



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAJIADO**

**MISC. CIVIL APPLICATION NO. E037 OF 2021**

**CECILIA WANJIKU WATHITHI ALIAS**

**CECILIA WANJIKU ALIAS WANJIKU WATHITHI.....APPLICANT**

**VERSUS**

**NDURUMO ELIZABETH.....1<sup>ST</sup> RESPONDENT**

**OSCAR PETER LAYIAYO.....2<sup>ND</sup> RESPONDENT**

**RULING**

The Applicant herein seeks leave to file an appeal against the judgment of Hon. Edwin Mulochi, Resident Magistrate in Kajiado CMCC No. 406 of 2016 delivered on 29<sup>th</sup> March 2019. The Notice of Motion, dated 12<sup>th</sup> August 2021, is brought under various provisions of the law as shown on the face of it.

The grounds in support of the Notice of Motion are found on the face of it and in the Supporting Affidavit sworn by the Applicant on 12<sup>th</sup> August 2021. The main grounds in support of this application are that the matter in the trial court was fixed for mention to confirm filing of submissions on 22<sup>nd</sup> March 2021. The advocate for the Applicant did not attend court on that day due to inadvertent failure on her part to properly diarize the matter. Subsequent to that date, judgment was scheduled to be delivered on 29<sup>th</sup> March 2021 when it was indeed delivered without notice to the Applicant's counsel. In that judgment, the Applicant was awarded Kshs 500,000 for general damages and Kshs 766,100 for special damages.

The Applicant's counsel was not aware that judgment had been delivered in the matter until 19<sup>th</sup> July 2021 when she sent a representative to the court to find out the status of the matter with a view to filing submissions. Upon perusal of the judgment, counsel found out that the award in general damages was too low given the serious injuries the Applicant had suffered. This necessitated her to contemplate the intended appeal. She wrote to the court on 22<sup>nd</sup> July 2021 seeking to be supplied with certified copies of the proceedings and judgment for purposes of filing an appeal. She also prepared this application and filed the same.

It is argued that the Applicant has an arguable appeal with high chances of success. It is argued that if this application is not granted, the appeal will be rendered nugatory as the Applicant stands to suffer great loss as the award of general damages is not commensurate with the injuries suffered. This court was urged to consider this application in the interest of justice and fairness given that the application has been brought without undue delay.

This application is being disposed of through written submissions. It is not opposed given that the defendants did not enter appearance in the lower court. The Applicant through her counsel filed her submissions on 8<sup>th</sup> November 2021. She has argued in that her application meets the threshold for grant of leave to file out of time. She has relied on section 79G and 95 of the Civil Procedure Act to argue the point 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 out of time and that the court may, in its discretion, enlarge time even though the time fixed or granted may have expired.

It was submitted that the Applicant has sufficient reasons to warrant the exercise of this court's discretion to grant an extension of time. The Applicant relied on *Thuita Mwangi v. Kenya Airways Ltd* [2003] eKLR. In this case the Court of Appeal listed matters that the court ought to take into account in deciding whether to grant extension of time or not to grant. These factors include the length of delay, the reason for that 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.

It is submitted that the Applicant's advocate took quick action on learning that judgment had been delivered and therefore the delay was not inordinate. It is submitted that the reasons for the delay have been explained. It is argued that judgment was delivered without notice to the Applicant or counsel. She urged the court that the mistake to diarize the date by the advocate should not be visited on the Applicant and that the intended appeal has high chances of success and that the respondent will not suffer prejudice because the respondents did not participate in this trial in the lower court despite service.

I have considered this matter. I have taken into account the reasons advanced for failure to attend court during delivery of judgment. I have considered the grounds of the intended appeal. I have considered the applicable law and the cited authorities. I am satisfied that the Applicant has an arguable intended appeal. I am also satisfied that the reasons given for failure to file the intended appeal within time are sufficient reasons. I am satisfied that the Applicant has met the threshold for extending time. Consequently, I hereby allow the application herein. I grant an extension of time to the Applicant to file the intended appeal. She shall prepare a Record of Appeal and file the same within 60 days from the date of this ruling. Contemporaneously with filing of Record of Appeal, she shall file written submissions. Orders shall issue

accordingly.

**Delivered, dated and signed this 30<sup>th</sup> November 2021.**

**S. N. MUTUKU**

**JUDGE**