Institute of Software Technologies Ltd v I&M Reality Limited (Miscellaneous Application E810 of 2024) [2025] KEHC 4672 (KLR) (Commercial and Tax) (10 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4672 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E810 OF 2024

PM MULWA, J

APRIL 10, 2025

BETWEEN

INSTITUTE OF SOFTWARE TECHNOLOGIES LTD ..... APPLICANT

AND

I&M REALITY LIMITED ..... RESPONDENT

RULING

1. The application dated 30th September 2024 seeks leave to file an appeal out of time against the judgment of Hon. L.B. Koech delivered on 31st May 2024.

2. The application is supported by the grounds on the face thereof particularly that the intended appeal is meritorious with overwhelming chances of success and that granting leave will not prejudice the Respondent.

3. The application is opposed via the replying affidavit of Ketan Vrajlal Gandhi, the Finance Manager of the Respondent, sworn on 29th October 2024. He asserts that the Applicant's counsel was notified of the delivery of judgment in June 2024 but failed to take any action. The Respondent argues that the Applicant is guilty of indolence. Furthermore, the Respondent contends that the instant application is a delay tactic intended to frustrate the execution of the judgment. He urges the court that if the application is granted, the applicant should be ordered to deposit the entire decretal sum in a joint interest-earning account in the names of both advocates or, in the alternative, release 50% of the decretal sum to the Respondent.

4. The application was heard through written submissions. The Applicant filed submissions dated 11th November 2024, while the Respondent's submissions are dated 9th December 2024.

5. I have carefully considered the application, the grounds and supporting affidavit, the grounds of opposition and the submissions for and against the application, as well as the authorities cited by both parties. The main issue for determination is whether the application has merit and, consequently, whether the orders sought should be granted.

6. Section 79G of the *Civil Procedure Act* states:

> " 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 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."

7. The decision of whether to grant leave to appeal out of time is an exercise of judicial discretion. In exercising this discretion, the court must be guided by established legal principles. The Court of Appeal in Edith Gichungu Koine v Stephen Njagi Thoithi [2014] eKLR articulated these guiding factors as follows:

> " Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others."

8. In the present case, the judgment sought to be challenged was rendered on 31st May 2024. The statutory timeline for filing an appeal is governed by Section 79G of the *Civil Procedure Act*, which stipulates that appeals from subordinate courts to the High Court must be filed within thirty (30) days from the date of the judgment or order appealed against. Accordingly, the last day for filing the appeal was 30th June 2024. However, the present application was filed on 30th September 2024 - three (3) months after the statutory period had lapsed. I find this delay to be excessive and inordinate.

9. I will now address the reasons for the delay. The applicant contends that the judgment was delivered on 31st May 2024 in their absence and that they were only notified of it on 17th September 2024, after the statutory time for filing an appeal had expired. The applicant attributes the delay to their previous counsel, whom they blame for failing to inform them of the judgment promptly.

10. A litigant has a duty to follow up on their case. It is not sufficient for a party to merely blame their advocate for failing to inform them of the judgment. As was stated in Bi-Mach Engineers Limited v James Kahoro Mwangi [2011] eKLR:

> " ...It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy."

11. Similarly, the Court of Appeal in Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR reiterated this principle:

> " It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized

that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel."

12. In light of the foregoing, I find that the Applicant has not satisfactorily explained the delay in filing the intended appeal. There is no Memorandum of Appeal on the record, and therefore, the court is not in a position to evaluate whether the appeal raises pertinent issues of law. As such, the appeal cannot be said to be meritorious with an overwhelming chance of success.

13. Accordingly, it is my finding that the application dated 30th September 2024 lacks merit and is dismissed with costs.

    It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 10TH DAY OF APRIL 2025.

PETER M. MULWA

JUDGE

In the presence of:

Mr. Otieno h/b for Mr. Anzala for Applicant

Ms. Kiarie h/b for Ms. Kendi for Respondent

Court Assistant: Kadzo