Achweya v Onyansi (Civil Appeal E090 of 2024) [2025] KEHC 14 (KLR) (10 January 2025) (Ruling)

Neutral citation: [2025] KEHC 14 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E090 OF 2024

DKN MAGARE, J

JANUARY 10, 2025

BETWEEN

HARON NYANDUSI ACHWEYA .... APPELLANT

AND

EVANS OMBANE ONYANSI .... RESPONDENT

RULING

1. This is a Ruling arising out of an application dated 27.5.2024 seeking the following orders:

    a. The Honourable court be pleased to grant leave to the intended appellant to file appeal out of time

    b. Costs of this Application be in the cause

2. It is not indicated in the prayers, which order is sought to be appealed against. Nevertheless, the case numbers are in the body of the application. The Application is supported by the Affidavit of the Applicant and premised on that the court awarded a measly cost of 7,000/= instead of Ksh. 100,000/- being his proposal. He views the costs as unconscionable and unjust vis-à-vis Kisii Small Claims Case No. E012 OF 2024. The court is equally accused of failing to consider an application dated 6.2.2024 in Kisii E843 of 2022. He stated that the intended Appeal was not filed in time since he fell sick. There is a draft memorandum of appeal annexed from two decisions from different courts.

3. The Applicant filed submissions dated 10.7.2024. He indicated that there were several annextures to the application, though there were none. He submitted that as a result of the ruling he became sick and could not appeal within time. He stated that if he was not allowed to file the Appeal, he was to suffer irreparable loss. Applicant relied on the decision of Njoroge v Kimani (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling).

4. The Respondent filed submissions opposing the instant application. He relied on the case Cleophas Wasike v Mucha Swala [1984] eKLR to buttress their case. They also supported the court's discretion though a retention and in Leo Sila Mutiso V. Rose Hellen Wangari Mwangi - Civil Application No. NAI 255 of 1997 (unreported) this Court in dealing with the issue of application for extension of time within which to file and serve Notice of Appeal and Record of Appeal stated inter alia:

> "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".

5. Reliance was further placed on the decision of Muringa Company Limited v Archdiocese of Nairobi Registered Trustees [2020] eKLR, where Ouko, (P), as he then was posited as doth;

> Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.

6. It was the Respondent's submission that the dismissal of the application will not be prejudicial to the Applicant. It was his further concern that documents referred to, were not annexed. Further, they submitted that the failure and defects go to the root of the Application and cannot be cured by Article 159(2) d of *the constitution*.

Analysis

7. The issue in this case is whether the Applicant has met the conditions necessary for granting an order to extend the time for appeal in two cases:

    a. Kisii Small Claims Case No. E012 of 2024 and,

    b. Kisii Case No. E843 of 2022.

8. This application was argued in court both physically and virtually. I will address the above issue under the following headings: -

    a. Whether the applicant has met the threshold for grant of orders sought.

    b. Who is to bear costs.

9. The suits giving rise to this matter, namely Kisii Small Claims Case No. E012 of 2024 and Kisii Case No. E843 of 2022, were not consolidated because the cases were before different courts—one before an adjudicator in the Small Claims Court and the other in the Magistrate's Court. This improper consolidation alone is sufficient to dispose of this appeal. The cases are governed by the Small Claims Act and the Magistrates' Court Act, 2015, respectively.

10. Nevertheless, it is necessary to address the merits of the application given the circumstances of the case, particularly the nature of the claims. The question of extending time was considered by the Court of Appeal in a case relied upon by the Applicant, that is, Njoroge v Kimani (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling), where Mativo JA (as he then was) addressed this issue.

In deciding whether sufficient cause has been shown, among the facts usually relevant are the degree of lateness, the explanation therefore, and the prospects of success. This list is not exhaustive and each case will depend on its peculiar facts and circumstances. In National Union of Mineworkers v Council for Mineral Technology[1998] ZALAC 22 at para 10, the court held: -"The approach is that the court has a discretion, to be exercised judicially upon a consideration of all facts, and in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degrees of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are interrelated; they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused."

