



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**MISC. CIVIL APPLICATION NO. E090 OF 2020**

**EVERLYN MURINGI GITHOGORA .....APPLICANT**

**VERSUS**

**EQUITY BANK (KENYA) LIMITED.....RESPONDENT**

**AND**

**GRACE WAMUYU MATHENGE.....1<sup>ST</sup> INTERESTED PARTY**

**GEEPARK LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. **Everlyn Muringi Githogora** (hereafter the Applicant) has by a motion dated 4<sup>th</sup> March, 2021 sought leave of this court to file an appeal out of time in respect of the ruling in **Milimani Civil Suit No. 8604 of 2019**. The motion is expressed to be brought inter alia under Section 3A, 63(e), 79G and 95 of the Civil Procedure Act and Order 50 Rule 5 of the Civil Procedure Rules and is premised on the grounds on the face of the motion which are amplified in the affidavit sworn by the Applicant.

2. The gist of the affidavit is that the Applicant is aggrieved by the ruling of the lower court delivered in the absence of her counsel on 11<sup>th</sup> December, 2020 and desires to appeal; that the lower court ruling had been scheduled for delivery on 4<sup>th</sup> December, 2020 but was not delivered until 11 December 2020, without notice to the Applicant ; and that her counsel only came to learn about the ruling while doing a follow up on the position of the matter, by which time, the period stipulated for filing an appeal had lapsed . The Applicant deposes the intended appeal as demonstrated in the draft memorandum of appeal raises serious issues and has a high chance of success, and that the Applicant will suffer loss if leave is denied.

3. The motion was opposed by replying affidavits filed by Equity Bank (Kenya) Limited (hereafter the Respondent), and **Grace Wamuyu Mathenge** (hereafter the 1<sup>st</sup> Interested Party).

4. **Kariuki King'ori** describing himself as the manager legal services in the Respondent swore the replying affidavit on behalf of the Respondent. He deposes that the ruling date of 4<sup>th</sup> December 2020 had been reserved by the lower court on 13<sup>th</sup> November, 2020 in the presence of all parties, and the ruling was indeed delivered as scheduled, contrary to the Applicant's assertions. He points out that the Applicant has not tendered any evidence that she or her counsel attended court on that date; that the Applicant has neither demonstrated that she made any follow up concerning the ruling after the 4<sup>th</sup> of December 2020, nor specify when her counsel eventually learnt that the ruling had been delivered and; that the delay of three (3) months in presenting the motion is inordinate and evidence that the intended appeal is an afterthought.

5. The 1<sup>st</sup> Interested Party in opposing the motion deposes that it is baseless, lacking in merit and an abuse of the court process. She further deposes the Applicant has not given good and sufficient reason for the delay and her motion ought to be dismissed.

6. The motion was canvassed by way of written submissions as directed on 15<sup>th</sup> May, 2021. The Applicant anchored her submissions on the provisions of Section 79G & 95 of the Civil Procedure Act, Order 50 Rule 6 of the Civil Procedure Rules and among other authorities, the decisions in **Thuita Mwangi v Kenya Airways [2003] eKLR**, **Nicholas Kiptoo Korir Arap Salat v IEBC & 7 Others [2014] eKLR**. Counsel submitted that the court ought to exercise its discretionary power by allowing the motion in favour of the Applicant as the intended appeal raises weighty issues. Citing **Donald O. Raballa v Judicial Service Commission & Another [2018] eKLR** it was asserted that the delay of barely two months was not inordinate and had been adequately explained. On likely prejudice on the Respondent, it was argued that the Respondent and the Interested Parties could be adequately compensated by an award on costs. The court was urged to grant the motion.

7. The Respondent submitted that the relevant considerations remain as enunciated in **Leo Sila Mutiso v Rose Hellen Wangari Civil Application No. Nai. 255 of 1997 (1999) 2 EA 231**. Counsel for the Respondent contended that the Applicant is guilty of inordinate delay and has not given any reasonable explanation for the delay. It was further submitted that the appeal is unlikely to succeed, and that the Respondent will be prejudiced by prolonged litigation. Finally, counsel emphasizing the overriding objective encapsulated in section 1A and 1B of the Civil Procedure Act commanding the expeditious, efficient, and timely disposal of court business, counsel asserted that the court ought not to exercise its discretion in favor of the Applicant.

8. Counsel for the 1<sup>st</sup> Interested Party cited the provisions of Section 79G of the Civil Procedure Act and the case of **Maree Ahmed & Another v Leli Chaka Ndoro [2017] eKLR** to submit that the Applicant has not shown good cause having failed to explain the delay in filing her appeal on time.

9. The court has considered the application in light of the parties' respective material and submission. 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.”**

10. The successful applicant 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.”**

11. 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 favor.

12. The Supreme Court in the case of **Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others [2014] e KLR** 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**.

13. The delay in this case is about two months, which is not inordinate after excluding the period between late December and mid-January, 2020 pursuant to the provisions of Order 50 Rule 4 of the Civil Procedure Rules. The copy of the ruling is on the file, and on the face of it, the same was delivered, not on 4<sup>th</sup> but on 11<sup>th</sup> December 2020. There is no evidence to controvert this and the assertion that it was delivered without notice to the Applicant. The Respondent while asserting otherwise did not attach a copy of the ruling showing the delivery date as 4<sup>th</sup> December, 2020. The exhibited email correspondence from the Respondent's counsel to the Respondent does not suffice.

14. Thus, the explanation given by the Applicant for not attending the ruling seems plausible although no evidence has been tendered by her to demonstrate subsequent efforts made by her to follow up on the ruling. Equally, the court takes judicial notice of the difficulties encountered by litigants due to the COVID-19 pandemic which affected access to court services. The court is prepared to accept the explanation as reasonable.

15. Parties have taken rival positions concerning the arguability of the intended appeal. From the language employed in **Mutiso v Mwangi** (supra) the requirement touching on the viability of the intended appeal, is neither mandatory nor stringently applied in an application of this nature. The draft memorandum of appeal attached to the Applicant's affidavit appears to raise issues serious enough to require the court's consideration on appeal or that are *prima facie* arguable. The Court of Appeal in **Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited (2020) eKLR** stated that such appeal:

**“... may not succeed as in law an arguable appeal need not succeed so long as it raises a bona fide issue for determination by the Court.”**

16. In **Vishva's** case, the Court 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;...”**

17. This court is persuaded in the circumstances of this case to facilitate the Applicant's undisputed right of appeal. The Respondent and the Interested Parties will not be unduly prejudiced if the motion is allowed, as they can be compensated through costs. In the result, the court is persuaded that the justice of the matter lies in allowing the motion dated 4<sup>th</sup> March 2021 while awarding costs to the Respondent and the 1<sup>st</sup> Interested Party in any event. The Applicant's appeal is to be filed within 14 days of today's date.

**DELIVERED AND SIGNED ELECTRONICALLY ON THIS 18<sup>TH</sup> DAY OF NOVEMBER 2021.**

**C.MEOLI**

**JUDGE**

**In the presence of:**

**Ms Omondi h/b for Mr Gachie for the Applicant**

**Mr Kamau h/b for Mr Mukiri for the Respondent**

**Ms Gachugu for the 1<sup>st</sup> Interested Party.**

**C/A: Carol**