



REPUBLIC OF KENYA



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**Ndungu v Freight Forwarders (K) Ltd & 2 others (Miscellaneous Civil
Case E029 of 2023) [2025] KEHC 2106 (KLR) (5 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2106 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
MISCELLANEOUS CIVIL CASE E029 OF 2023
AK NDUNG’U, J
FEBRUARY 5, 2025**

BETWEEN

DANIEL MUCHEMI NDUNGU APPLICANT

AND

FREIGHT FORWARDERS (K) LTD 1ST RESPONDENT

CYRUS MURIUKI GAKENIA 2ND RESPONDENT

VENDRINE ISAK MBUVI 3RD RESPONDENT

RULING

1. The Applicant in this case, Daniel Muchemi Ndungu moved this court vide a notice of motion dated 20/11/2023 seeking an order for extension of time within which to lodge an appeal against 2nd Respondent in respect of the judgment delivered on 22/02/2023 in Nanyuki CMCC No 58 of 2017. The application is brought under section 79G of the *Civil Procedure Act* and Order 50 Rule 6, Order 42 rule 6 of the Civil Procedure Rules. The judgment having been delivered on 22/02/2023, appeal ought to have been lodged on or before 22/03/2023 pursuant to the dictates of 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.”



2. The present application was filed on 27/11/2023, a delay of about eight (8) months. Under the proviso to section 79G aforesaid, this court may admit an appeal out of time if the applicant satisfies the court that he had good and sufficient cause for not filing the appeal in time.
3. The reasons for the delay in lodging the appeal are set out on the face of the application and more particularly deponed in the supporting affidavit sworn by Daniel Muchemi Ndung'u, the Applicant herein. Those reasons are –
 - i. That judgment was entered against the 3rd Respondent whereas the claim against the 1st and 2nd Respondents was dismissed.
 - ii. That the Applicant has faced difficulties in the process of execution and has also discovered that the 2nd Respondents was the owner of the negligent motor vehicle which he had admitted in his defence and witness statement filed before the trial court yet the trial court exonerated him from liability.
 - iii. That he thought he would recover the decretal sum from the 3rd Respondent but she is untraceable.
 - iv. That the delay in filing the appeal was not intentional and that the appeal has high chances of success.
4. The Application was opposed by the 2nd Respondent. The 1st Respondent was expunged from these proceedings and the 3rd Respondent did not respond to the application. The 2nd Respondent filed a replying affidavit dated 12/02/2024 sworn by Kinyanjui Theuri, counsel for the 2nd Respondent opposing the application on the grounds that;
 - i. There has been an inordinate delay in filing the application without sufficient and justifiable cause.
 - ii. The Applicant has never filed a memorandum of appeal nor applied for certified copies of the proceedings. He is therefore an indolent litigant who has no respect for statutory timelines.
 - iii. The Applicant was satisfied with the lower court judgment and commenced execution against the 3rd Respondent and it is upon facing difficulties in execution that he filed the current application.
 - iv. He is in a fishing expedition as he stated in paragraph 6 of his affidavit that he thought he would recover from the 3rd Respondent but since she cannot be traced, he now believes that she was not the owner of the motor vehicle.
 - v. He has not adduced evidence to show that the 2nd Respondent was in ownership of the motor vehicle at the time of the accident.
 - vi. The 2nd Respondent stand to suffer prejudice since he was not the owner or in possession of the motor vehicle at the time of the accident.
 - vii. The application has come way too late and the grounds does not merit judicial consideration and therefore, it should be disallowed
5. The application was canvassed by way of written submissions. The Applicant submitted that the delay in filing the appeal was eight (8) months which delay is excusable since it has been sufficiently explained. Reliance was placed on the case of Emergency Plus Medical Services Limited v Mandera County Government (2011) eKLR where the court found that a delay of 11 months was excusable. That the



