



Kuria v Tamarind Properties Limited & 2 others (Commercial Miscellaneous Application E682 of 2024) [2025] KEHC 2159 (KLR) (Commercial and Tax) (14 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2159 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E682 OF 2024**

**MN MWANGI, J
FEBRUARY 14, 2025**

BETWEEN

ANNE WAIRIMU KURIA APPLICANT

AND

TAMARIND PROPERTIES LIMITED 1ST RESPONDENT

HOUSING FINANCE COMPANY LIMITED 2ND RESPONDENT

TAMARIND VALLEY EMBAKASI LIMITED 3RD RESPONDENT

RULING

1. Before me is a Notice of Motion application dated 20th August 2024 filed by the applicant pursuant to the provisions of the *Judicature Act*, Cap 8 of the Laws of Kenya, the High Court (Practice & Procedure Rules (Part 1 Rule 3), Sections 1A, 1B, 3A & 95 of the *Civil Procedure Act*, Order 50 Rule 6 & Order 51 Rule 1 of the Civil Procedure Rules, 2010, and all enabling provisions of the law. The applicant prays for enlargement of time to file an appeal against the judgment delivered on 28th May 2024, and for leave to file and serve a Memorandum of Appeal out of time.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Kennedy Ochieng', an Advocate of the High Court of Kenya, and Counsel for the applicant. He averred that the applicant obtained a judgment against the 1st & 3rd respondents in Milimani Commercial Suit No. E608 of 2021 for Kshs.3,400,000/= plus costs and interest at Court rates from the date of judgment until payment in full. He stated that the applicant is however aggrieved by the award of interest from the date of judgment and contends that the award should have been for interest from the date of filing suit. The applicant as such instructed her Advocates on record to lodge an appeal against the said issue.



3. Mr. Ochieng’ deposed that the aforesaid judgment was delivered on 28th May 2024, thus the period for filing an appeal against it had elapsed by the time they received instructions to lodge an appeal. He contended that the delay in filing the said appeal was due to an inadvertent mistake on the part of the applicant, who gave instructions for lodging an appeal against the said judgment after the timeline within which she could do so had elapsed. Counsel asserted that the 1st respondent has already filed an appeal against the said judgment, thus the applicant’s cross-appeal can be heard together with the 1st respondent’s appeal. He expressed the view that the respondents stand to suffer no prejudice in the event that the orders sought herein are granted.
4. In opposition to the application, the 1st respondent filed Grounds of Opposition dated 5th September 2024 raising the following issues –
 - i. The delay of 60 days from delivery of the lower Court judgment is inordinate and unexplained;
 - ii. The reason for delay given as failure of the applicant to give instructions for filing an appeal is not satisfactory;
 - iii. In ordering that the interest to apply from the date of the judgment, the Court was exercising a discretion under Section 26 of the Civil Procedure Act; the applicant has not demonstrated how the Court erred in exercising that discretion hence the intended appeal does not raise pertinent issues of law which are arguable; and
 - iv. The applicant has thus not satisfied the Court that she has a good and a sufficient cause for not filing the appeal on time.
5. From the Court record, the 2nd & 3rd respondents did not participate in the instant application, which was canvassed by way of written submissions. The applicant’s submissions were filed by the law firm of Ochieng’ K. & Associates Advocates on 12th September 2024, whereas the 1st respondent’s submissions were filed by the law firm of Gacheru Ng’ang’a & Company Advocates on 20th September 2024.
6. Mr. Ochieng’, learned Counsel for the applicant cited the provisions of Section 79G of the Civil Procedure Act and submitted that the applicant has made out a case to warrant this Court to exercise its discretion in her favour by granting her an order for extension of time to file an appeal against the Trial Court’s judgment delivered on 28th May 2024. He relied on the case of Factory Guards Limited v Abel Vundi Kitungi [2014] eKLR, and indicated that the applicant was required to file an appeal from the Trial Court’s judgment on or before 28th June 2024. He stated that since the application herein was filed on 20th August 2024, there was a 50-day delay in filing it, which delay is not unreasonable.
7. He submitted that the applicant’s appeal is arguable, as outlined in her Memorandum of Appeal, and that it raises serious issues in respect to the Trial Magistrate’s computation of interest. He contended that even though the 1st respondent claims that the said issue is a matter of the Trial Court’s discretion, the Court still has jurisdiction to intervene where necessary, even in discretionary matters. Mr. Ochieng’ pointed out that the 1st respondent has neither contended nor demonstrated the prejudice it will suffer in the event that the instant application is allowed.
8. Mr. Gacheru, learned Counsel for the respondent relied on the case of Githau v Kagiri & another (Civil Appeal 314 of 2023) [2024] KEHC 6320 (KLR) (Ruling), and submitted that in this instance, there was a 90-day delay in filing of an application for extension of time from the delivery of judgment dated 28th May 2024, and a 60-day delay from the time when the timeframe within which the applicant ought to have filed an appeal against the Trial Court’s judgment lapsed, which delay is not only inordinate



but also unexplained. He further submitted that the instant application is an afterthought, especially since it followed the 1st respondent's appeal.

9. Mr. Gacheru argued that the applicant's intended appeal lacks merit, as the lower Court exercised its discretion under Section 26 (sic) of the *Civil Procedure Act* in awarding interest from the date of judgment as opposed to the date of filing suit. Further, that the applicant has not demonstrated any error in the Court's decision or cited any relevant laws and/or case law to substantiate her claim. Counsel asserted that the issue of costs was left to the Court's discretion since the applicant did not expressly plead for and/or request for interest from the date of filing the suit in her pleadings.