11. Turning to the inherent merits of the Application, it is noted that the order dated 8th February 2024 pertained to the withdrawal of the suit. The withdrawal was made in the presence of the Applicant in person. Further, there is no evidence suggesting illness. The assertions in the affidavit fail to establish any valid grounds for the delay. The claim of sickness appears to be a red herring intended to mislead the court into pursuing a futile search for a non-existent dispute.

12. Secondly, award of costs in small claims court are provided under Section 33 of the *Small Claims Court Act* as follows:

    1. The Court may award costs to the successful party in any proceedings.
    2. In any other case parties shall bear their respective costs of the proceedings.
    3. Without prejudice to subsections (1) and (2), the Court may award to a successful party disbursement incurred on account of the proceedings.
    4. Except as provided in subsection (2), costs other than disbursements, shall not be granted to or awarded against any party to any proceedings before a Court. (emphasis added).

13. The court must therefore address whether there is an appealable issue in the Small Claims matter. The Applicant indicated that the issue in question pertains to the quantum of costs. However, Section 33(4) of the *Small Claims Court Act* prohibits awarding costs other than disbursements. The quantum of costs is a matter of fact and falls within the exercise of discretion.

14. Costs in the Small Claims Court differ from those in other cases. While the decision to award costs is a matter of discretion, the quantum of those costs in the lower court is a question of fact. This matter falls outside the purview of the appellate court. In *James Koskei Chirchir versus Chairman Board of*

Governors, Eldoret Polytechnic [2011] eKLR (Civil Appeal No. 211 of 2005), the Court held inter alia, that:

> " Notwithstanding the provisions of section 27, above costs is generally a matter within the discretion of the Court. The Court did not, however, explain why it denied the appellant his costs before the trial Court.
>
> In absence of any explanation in that regard we think that the learned Judge of the Superior Court erred in denying the appellant the costs of the suit before the trial Court".

Where there is sufficient reason why a trial Court awarded costs, then the appellate Court will not interfere with that award as was the case in S.K. Njuguna& another versus John Kiarie Waweru & another [2009] eKLR (Civil Appeal No. 219 of 2008) where the Court stated that:

> " We reiterate that the issue of costs is in the discretion of the Court and in this appeal, we are satisfied that there were justifiable reasons why the appellants herein were ordered to pay the costs although the Election Petition against them was dismissed."

15. The above principle is grounded in the nature of appeals from the Small Claims Court, as outlined in Section 38 of the *Small Claims Court Act*, which provides as follows:

    (1) A person aggrieved by the decision or an order Appeals. of the Court may appeal against that decision or order to the High Court on matters of law.

    (2) An appeal from any decision or order referred to in subsection (1) shall be final.

16. What, then, constitutes matters of law? In Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others, (2014) eKLR, the court stated as doth: -

> " 4. Although the phrase 'a matter of law' has not been defined by the *Elections Act*, it has been held in Timamy Issa Abdalla Vs Swaleh Salim Swaleh Imu & 3 Others, Malindi Civil Appeal No. 39 Of 2013 (Court of Appeal), (Okwengu, Makhandia & Sichale, JJA) of 13.01.2014 that a decision is erroneous in law if it is one to which no court could reasonably come to, citing Bracegirdle vs Oxney (1947) 1 All ER 126. See also Khatib Abdalla Mwashetani Vs Gedion Mwangangi Wambua & 3 Others, Malindi Civil Appeal No. 39 Of 2013 (Court of Appeal), (Okwengu, M'inoti & Sichale, JJA) of 23.01.2014 following AG vs David Marakaru (1960) EA 484."

