



Ogutu (Suing as Legal Representative of the Estate of Jackson Ogutu Osende, Deceased) v Okumu & 2 others (Miscellaneous Civil Application E015 of 2024) [2025] KEHC 1596 (KLR) (21 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1596 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
MISCELLANEOUS CIVIL APPLICATION E015 OF 2024
WM MUSYOKA, J
FEBRUARY 21, 2025**

BETWEEN

**SYLVESTER ODHIAMBO OGUTU APPLICANT
SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF JACKSON OGUTU
OSENDE, DECEASED**

AND

**VICTOR ODUORI OKUMU 1ST RESPONDENT
FRANCIS OKUMU WERE 2ND RESPONDENT
ONGUMWE AUCTIONEERS 3RD RESPONDENT**

RULING

1. I am tasked with determining an application, dated 22nd April 2024. It seeks enlargement of time for filing appeal, for a period of 30 days or such period as the court may direct, against the ruling of the trial court, in Busia CMCCC No 350 of 2009, of 13th December 2022. The grounds, upon which the extension of time is sought, are set out on the face of the application, and include the fact that the applicant had first sought review, at the trial court, of the impugned orders, before moving the High Court; the time for filing appeal had lapsed; the delay in filing appeal was occasioned by financial difficulty; enlargement of time would not be prejudicial to the respondent; and it would be in the best interests of justice.
2. In his affidavit in support of the application, the applicant avers that he had waited for the trial court to determine the review application, which he had filed on 30th December 2022, but the trial court had gone mute on it thereafter. He also explains that the delay was caused by financial difficulty, and, for the 15 months that had elapsed before he filed it, he had no money to instruct an Advocate to take up the matter, and he was afraid of borrowing lest he exposed himself to further financial distress.



3. The respondents filed grounds of opposition, dated 17th May 2024, where they argue that the application was fatally defective, the delay in bringing it was inordinate, and it was misconceived given that the intended appeal could not stand as the applicant had opted to file for review.
4. The parties opted to canvass the application by way of written submissions.
5. The written submissions by the applicant are dated 13th September 2024. They address only 1 issue. It is argued that the guiding principle for enlargement of time to institute an appeal was outlined in section 79G of the *Civil Procedure Act*, Cap 21, Laws of Kenya. The applicant expresses perplexion with the behaviour of the trial court, and cites Article 159(2)(b) of the *Constitution* of Kenya, on judicial authority requiring courts to do justice without delay. He argues that the respondents would not be prejudiced, since the impugned ruling does not relate to execution proceedings. He submits that he has an arguable appeal, which raises substantial points of law and fact.
6. The written submissions by the respondents are dated 19th January 2025. 2 issues are outlined. On whether the threshold for grant of leave to appeal, against the orders of 13th December 2022, out of time had been reached. Section 79G of the *Civil Procedure Act* is cited, to argue that extension of such time would be a matter subject to discretion. The exercise of that discretion is judicial, based on evidence and sound legal principles, and the burden was on the applicant to disclose the relevant material required by the court, to assist it assess whether to exercise the discretion with respect to the application. It is submitted that the applicant had not provided such material, particularly to demonstrate the circumstances of the delay, in failing to bring that application, of 3 years to date. The respondents submit that they would be entitled to the costs of the application.
7. The only issue for me to determine is whether the application is merited.
8. The provision that the applicant relies on in his pursuit of leave, is section 79G of the *Civil Procedure Act*, which provides:

“Time for filing appeals from subordinate courts

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.”

9. The court has the discretion to extend time for filing an appeal, but the exercise of that discretion to extend time is not automatic. Sufficient cause must be shown, to warrant exercise of the discretion. The principles were laid out in *Nicholas Kiptoo arap Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR (Ibrahim & Wanjala, SCJJ), a decision of the Supreme Court, premised largely on the Supreme Court Rules, but of relevance to the exercise of similar discretion under the *Civil Procedure Act* and Rules. The points made there are that the extension of time is not a matter of right, for it is an equitable remedy, available only to a deserving party; a party seeking exercise of the discretion in its favour must endeavour to demonstrate that they deserve it; the discretion would be exercised on a case to case basis; where delay is alleged to be reasonable, then the reasonableness of the delay must be explained; it ought to be demonstrated that the other parties would not be prejudiced by the exercise of the discretion; and the application must be filed without undue delay.



10. The applicant admits that there was a 15-month delay in the bringing of the instant application. The explanation is that he had filed an application to review the order that is now sought to be appealed against. He argues that the trial court ignored his review application, which consequently forced him to seek to appeal against it instead. He explains that he had financial difficulties, hence, due to lack of funds, he was unable to file the instant application expeditiously.
11. Has the delay been adequately explained? I do not think so. While lacking resources to file the application of leave to file appeal out of time may be understandable, there is no explanation as to why he did not pursue the hearing of his review application. It would not be enough to argue that the trial court ignored his review application. He should have sought to explain the steps that he took to have the said application heard and determined. That he has not done. He has not also disclosed whether he has withdrawn the review application, or whether the same is still pending.
12. I make the last point, in the foregoing paragraph, because of what section 80 of the *Civil Procedure Act* provides. It reads as follows:

