the appeal No. E026 OF 2021 that was filed out of time. He prayed for dismissal of the applications with costs.

## **DETERMINATION**

9. I have considered the application by the applicant, the grounds, supporting affidavit, grounds of opposition and oral submissions for and against the application as supported by cited authorities. In my view, the main issue for determination is whether the application has any merit and therefore whether the orders sought should be granted.

10. According to the applicant's counsel, he received instructions to file an appeal from Ukwala PMCC No. 13/2019 against judgment delivered on 22/6/2021 but that despite preparing the Memorandum of appeal dated 16/7/2021, he was unable to file it as the network did not accept the Memorandum of appeal until 23/7/2021 which was a day late and on the latter date, HCCA No. E026 of 2021 was received by the court and filed.

11. From the opposition put forth by the Respondent, upon the latter realizing that the appeal had been filed out of time, she filed an application to strike out the appeal and that is when the applicant filed this application to validate the filed appeal. According to the Respondent, no good reasons have been advanced explaining the delay in filing of the appeal hence this court's discretion should not be exercised. Mr. Mayende relied on the **APA Insurance Co. Ltd** (supra) case which, apparently, is in favour of the applicant as the court exercised discretion and extended time for filing of an appeal out of time.

12. 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.

13. In this case, the judgment sought to be challenged was rendered on 22/6/2021. It follows that any appeal challenging that decision ought to have been filed on or before 22/7/2021. Instead, the applicant's counsel filed the appeal on 23/7/2021 which was one day late and has come before this court seeking to have the time enlarged and the appeal filed out of time validated and be deemed to be duly filed within the time so enlarged.

14. The Respondent's counsel viciously opposes the application stating that the same is abuse and misuse of judicial process and an afterthought. Further, that besides mere allegation of a technical hitch hindering the filing of the appeal in time, no evidence by way of an email sending the appeal to court has been exhibited.

15. In **Charles Karanja Kiiru Vs Charles Githinji Muigwa [2017]eKLR** where the Respondent had delayed for 41 days before filing an appeal and where the High court enlarged time to enable the respondent file an appeal out of time, the appellant was 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 cited this court's decision in **Wanjiru Mwangi & Another [2015]eKLR** and **APA Insurance Co. Ltd Vs Michael Kinyanjui Muturi[2016]e KLR** in dismissing the appeal.

16. I will therefore entirely rely on the above binding Court of Appeal decision in determining the merits of this application which is two pronged namely:- ***whether the prayer for extension of time is merited and whether this court can validate an appeal which was filed out of time.***

17. Under Section 79G of the Civil Procedure Act:

***“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 a good and sufficient cause for not filing the appeal in time.*** [Emphasis added].

18. The Court of Appeal in the above Case guided 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 Thoithi [2014]eKLR** thus:

***“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.”*

19. The Court of Appeal further guided that there is also 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.

20. As earlier stated, it is obvious that the appeal No. E026/2021 was filed one day out of the 30 days stipulated in Section 79G of the Civil Procedure Act.

21. The reason given for the delay hence this application to validate the appeal is that the network did not allow filing of the appeal dated 16/7/2021 until 23/7/2021. No email has been exhibited to demonstrate the failure of the court's internet to receive the Memorandum of Appeal, at least, initially, for invoicing purposes before payment is done and the document received and printed and stamped for filing.

22. Nonetheless, the delay is only one day. In **Kamlesh Mansukhalal Damki Patni Vs Director of Public Prosecution & 3 Others [2015]eKLR**, the Court of Appeal articulated that:

*“It must be realized that courts exist for the purpose of dispensing justice. Judicial officers derive their judicial power from the people, or as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of the Constitution which succinctly states that “judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.” Judicial officers are also state officers, and consequently, are enjoined by Article 10 of the Constitution to adhere to national values and principles of governance which require them whenever applying or interpreting the Constitution or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity, are upheld.*

*For these reasons, decisions of the courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve. Such decisions may involve only parties inter se (and hence only parties' interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice.”* (emphasis added).