17. The proposed appeal from the Small Claims Court raises only a question of fact, and no matter of law has been demonstrated in the proposed appeal. It is undisputed that an order on costs is discretionary, and such discretion is limited and cannot form the basis of an appeal. Even if there was an error in awarding costs contrary to Section 33(4) of the *Small Claims Court Act*, there is no appeal challenging whether the court was entitled to award costs. Instead, the issues raised are centred on the amount of costs being too low.

18. In this regard, since no matters of law are raised in the draft memorandum of appeal, there is nothing to be heard in the appeal from Kisii SCC E012 of 2024. It is worth noting that the exercise of judicial discretion constitutes a matter of law, as established in the case of PeterGichuki King'ara Vs Iebc & 2

Others, Nyeri Civil Appeal No. 31 Of 2013 (Court Of Appeal) (Visram, Koome & Odek, JJA) Of 13.02.2014, the court of Appeal held as follows: -

> "it was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanour – is an issue of law."

19. Turning to the second matter, the proposed appeal from Kisii CMCC E843 of 2022 is otiose. No appealable order was made by the court on the impugned date. The case had been withdrawn on 8th May 2023, and subsequently, the court dismissed the case for non-attendance, despite the withdrawal. Upon the respondent's application, the court acknowledged the error on the face of the record, noting that the case had already been withdrawn at the time of dismissal for non-attendance. There was nothing to dismiss in a withdrawn suit, and the court simply clarified that the matter had already been withdrawn and, therefore, could not be dismissed. There are no further questions to address from these directions.

20. The Appellant appears oblivious that an order made pursuant to Order 25 of the Civil Procedure Rules is not appealable. Order 43 rule 1(n) and 2 provide as follows:

> Dismissal for an appeal shall lie as of right from the following Orders and rules under the provisions of section 75(1)(h) of the Act
>
> (n) Order 25, rule 5 (compromise of a suit)
>
> (2) An appeal shall lie with the leave of the court from any other order made under these Rules.

21. Although the order resulted from a review, the original order in place was for the withdrawal of the suit. The net effect of either setting aside or maintaining the order is zero; no right was lost or gained by the court's order in Kisii CMCC E843 of 2022. The purported grounds for appeal are insufficient. For instance, being vague is not a valid ground of appeal. Additionally, no materials were presented to the court to justify exercising discretion in favour of the applicant. This is further compounded by the fact that the decision was made in the presence of the parties, particularly the applicant.

22. In an application for an extension of time, each case must be considered based on its own unique facts and circumstances. It is neither feasible nor reasonable to establish a rigid standard for measuring periods of delay, as the explanations for such delays are as varied as the cases themselves. Nevertheless, however short or long the period of delay, the period must be explained. It is not enough to state that one was sick without evidence. Waki, JA in Seventh Day Adventist Church East Africa Ltd. & Another vs. M/S Masosa Construction Company Civil Application No. Nai. 349 of 2005 held that:

> "As the discretion to extend time is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant; the period of delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with the time limits, the resources of the parties, whether

the matter raises issues of public importance are all relevant but not exhaustive factors...In an application for extension of time, each case must be decided on its own peculiar facts and circumstances and it is neither feasible nor reasonable to lay down a rigid yardstick for measuring periods of delay as explanations for such delays are as many and varied as the cases themselves...The ruling striking out the appeal is not only necessary for exhibiting to the application for extension of time but also for consultations between the applicant's counsel and their clients and the fact that the ruling was returned to Nairobi for corrections is a reasonable explanation for the delay... Where the Respondent has already recovered all the decretal sum and costs attendant to the litigation, the right of appeal being a strong right which is rivalled only to the right to enjoy the fruits of judgement, no prejudice would be caused to the respondent who has enjoyed his rights in full if an opportunity is given to the applicants to enjoy theirs too, even if it is on a matter of principle."

