



REPUBLIC OF KENYA



KENYA LAW
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**Diastar Autocare Centre & 2 others v Ghatahora (Civil Appeal
4 of 2021) [2022] KEELC 3758 (KLR) (16 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3758 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL APPEAL 4 OF 2021**

JA MOGENI, J

MAY 16, 2022

BETWEEN

DIASTAR AUTOCARE CENTRE 1ST APPELLANT

PARAMJIT SINGH 2ND APPELLANT

GURMUKH SINGH 3RD APPELLANT

AND

PARDEEP GHATAHORA RESPONDENT

RULING

(Application to lodge Notice of Appeal out of time; Section 7 *Appellate Jurisdiction Act*; application allowed).

1. I have a Notice of Motion Application before me dated 12/11/2021 brought pursuant to the provisions of Section 1A, 1B & 3A of *Civil Procedure Act* Cap 21 of the Laws of Kenya, Order 42 Rule 6 & Order 51 Rule 1, of the *Civil Procedure Rules*, and any other enabling provisions of the law. The principal order sought is for the applicant to be granted leave to file a Notice of Appeal out of time. The application is opposed.
2. The application is based on the grounds on the face of it and on the supporting affidavits of one Edna Brandy Wanja dated 12/11/2021 the applicants' advocate who has the conduct of the matter on behalf of the applicants and the affidavit of Paramjit Singh the 2nd Appellant who was authorized by the co-appellants to swear the Affidavit on their behalf. Both Edna and Paramajit aver that the applicants were aggrieved by the Business Premises Rent Tribunal ruling delivered on 30/08/2021 by the Honorable Cyprian Mugambi Nguthari in Tribunal Case Number 828 of 2019 which was consolidated by Tribunal Case Numbers 826,827,828 and 829 of 2019.



3. The Advocate Edna avers that on the material date when the tribunal delivered its ruling the Counsel for the Applicant one Mr. Ondiek was absent from court as they had not been issued with any notice that the ruling was scheduled to be delivered on the said date. That when they sought to fix the matter for hearing of the reference on 18/10/2021 is when they learnt that the ruling had already been delivered with regard to the Preliminary Objection that they had raised.
4. The applicants aver that when they learnt that the Notice of the Preliminary Objection has been dismissed they also learnt that the time allowed for appeals had already lapsed. Further that though they had made frantic effort to obtain a copy of the tribunal's ruling from the registry they only obtained the same recently when the period allowed for appeals had lapsed.
5. They aver that the delay is not so inordinate or so great the applicant contends that ruling of the BPRT was delivered on 30/08/2021 in the absence of the applicant. That it was the applicant's advocates who when he sought to fix the reference for hearing on 18/10/2021 learnt that the ruling had been delivered.
6. The application is opposed by the respondent who avers that the application lacks merit, is frivolous, an abuse of the court process, bad in law, incurably defective and does not meet the required threshold of an appeal and a stay.
7. The Court directed that the Application be canvassed by way of written submissions and the Applicants filed their submissions dated 16/02/2022 through the Law Firm of N.K Mugo & Co. Advocates, while the Respondent filed his submissions dated 14/02/2022 through the Law Firm of Shaban Osman & Associates.

Analysis And Determination

The issue for determination which arise from this application is only one, whether leave can be granted to appeal out of time.

Whether leave can be granted to appeal out of time.

