



REPUBLIC OF KENYA



**Kata v Sila & another (Environment and Land Miscellaneous Application
5B of 2022) [2023] KEELC 16175 (KLR) (1 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16175 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 5B OF 2022
TW MURIGI, J
MARCH 1, 2023**

BETWEEN

ILE MUSAU KATA APPLICANT

AND

JAPHETH MUTHENYA SILA 1ST RESPONDENT

STEPHEN SILA NGOMO 2ND RESPONDENT

RULING

1. By a Notice of Motion application dated July 4, 2022 brought pursuant to the provisions of Sections 1A, 2A, 3A, 79C and 95 of the [Civil Procedure Act](#) and all other enabling provisions of the law the Applicant seeks the following orders: -
 1. Spent.
 2. That this Honourable Court be pleased to grant leave to the Applicant herein file an appeal out of time.
 3. That costs of the application be provided.
2. The application is premised upon the grounds appearing on its face together with the supporting affidavit of the Applicant sworn on even date.

The Applicant's Case

3. The Applicant averred that he instituted Makindu SPMCC Civil Suit No 312 of 2014 which was heard and determined on May 11, 2022. He averred that the suit was dismissed on the grounds that he did not have the locus standi to file the suit. That in addition, the judgment allowed the Defendants' Counter Claim.



4. The Applicant further averred that he was unable to comprehend the contents of the judgment at the time of delivery because he was ailing. That once the judgment was explained to him by his Advocate on record he was dissatisfied with the same. That he instructed his Advocates of his intention to appeal the judgment on June 15, 2022 only to be informed that the 30-day time line for appeal had already lapsed.
5. He went on to state that the Respondents are likely to execute the judgment which will cause him irreparable loss since he is the registered owner of the subject matter of the intended appeal. He argued that the delay in filing the appeal is not so inordinate as to be inexcusable.

The 1st Respondent's Case

6. Opposing the application, the 1st Respondent *vide* his replying affidavit sworn on September 15, 2022 averred that Applicant has not sufficiently explained his reasons for not filing his appeal in time. He argued that the treatment notes annexed to the supporting affidavit ought to be regarded with caution as they appear to have been prepared for this specific case.
7. He further averred that the Applicant has not demonstrated that he stands to suffer substantial loss if the orders sought are not granted. He argued that the intended appeal has no chances of success and that the instant application is meant to frustrate the Respondents right to enjoy the fruits of their judgment. He argued that should this Court be inclined to allow the application, the Applicant should be ordered to provide security for costs as per the lower Court's decree and certificate of costs dated July 20, 2022. He contended that the application lacks merit and it ought to be dismissed with costs.

The Response

8. The Applicant *vide* his further affidavit sworn on October 13, 2022 reiterated that he stands to suffer irreparable loss should the Respondents execute since they have already obtained costs from the lower Court.
9. The application was canvassed by way of written submissions.

The Applicant's Submissions

10. The Applicant's submissions were filed in Court on October 18, 2022. Counsel for the Applicant identified the following issues for the Court's determination:-
 - i. Whether the Applicant should be granted leave to appeal out of time.
 - ii. Who is to bear the costs of the application.
11. Counsel submitted that the delay in filing the appeal in time was due to illness on the part of the Applicant who was receiving treatment at the time and was unable to relay instructions to his Advocates on time.
12. Counsel further submitted that the treatment notes annexed to the Applicant's supporting affidavit are true documents from the dispensary where the Applicant received his treatment. Counsel contended that the period of delay was about thirty days which is not inordinate or unreasonable Counsel submitted that the Court's unfettered discretion to enlarge time for filing a late appeal must be exercised judiciously.
13. In urging the Court to allow the application, Counsel submitted that the 1st Respondent has not shown the prejudice he will suffer if the application is allowed.



The Respondent's Submissions

14. The Respondents submissions were filed on December 2, 2022. Counsel submitted that the factors to be considered by the Court in deciding whether or not to enlarge time to file an appeal were laid down in the case of *First American Bank of Kenya Ltd Vs Gulab P Shab & 2 Others* [2002] I EA 65 as follows: -
 1. The explanation for the delay;
 2. The merits of the contemplated action;
 3. Whether or not the Respondent can adequately be compensated in costs for the prejudice he may suffer as a result of allowing the application.
15. Counsel argued that the Applicant has not demonstrated sufficient reasons for not filing the appeal in time. Counsel submitted that the period between June 6, 2022 and July 4, 2022 constitutes to inordinate delay since it was unexplained by the Applicant.
16. Counsel contended that the intended appeal is not arguable nor one deserving a day in Court since the agreements relied upon by the Applicant in filing the lower Court case were a continuation of a sale agreement done in the year 1972 seeking to be paid a balance from the said sale agreement by the Respondents on behalf of their deceased father.
17. On whether or not the Respondents can adequately be compensated in costs for any prejudice that he may suffer, Counsel submitted that the present application is intended to frustrate the Respondents enjoyment of the fruits of their judgment.
18. Counsel further submitted that the Respondents have a vested right to the judgment of the lower Court which ought to be effected.
19. Lastly, it was submitted that should the Court be inclined to allow the application, the Applicant should be ordered to give security for costs as per the lower Court decree dated July 20, 2022.

