



**JAM (Suing through guardian and next friend JMS) v Mumias Sugar Millers (2021)
(Civil Appeal 96 of 2023) [2024] KEHC 1231 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1231 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 96 OF 2023
PJO OTIENO, J
FEBRUARY 9, 2024**

BETWEEN

**JAM (SUING THROUGH GUARDIAN AND NEXT FRIEND
JMS) APPELLANT**

AND

MUMIAS SUGAR MILLERS (2021) RESPONDENT

*(Being an appeal from the Judgment of Hon. Caroline Cheruiyot (RM) in
Kakamega SCCC Case No. E036 of 2023 delivered on 24th March, 2023)*

RULING

1. By a Notice of Motion dated the 15/5/2023, the Applicant seeks the enlargement of time to lodge an appeal from the decision of the trial Court in a judgment dated and delivered on the 24.3.2023. The only reason put forth for the Defendant to lodge the appeal within time is that the Counsel lost touch with the client who only contacted them after time had lapsed. It is added that the delay is only for a period of 60 days.
2. The application is supported by the Affidavit sworn by the Applicant which essentially rehashes the facts of the applications with an emphasis that the appeal is arguable and that the Appellant stands to suffer irreparable loss if time is not extended to appeal.
3. The application was opposed by the grounds of opposition filed on the 21.9.2023 whose gist is that application was brought after inordinate and undue delay, was misconceived, incompetent, misplaced, frivolous, vexatious, abusive of the Court and bereft of any evidence on when instructions were received hence was meritless and a good candidate for dismissal with costs.
4. When the matter came up before the Court for arguments, both Counsel made very short oral submissions. The Applicant's Counsel made here submissions to the effect that the client disappeared



from the Counsel and only reappeared after the period within which to file the appeal had lapsed, which in any event only amounted to a delay of sixty (60) days.

5. She added that the appeal was arguable and that there was no prejudice to befall the Respondent should there be granted enlargement of time.
6. For the Respondent, full reliance was placed on the grounds of opposition filed then stressed the fact that even though the client reappeared in May, 2023, the application was never filed till July, 2023 and that there was no account given for that period of two months. To the Respondent no basis had been laid to merit extension time hence the application ought to be dismissed with costs.
7. The considerations for due regard, on when to extend time for lodging an appeal out of time is now well settled. Settled that an application ought to be brought without undue delay and there must be offered a plausible explanation for the delay, which delay must equally not be inordinately long. It is also a consideration on what is the arguability of the intended appeal.
8. Whether or not a delay is inordinate is determinable by the circumstances of each case. In this matter, the Judgment was delivered on the 24.3.2023 in the presence of representative for the Claimant and in the absence of the Respondent. It is to this Court settled that the brief belongs to the client who has a duty to keep contact with the Counsel and that when one fails to contact Counsel and a default occurs, his initial default to be vigilant is enough a plausible enough reason to justify extension of time. For that reason, the Court finds the basis for explanation of the delay to be implausible.
9. The second reason the explanation is not convincing is that the Court takes the view that the opinion to challenge a decision is actually a legal one to be made by Counsel and not the client. When the duty of Counsel to help Court execute its mandate of just, expedient and proportionate determination of Court disputes, it behoves the Advocate, to make a determination on the advisability of an appeal, and employ the ostensible authority, and more so as to beat time and avoid the kind of an application now before the Court.
10. It has not been demonstrated that there was a constraint against Counsel that disable her from lodging the appeal in time and seeking client notification. In any event, even if the client was to countermand such a step, all that was to be put at stake was costs of filing the Memorandum of Appeal and no more. Such court fees I consider to compare very well with the court fees for filing an application for enlargement of time. The Court that finds that the delay was more caused by indolence and not an excusable mistake.
11. On the strength or arguability of the appeal to be admitted out of time, a reading of the draft Memorandum of Appeal reveal that the challenge is on the quantum of damages awarded. The law on award of damages is that it falls to the discretion of the trier of facts and that it takes a strong case for an appellate Court to substitute its discretion for that of the trial Court.
12. The Court has had the benefit of reading the trial Court's file and take the view that it does not demonstrate that the assessment of damages was manifestly so low as to reveal an obvious error in principle of assessment of damages.
13. Flowing from the above discussion the Court finds and determines that the application for enlargement of time is not merited. The same is hereby dismissed with costs to the Respondent. The effect is that the appeal as filed is struck out for having been filed out of time and without leave of the Court.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 9TH DAY OF FEBRUARY, 2024.

PATRICK J. O. OTIENO



JUDGE

In the presence of:

Ms. Mugasia for the Appellant/Respondent

Mr. Ommani for the Respondent

Court Assistant: Polycap Mukabwa