8. Section 79G of the *Civil Procedure Act* provides that appeals originating from the subordinate court should be filed within thirty (30) days from the date of the decree or order appealed against. Section 95 of the said Act gives the court discretion to extend the time as it deems fit even if the time originally fixed has expired.
9. Section 79G of the *Civil Procedure Act* provides as follows;

“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. Section 95 of the *Civil Procedure Act* provides thus: -

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”



11. The principles to be considered in exercising the court's discretion on whether or not to enlarge time to file appeal were set out in the case of *Leo Sila Mutiso vs Rose Hellen Wangeri Mwangi* Civil Appeal 255/ 1997, the court, in considering the exercise of discretion to extend time, held 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 in general, the matters which this court takes into account in deciding whether to grant an extension of time are first, the length of the delay. Secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

12. These principles were also reiterated in *First American Bank of Kenya Ltd -vs- Gulab P. Shah & Others* HCC 2255/2000 [2002] IEA 65 as follows: -

- 1) The explanation if any, for the delay;
- 2) The merits of the contemplated action, whether the appeal is arguable;
- 3) Whether or not the respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the applicant.

13. I will therefore proceed to address each of the limbs outlined in the above mentioned cases and establish whether the Applicant has satisfactorily met each of the said principles. The length of the delay and the explanation if any. The present Application was filed on the 12/11/2021 after the trial court delivered its ruling on the Preliminary Objection on the 30/08/2021. The Applicant has also given an explanation of the 2-months and 12 days' delay since the delivery of the Ruling on the 30/08/2021.

14. The Applicant contends that the delay was caused by the court for failure to issue the Notice indicating the Ruling date. He was therefore not aware of the ruling date and only came to find out about the same when the matter was scheduled for hearing of the reference before the court on 18/10/2021. Further, he has also explained that upon discovery that the ruling had been issued, he made every effort to obtain a copy of the ruling from the tribunal's registry, which they got after the period of allowed for appeal had lapsed.

15. Even though there is no maximum or minimum period of delay set by the law, anyone seeking this relief must satisfactorily explain the cause of the delay. See [*Andrew Kiplagat Chemaringo V Paul Kipkorir Kibet* \[2018\] eKLR.](#)

16. From the delivery of the ruling to the filing of the instant Application is about 2 months' delay. This in my view does not amount to inordinate delay further, the explanation given by the Applicant is sufficient and I therefore find that the Application was filed without undue delay.

17. Chances of success of the intended Appeal. I am alive to the fact that in deciding an application of this nature, the court must be careful not to delve into the merits of the case at this stage. Having that in mind, I wish to state that from the Draft Memorandum of Appeal, one of the issues the Applicant intends to raise is on the capacity of the Respondent to raise rent yet the property belongs to joint owners who are both deceased without involving either the estate of the administrators of the estate.

18. I note that the subject matter in dispute between the parties relates to a reference filed by the applicants on the issue of increase of rent and the capacity of the respondent to do so. Land is an emotive issue in this country and the right to land and protection of private and public interest and rights over land are matters that require conclusive and substantive determination on merit.



19. This court has taken the unusual liberty to peruse the trial/ lower court file to peruse the Ruling delivered on 30/08/2021 and I have noted that the said Ruling was indeed delivered in the absence of the Applicant and/or their advocates on record and thus I find the reasons advanced by the Applicant to be true.
20. The third limb is whether the Respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the Applicant. The answer is in the affirmative, I find that no prejudice will be caused to the Respondent that cannot be compensated by an award of costs if the Application is allowed.
21. The principles laid down by the Supreme Court in Nicholas Kiptoo Korir Arap Salat vs. IEBC & 7 Others [2014] eKLR are pertinent in this case; namely:
- “(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.”
22. Guided by the above principles, the upshot of the foregoing is that the orders sought by the Applicant; for leave to file the Appeal out of time is merited and for that reason Prayer no. (2) in the Notice of Motion dated 12/11/2021 is allowed.

Disposal Orders

23. In my view, I consider it necessary that, for the ends of justice, the applicant herein be allowed to file an appeal out of time. I have perused the draft Memorandum of Appeal and consider that the same does have some merit. Accordingly, I direct that the applicant do file its Appeal within 14 days from the date hereof. There shall be no order as to costs.
24. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF MAY 2022

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MOGENI J

JUDGE

In presence of: -

..... for the applicant.



.....for the respondent.

Mr. Vincent Owuor Court Assistant