23. The Court of Appeal in the above case agreed with the sentiments of the learned Judge of the High Court and I concur that:

*“It suffices to comment that a court of law should be hesitant at closing the door to the corridors of justice prior to a litigant being heard on his complaint. So far the applicant did not have a chance to file a defence. He sought to set aside that default judgment and that application was dismissed on a date he contents the same was not due for hearing and when he had no notice.....”*

24. Article 48 of the Constitution guarantees every person access to justice, in addition, under Article 50(1) of the Constitution, every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

25. The ultimate goal and purpose of the justice system is to hear and determine disputes fully. It follows that no person who has approached the court seeking an opportunity to ventilate their grievances fully should be locked out. In the instant case, the applicant filed the appeal one day late and has approached this court for extension of time as stipulated in Section 79G of the Civil Procedure Act, the proviso thereof. Reasons or no reasons for that delay, it is before the court seeking to be granted a chance to agitate its appeal challenging the judgment of the lower court.

26. There is no evidence that the application is an afterthought or how the same is intended to abuse court process. Further, it is not uncommon for clients to instruct their counsel who procrastinate on filing court processes and only wake up when time for such filing has elapsed. Courts have over time excused parties where such delay is not inordinate as is in this case and even in cases where there is inordinate delay, depending on the circumstances of each case and reasons for the delay, courts have accorded parties an opportunity to be heard on appeal. Furthermore, there is no evidence to demonstrate what prejudice the Respondent will suffer if the applicant is granted extension of time.

27. Albeit the Respondent maintained that no sufficient reason was given for the one day lateness, in **Belinda Mural & 9 Others Vs Amos Wainaina [1978]eKLR**, the Court of Appeal – Law JA, citing other cases such as **Shah H. Bharmal & Brothers Vs Kumar [1961]EA 679** where it was held that:

*“Mistakes of a legal adviser may however amount to ‘sufficient cause under the East African Rule.’”*

28. And in **Hamam Singh & Others Vs Mistri [1971]EA 122** where it was held that:

*“...in relation to applications to this court for leave to appeal out of time, it has been held that mistakes of a legal advisor may amount to sufficient cause but not inordinate delay on his part...”*

29. No doubt, the discretion of this court to enlarge time for filing of a late appeal is unfettered. However, that discretion must be exercised judiciously and not capriciously. On the material placed before me and supported by the above decisions, I am satisfied that the one-day delay is not inordinate or unreasonable and therefore failure to establish sufficient cause or reason is not a reason for this court to fetter its

discretion to lock the door of justice to the applicant. This is not to say that this court would condone or forgive inordinate delays but that it must do whatever is necessary to rectify mistakes where it serves the interests of justice.

30. For all the above reasons, I find and hold that the application for enlargement of time to file an appeal out of 30 days challenging judgment in Ukwala PMCC 13 of 2019 is merited. The same is hereby allowed.

31. The second limb of this application is whether the applicant's appeal, being HC E026/2021 having been filed out time on 23/7/2021 instead of 22/7/2021 before seeking leave herein, can be validated with leave and therefore deemed to be duly filed.

32. Again, the Court of Appeal in **CA 71/2016 between Charles Karanja Kuru Vs Charles Githinji Muigwa** (supra), was faced with a similar situation. The superior court posed the following question:

*“Having expressed ourselves as herein above the other issues that falls for considered is whether the appeal filed out of time on 24<sup>th</sup> October 2014 could be deemed as being properly on record. There is a plethora of authorities from the High court which interpret the proviso to Section 79G of the Civil Procedure Act to mean that an appeal filed out of time can be admitted as being properly on record once extension of time is granted. Emukule J. in the Gerald M'Limbine Vs Joseph Kangangi [2009]eKLR stated that:*

*“my understanding of the proviso to Section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal and at the same time seek leave of court to have an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the court's permission to admit a non-existent appeal out of the stipulated period to do so would actually be an abuse of the court's process under Section 79B.”*

33. The Court of Appeal in the above stated case cited with approval Aburili J in **Martha Wambui Vs Irene Wanjiru Mwangi & Another** (supra) where this court stated:

*“In my view, the use of the term “admitted” connotes both the act of allowing an appeal to be filed out of time and also the act of allowing or permitting an appeal already filed to be admitted out of time.....”* see also **APA Insurance Ltd Vs Michael Kinyanjui Muturi** (supra).