Analysis And Determination.

10. I have considered the application filed herein and the affidavit filed in support thereof. I have also considered the 1st respondent's Grounds of Opposition and the written submissions by Counsel for the applicant and the 1st respondent. The issue that arises for determination is whether the application for leave to file an appeal out of time is merited.
11. This Court's jurisdiction to extend time to file an appeal from a decision of the Subordinate Court is derived from the provisions of Section 79G of the *Civil Procedure Act*, Cap 21 Laws of Kenya which provides that every appeal from a Subordinate Court to the High Court shall be filed within a period of thirty (30) days from the date of the decree or order appealed against. It further provides that in the event that an appeal is not lodged within thirty (30) days as prescribed, it may be admitted out of time if the appellant satisfies the Court that there was sufficient reason for not filing the appeal in time.
12. In this instance, the Trial Court's judgment was delivered on 28th May 2024. As such, the applicant ought to have filed an appeal against it on or before 26th June 2024, pursuant to the provisions of Section 79G of the *Civil Procedure Act*. The guiding principles when it comes to extension of time were laid down by the Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, as hereunder-

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 underlying 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...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. [where] there is a reasonable [cause] 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.



13. The instant application was filed on 26th August 2024, which is approximately 62 days after the elapse of the thirty (30) days' period provided for by law for the filing of an appeal. The applicant is therefore required to offer sufficient explanation for the delay in lodging an appeal within the timelines provided for under Section 79G of the *Civil Procedure Act*. The Court of Appeal in the case of Abdul Azizi Ngoma v Mungai Mathayo [1976] KLR 61 at p. 62 held as follows -

We would like to state once again that this court's discretion to extend time under rule 4 only comes into existence after 'sufficient reason' for extending time has been established and it is only then that other considerations such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered.

14. It is not in contest that the applicant was duly notified and she was aware that the Trial Court delivered its judgment on 28th May 2024. The applicant however contends that in as much as she was aggrieved by the Trial Court's award that interest was to be calculated from the date of judgment until payment in full, she inadvertently failed to instruct her Advocate to lodge an appeal against the said judgment in good time, and by the time she gave instructions, the time within she could lodge an appeal had elapsed.
15. In determining an application for extension of time to file an appeal out of time, Courts have to consider the competing interests between the applicant who has a constitutionally underpinned right of appeal and the respondent who has a decision in his favour, thus has the right to enjoy the fruits of his judgment. It is however worthy noting that in this case, there are no competing interests since the applicant who wishes to appeal against part of the judgment delivered on 28th May 2024, is the decree holder who has a decision in her favour and the right to enjoy the fruits of her judgment.
16. I am not persuaded that the application herein has been necessitated by the 1st respondent's appeal against the said judgment especially because, it was filed after the elapse of approximately 62 days after the thirty (30) days' period provided for by law for the filing of appeals. In the circumstances, it is my finding that the delay in filing this application is not so inordinate as to deter this Court from exercising its discretion in favour of the applicant. The explanation offered for the delay is sufficient and plausible.
17. As to whether the applicant's intended appeal is arguable, the Court of Appeal in the case of Andrew Kiplagat Chemarigo v Paul Kipkorir Kibet [2018] KECA 701 (KLR), addressed itself on what amounts to an arguable appeal and held that –
- An arguable appeal does not necessarily mean one which will succeed.
18. On perusal of the applicant's Memorandum of Appeal dated 20th August 2024, it is evident that she intends to challenge the Trial Court's award on interest, on the ground that the Trial Court exercised its discretion wrongly. The applicant contends that the said Court ought to have directed that interest on special damages be calculated from the date of filing the suit as opposed to from the date of delivery of the judgment. It is my finding that the issue of whether or not the Trial Court exercised its discretion properly in determining the period for calculation of interest is arguable. Bound by the Court of Appeal decision cited in the preceding paragraph, I find that the applicant has demonstrated that she has an arguable appeal that ought to be determined on merits.
19. It is evident from the pleadings filed that the 1st respondent neither averred nor demonstrated that its stands to suffer any prejudice whatsoever, in the event that the application herein is allowed. Furthermore, it is not disputed that there is a pending appeal against the Trial Court's judgment delivered on 28th May 2024 already filed by the 1st respondent. In the premise, this Court finds that the 1st respondent does not stand to suffer any prejudice in the event that the orders sought herein are granted.



20. The Supreme Court in the case of Naomi Wangechi Gitonga & 3 others v Independent Electoral & Boundaries Commission & 17 others [2018] eKLR, held that 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.
21. Accordingly, this Court is persuaded that the applicant has successfully demonstrated that she is deserving of this Court's discretion.
22. The upshot is that the application dated 20th August 2024 is merited. I make the following orders –
 - i. An order for extension of time to file an appeal from the judgment delivered on 28th May 2024 by the Trial Court is hereby granted;
 - ii. Leave is hereby granted to the applicant to file and serve a Memorandum of Appeal within 14 days from the date of this ruling; and
 - iii. Costs of the application shall abide the outcome of the appeal.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF FEBRUARY 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Ms Nakeu h/b for Mr. Ochieng for the appellant/applicant

No appearance for the respondents

Ms B. Wokabi – Court Assistant.