“ Review

Any person who considers himself aggrieved—

 - (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
13. My understanding of section 80 of the *Civil Procedure Act* is that a party is given the options of filing an appeal or a review against a decision of a court. It is an option, between the 2, and one cannot file both an appeal and a review of the same order at the same time. While this application for leave to extend time to file appeal is before me, the application for review is pending before the trial court. It looks like a case of forum-shopping. The applicant cannot have it both ways.
14. My attention has also been drawn to *Gerald M’Limbine v Joseph Kangangi* [2008] eKLR (Emukule, J), where the court sought to construe section 79G of the *Civil Procedure Act*. The court noted that that provision does not provide for leave to appeal out of time, but rather for admission of appeals out of time, which would presuppose that, a party approaching the court, under section 79G of the *Civil Procedure Act*, should first file an appeal out of time, and then ask the court to admit that appeal out of time. It was argued that a court ought not exercise discretion, to extend time to appeal, before it has perused the appeal filed out of time, to assess, under section 79B of the *Civil Procedure Act*, whether the same ought to be admitted or not.
15. The applicant has not filed an appeal out of time, which he would be asking me to admit out of time. As no appeal, by way of memorandum of appeal, is before me, which I can peruse, to assess whether it ought to be admitted out of time, there would be no basis for me to grant the orders sought from me, under section 79G of the *Civil Procedure Act*.
16. The trial court file has been availed. I have perused it. I note that the review application, dated 30th December 2022, is still pending. It has not been withdrawn nor determined. I note that the same stalled because the applicant has not pressed to have it heard and determined, or he has failed to comply with certain orders or directions of that court. After that application was filed, the court registry acted on it on 24th January 2023, when it allocated it 20th April 2023 as the date for its hearing. On 20th April



2023 the trial court did not sit, and another date was allocated by the registry for hearing, being 16th May 2023. On 16th May 2023, it was stood over to 20th June 2023, for mention. On 20th June 2023, it was directed that the applicant was to pay certain costs before he could be heard, and the matter was marked for mention on 5th September 2023. On 5th September 2023, it was indicated that the said costs were still outstanding, and a further mention was given, for 26th September 2023. On 26th September 2023, the applicant was yet to settle the costs, and the matter was marked for 23rd November 2023, for mention. On 23rd November 2023, the applicant did not attend court, and a warrant was issued for his arrest, and the matter was stood over to 5th March 2024.

17. 23rd November 2023 was the last time the matter was before the trial court. I am not too clear as to what might have happened. I am aware that there was an appeal, arising from other orders made in the same lower court matter, Busia CMCCC No 350 of 2009, being Busia HCCA No E023 of 2022. I have perused the file in Busia HCCA No E023 of 2022, and the proceedings of 22nd April 2024 indicate that the trial court records in Busia CMCCC No 350 of 2009 had been availed, which paved the way for canvassing of that appeal, by written submissions. The appeal in Busia HCCA No E023 of 2022 was determined on 27th November 2024, when judgment was delivered, dismissing that appeal.
18. It should be of note, that the instant application was lodged herein on 22nd April 2024, the same day when the appeal in Busia HCCA No E023 of 2022 was being mentioned, and when it was being disclosed that the file in Busia CMCCC No 350 of 2009 had been moved to the High Court, and had been placed in Busia HCCA No E023 of 2022. It would appear that the instant application was filed deliberately, to throw a spanner into the works, in view of the warrant of arrest issued against the applicant in Busia CMCCC No 350 of 2009, on 23rd November 2023, the objective being to take the matter away from the trial court, in order to defeat that order for his arrest.
19. What should be clear, from the above, is that the trial court had not sat on the application, dated 30th December 2022, as claimed by the applicant. Certain conditions were imposed by that court, which the applicant was required to satisfy, before he could be granted audience on that and another application. He has not complied with the terms imposed, hence his review application stalled, but it is still pending. Secondly, the trial records in Busia CMCCC No 350 of 2009 were called to the High Court for the purpose of the hearing and disposal of the appeal in Busia HCCA No E023 of 2022, which meant that the proceedings, in Busia CMCCC No 350 of 2009, were held in abeyance, to await the final disposal of that appeal. Quite clearly, no mischief can be attributed to the trial court, with respect to disposal of the review application in Busia CMCCC No 350 of 2009.
20. As it is, the applicant is seeking leave to appeal against an order, in respect of which there is a pending application for review, before the court which made the impugned order. The law, as it currently stands, would not allow him to have it both ways.
21. In view of everything said above, I find and hold that the application herein, dated 22nd April 2024, is without merit, and I hereby dismiss it, with costs. The original trial court records, in Busia CMCCC No 350 of 2009, shall be returned to that court, for disposal of the business outstanding, inclusive of the application, dated 30th December 2022. The instant file shall be closed. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 21ST DAY OF FEBRUARY 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.



Mr. Sylvester Odhiambo Ogutu, the applicant, in person.

Advocates

Mr. Ouma, instructed by BM Ouma & Company, Advocates for the 1st respondent.

Mr. Wanyama, instructed by Wanyama & Company, Advocates for the 2nd respondent.