23. In order to succeed, there must be some material before the Court to enable its discretion. In Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR Odunga J, as he then was, observed that: -

> " In an application for extension of time, where the Court is being asked to exercise discretion, there must be some material before the Court to enable its discretion to be so exercised. Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the court why the discretion should nevertheless be exercised in his favour and the rule is that where there is no explanation, there shall be no indulgence. See Ratman vs. Cumarasamy [1964] 3 All ER 933; Savill vs. Southend Health Authority [1995] 1 WLR 1254 at 1259.

24. Section 38(1) of the small claims court provides for Appeals from the small claims court. On the other hand, the time for appeal is laid out in Section 79 G of the *Civil Procedure Act* as doth: -

> 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.

25. Therefore, in my view, without a valid reason, this court has no jurisdiction to extend time. It is not something to be granted arbitrarily, but rather an exercise of judicial discretion. Unless the court is properly moved, it has no power to exercise that discretion. Such an application is considered not by whim, but through careful and judicious consideration. The factors to consider in dealing with such an application are: -

    a. The length of delay.

    b. The reason for delay.

    c. The animus of the applicant.

    d. The prejudice to the Respondent.

26. The delay is inexcusable, especially given that no reason has been provided for failing to file the appeal after 6th March 2024. With such an inexcusable delay, the issues of animus and prejudice cannot be considered. This is further compounded by the fact that no valid reason has been provided for not filing the appeals within time. Additionally, the memorandum of appeal, though erroneously filed jointly

for two matters, fails to disclose any grounds of appeal or any arguable issues. The delay of 2 months and 20 days is excessive and inordinate.

27. The allegations of sickness are not supported by any credible evidence or candid disclosure. There is no explanation provided for the failure to file an appeal in either of the two matters. The Supreme Court has set out the standards to be applied in applications of this nature. In the case of Nicholas Kiptoo Arap Korir Salat v. The Independent Electoral and Boundaries Commission & Others (Supreme Court Application No. 16 of 2014), the Supreme Court, through Justices M.K. Ibrahim and S.C. Wanjala, acknowledged that the extension of time is discretionary and a very powerful tool, which should be exercised with abundant caution, care, and fairness. In considering an extension of time, this court is guided by the inherent justice of the case. The order must be made judiciously, not whimsically, to ensure that the principles enshrined in our Constitution are upheld. There is no purpose in engaging in an academic exercise in matters of this nature. The court outlined the principles to guide the extension of time as follows:

> "This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:
>
> 1. Extension of time is not a right of a 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 on 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 respondents if the extension is granted;
> 6. Whether the application has been brought without undue delay; and
> 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

28. When juxtaposing the facts of the case, the applicable law, and the inherent justice, there is no justification for allowing the application. It is inherently unmeritorious and patently defective. Therefore, the court must exercise its discretion judiciously. The court cannot conclude that the delay is inexcusable and inordinate, with no reason provided, and then, out of sheer whim or fiat, extend time. Such an approach would make litigation unpredictable and endless. No valid reason was advanced for the delay, and no explanation was offered for failing to file the application. As a result, the application is untenable and is accordingly dismissed.

29. The award of costs in this court is governed by Section 27 of the *Civil Procedure Act* and is discretionary. The Supreme Court has set forth guiding principles for the exercise of that discretion in the case of Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai & 4 Others, SC Petition No. 4 of 2012; [2014] eKLR, as follows:

(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

30. Since costs follow the event, the respondent is entitled to costs for the application. A sum of Ksh 10,000/= is appropriate and just. The Application dated 27.5.2024 is accordingly dismissed for lack of merit with costs of 10,000/= payable to the Respondent within 30 days, in default execution to issue.

Determination

31. In the end, I make the following Orders:

a. The application dated 27.5.2024 lacks merit and is accordingly dismissed.

b. The Respondent shall have the cost of this Application of Ksh 10,000/= payable within 30 days, in default execution do issue.

c. The file is closed.

DELIVERED, DATED AND SIGNED AT KISII ON THIS 10TH DAY OF JANUARY, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

The Applicant in person

M/s B N. Ogari & company Advocates for the Respondent

Court Assistant – Kiptum