The Court of Appeal went on to state;

*“This is the position this court has taken when dealing with applications for extension of time. We have always, and we believe lawfully so, deemed as fully filed applications without leave where leave is sought and subsequently granted. Learned counsel for the appellant submitted that this position as found to be untenable by the Supreme Court which pronounced itself as follows in the **Nicholas Arap Korir Salat Vs Independent Electoral and Boundaries Commission & 7 Others** [2014]eKLR (Salat case):*

*“.....counsel for the applicant acknowledged having already filed his appeal. He now prays for extension of time and urges that once so granted, the Petition of appeal already filed be deemed to have been duly filed.*

*What we hear the applicant telling the court is that he is acknowledging having file a ‘document’ he calls ‘an appeal’ out of time without leave of the court. Pursuant to Rule 33(1) of the Court's Rules, it is mandatory that an appeal can only be filed within 30 days of filing the Notice of Appeal. Under Rule 53 of the Court's Rules, this court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one needs to first seek extension of that time before he can proceed to do that which the law requires.*

*By filing an appeal out of time before seeking extension of time, and subsequently seeking the court to extend time and recognize such ‘an appeal’, is tantamount to moving the court to remedy an illegality. This, court cannot do.*

*To file an appeal out of time and seek the court to extend time is presumptive and inappropriate.no appeal can be filed out of time without leave of the court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this court will not accept a document filed out of time without leave of the court.”* (Emphasis added).

26. In our view however, the Salat case was in respect of Rule 53 of the Supreme Court Rules which simply provides as follows:

*“The court may extend the time limited by these Rules or by any decision of the court.”*

*That Rule only applies to applications before the Supreme Court and not before any other court. Conversely, Rule 4 of the Court of Appeal Rules provides as follows on extension of time:*

*“The court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the court, or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and any reference in these Rules to any such time shall be construed as a reference to that time as extended.”* (Emphasis added).

*“We find it necessary to cite the above Rule in entirety because even assuming the learned Judge was wrong in deeming*

*the appeal as having been deemed to have been duly filed, this court would still have jurisdiction to validate the said leave if it deemed it appropriate to do so, moreover, in our view under Order 50 Rule 6 of the Civil Procedure Rules on which the learned Judge relied, the court has power to enlarge time-“Upon such time as the justice of the case may require.” If therefore the learned Judge finds it in the interest of justice to deem an already filed document as having been duly filed then his discretion in that respect should not be fettered.*

**27. From the record before us, we are satisfied that the learned Judge addressed himself to all the facts and evidence placed before him arriving at the conclusion that...**

34. The above, Court of Appeal decision is in parimateria with this application. The applicant first filed CA E026/2021 one day out of the 30 days stipulated in Section 79G of Civil Procedure Act. It then filed this application to enlarge time for filing of the appeal and to deem the filed appeal as duly and properly filed.

35. The Respondent on realizing that the appeal was filed out of time, expeditiously filed an application therein seeking the appeal to be struck out on the ground that it was filed out of time. However, that application was not brought before me for consideration.

36. The Applicant then filed this application seeking enlargement of time and validation of the appeal filed out of time and the application was filed under Certificate of urgency and it was so certified.

37. Considering all the matters discussed in the Charles Karanja (supra) decision, where the Court of Appeal agreed with use of two different decisions cited. That an appeal filed out of time could still be validated with leave sought thereafter to enlarge this time, I find no reason to differ from the wise decisions of the superior court.

38. Accordingly, I find and hold that the Siaya HCA E026/2021 filed out of time is deemed to be duly and properly filed with leave of this court herein being granted enlarging the period within which the said appeal should have been filed by one day.

39. In the end, I find the application by the applicant herein and appeal in HCCA E026/2021 meritorious. I grant the prayers sought and order as follows:

**1) That the Applicant is granted leave to file an appeal out of time against the judgment in Ukwala PMCC No. 13 of 2019 delivered on 22/6/2021;**

**2) That the Siaya HCCA E026 of 2021 which was filed on 23/7/2021 one day out of the statutory period of 30 days is hereby deemed to be fully and properly filed and served;**

**3) That the application for striking out Siaya HCCA E026 of 2021 on account of it having been filed out of time is hereby spent;**

**4) The Applicant to expeditiously extract this ruling and process the prosecution of Siaya HCCA E026 of 2021;**

**5) That each party shall bear their own costs of this application.**

**6) This file is effectively closed.**

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 22<sup>ND</sup> DAY OF OCTOBER 2021**

**R.E. ABURILI**

**JUDGE**