- delay was satisfactorily explained in that it was at the time of execution that he realised the 2nd Defendant was the one in possession of the motor vehicle and the 3rd Respondent was not traceable. That the trial court judgment raised eyebrows for reasons that the 3rd Respondent was possibly a fictitious character who was apportioned liability for an accident caused by a motor vehicle that was in the hands of the 2nd Respondent. That he has an arguable appeal as it is clear from the record that the 2nd Respondent admitted to be the owner of the motor vehicle and therefore, the trial court erred dismissing the suit against him.
6. Further, the trial court erred for failing to award interest on special damages from the date of filing the suit. That the Respondent does not stand to suffer any prejudice since he was a defendant during trial and an order for costs would be sufficient to compensate his trouble in opposing the appeal. That he stands to suffer prejudice since he is the one who suffered loss and denying him an opportunity to appeal would be denying him justice.
 7. In rejoinder, the 2nd Respondent argued that extension of time is discretionary which discretion must be exercised within the established principles and the factors to consider includes the length of delay, the reason for delay, chances of the appeal succeeding, the degree of prejudice to the Respondent as was held in *Omar Shurie vs Marian Rashe Yafar (Civil Application No.107 of 2020)*. That the delay of 8 months is inordinate and the Applicant has not offered any justifiable reason to explain the delay. That having been satisfied with the judgement, he proceeded with execution and it is upon facing difficulties in execution that he considered to file the current application. That he hinges his argument on the 2nd Respondent statement dated 04/06/2018 where the 2nd Respondent stated that he was the current owner of the motor vehicle. That the accident occurred on 08/12/2016 and the Applicant has not produced any evidence to show that the 2nd Respondent was the owner at the time of the accident.
 8. That he has failed to demonstrate that he has an arguable appeal that raises triable issues and that the application is an abuse of the court process and an afterthought. The grounds raised in the memorandum of appeal are moot as he did not tender evidence before the trial court to show that the 2nd Respondent was in possession of the motor vehicle at the time of the accident as the matter of ownership of the motor vehicle revolved around the 1st and 3rd Respondent as at 08/12/2016 as per the evidence before the trial court. That he stands to suffer prejudice for he will incur costs defending a claim which he is not a party to when it is clear there is no evidence that he was the owner of the vehicle.
 9. I have considered the application, the supporting grounds and affidavit for and against. I have had due regard of the rival submissions by the parties herein. It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. The Court of Appeal in *Thuita Mwangi v Kenya Airways Ltd [2003] eKLR* while relying on the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No Nai 255 of 1997) (unreported)*; stated that;

“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”. (Emphasis added)
 10. The applicable conditions that were set by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v. The Independence Election & Boundaries Commission & 7 Others, [2014] eKLR* where the Apex court held that a court exercising its discretion to extend time has to consider the following factors;
 - a. . 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;



- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 - e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - f. Whether the application has been brought without undue delay; and
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10. It is not in dispute that the current application has been brought after expiry of 8 months. The reasons advanced is that it is at the time of execution that he realized it was the 2nd Respondent who was in possession of the vehicle and not the 3rd Respondent. He further stated that the 3rd Respondent is untraceable hence he faced difficulties in execution.
 11. From a reading of the application, the grounds in support and affidavit filed, as well as the submissions, one gets the feeling that the Applicant attempts to prosecute the appeal without the necessary focus on explanation for the delay in filing of the appeal. When he attempts an explanation, it borders on the bizarre. The Applicant appears to experience a Saul/Paul moment, a road to Damascus experience, when he states he has now realized that the vehicle was owned by the 2nd Respondent but not the 3rd Respondent. This is after, according to him, facing headwinds at execution. This cannot meet legal muster as an explanation for delay. Indeed, it was a matter to be canvassed at trial and even assuming that it was raised and the trial court misapprehended it, the Applicant ought to have filed an appeal timeously. To accept a judgement and even commence execution only to turn back later and seek enlargement of time to file an appeal against another party is in my view a clear abuse of the court's process.
 12. To enable this court to exercise its discretion in favour of the Applicant, the Applicant had the duty to satisfy the court that he had good and sufficient cause for not filing the appeal in time. The reasons advanced by the Applicant in my view are not sufficient for grant the order sought.
 13. With the result that the application herein fails and is dismissed with costs.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 5TH DAY OF FEBRUARY 2025

A.K. NDUNG'U

JUDGE