Analysis And Determination

20. Having considered the application, the affidavits and the rival submissions, I find that the only issue that arises for determination is whether the Applicant has demonstrated sufficient cause to warrant enlargement of time to file an appeal from the impugned judgment dated May 11, 2022.
21. The statutory provisions that deal with the requisite period for filing of appeals from the Subordinate Courts to the High Court is Section 79G of the *Civil Procedure Act* which 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.
22. Section 95 of the *Civil Procedure Act* goes on to state as follows: -

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.



23. It is not in dispute that the judgment in Makindu SPMCC No 312 of 2014 delivered on May 11, 2022 was not appealed within the stipulated period of 30 days. Nonetheless, this Court has unfettered discretion under the proviso to Section 79G to admit an appeal which has been filed out of time provided that sufficient cause has been demonstrated.
24. The considerations to be made when deciding upon such an application were set out by the Court of Appeal in the case of *Thuita Mwangi Vs Kenya Airways Ltd* [2003] eKLR where the Court held as follows: -
- “Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under Rule 4 of the Rules. For instance in *Leo Sila Mutiso Vs Rose Hellen Wangari Mwangi*, (Civil Application No Nai 255 of 1997) (unreported), the Court expressed itself thus:
- “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.”
25. In the case of *Omar Shurie Vs Marian Rashe Yafar* Civil Application No 107 of 2020 the Court of Appeal discussed the conditions as follows:-
- i. The length of the delay.
 - ii. The reason for the delay.
 - iii. The chances of the appeal succeeding if the application is granted.
 - iv. The degree of prejudice the respondent if the application is granted.
26. In *First American Bank of Kenya Ltd Vs Gulab P Shah & 2 Others*, Nairobi (Milimani) HCCC No 2255 of 2000 (2002) I EA 65 the Court set out the factors to be considered in deciding whether or not to grant such an application and these are;
- i. The explanation if any for the delay;
 - ii. The merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is frivolous one which would only result in the delay of the course of justice;
 - iii. Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the Applicant.
27. It is clear from the above authorities that the Court has wide unfettered discretion in granting leave to file appeal out of time. However, in exercising its discretion to grant extension of time, the Court must consider the length of the delay, the reason for 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.
28. In explaining the delayed in filing file the appeal within time, the Applicant stated that he was unable to instruct his Counsel due to his ill health.
29. The Judgment sought to be challenged was delivered on 11th of May, 2022. Any Appeal in respect to the said judgment ought to have been filed on or before 11th of June, 2022. The instant application



was filed on the July 5, 2022 which is slightly less than a month since the last date when the appeal ought to have been filed.

30. The Applicant sufficiently explained the delay vide a signed and stamped treatment summary from Mangelete Dispensary (annexure “IMK2”).

31. I have considered the circumstances of this case and I find that even though the Applicant delayed in filing his appeal within the stipulated period, the Applicant has given reasonable and plausible reasons for the same.

32. On the chances of the appeal succeeding if the application is granted, the Court in the case of *Samuel Mwaura Muthumbi Vs Josephine Wanjiru Ngugi & Another* [2018] eKLR held as follows: -

“Lastly, looking at the Draft Memorandum of Appeal filed, I am unable to say that the intended appeal is in-arguable. Of course, all the Applicants have to show at this stage is arguability – not high probability of success. At this point, the Applicant is not required to persuade the Appellate court that the intended or filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal: a demonstration that the Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict. The Applicants have easily met that standard. I believe that the Applicant has discharged this burden.”

33. In the instant case, the Applicant in his supporting affidavit annexed a memorandum of appeal (annexure “IMK3”) to demonstrate his willingness and intention of appealing the impugned judgment.

34. On the prejudice that is likely to be suffered by the Respondents if an appeal is filed out of time, it was held in the case of *George Kianda & Another Vs Judith Katumbi Kathenge & Another* (2018) eKLR as follows:-

“The Respondent has not stated that she cannot be adequately compensated in costs for any prejudice that she may suffer as a result of a favourable exercise of discretion in favour of the applicant. It has been said there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such advantage or that it cannot be cured by the application of that healing medicine. See *Waljee’s (Uganda) Ltd vs Ramji Punjabhai Bugerere Tea Estates Ltd* [1971] EA 188.”

35. The Respondents have not demonstrated that they will suffer loss if the application is granted.

36. From the foregoing, it is clear that the Applicant has sufficiently demonstrated merit in the application for enlargement of time for filing an appeal.

37. The upshot of the foregoing is that the application dated July 4, 2022 is allowed in the following terms;

- i. Leave is granted to the Applicant to file appeal out of time against the judgment delivered in Makindu SPMCC No 312 of 2014.
- ii. The Applicant to file and serve his Memorandum of Appeal within 14 days from the date hereof.
- iii. Each party to bear its own costs.

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HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 1ST DAY OF MARCH, 2023.

IN THE PRESENCE OF: -

Court Assistant – Mr. Kwemboi.

A. K. Singi for the Respondent.

Ms Ong'ong'a for the Applicant.

