



REPUBLIC OF KENYA



KENYA LAW
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**Kungu v Ligabo (Civil Appeal E019 of 2024)
[2024] KEHC 1521 (KLR) (20 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1521 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E019 OF 2024
DKN MAGARE, J
FEBRUARY 20, 2024**

BETWEEN

DANIEL K KUNGU APPLICANT

AND

AMBEYI LIGABO RESPONDENT

RULING

1. This is a decision over an application dated 2/2/2024. The prayers sought are as follows: -
 - a. Leave be granted to the firm of M/s Wandai Matheka & company advocates to come on record instead of Munene Wambugu And Company Advocates.
 - b. The honorable court be pleased to grant the Applicant leave to Appeal out of time against the judgment delivered by hon J B Kalo (cm) dated 30/11/2023.
 - c. This Honourable Court be pleased to enlarge time and deem the memorandum of Appeal filed on 29/1/2024 as properly filed.
2. The grounds indicate the suit referred to as CMCC2093 of 2018. The number can be deceptive. From the replying affidavit, it is revealed that the matter was initially Nairobi Milimani commercial CMCC 2093 of 2010. The same related to an accident in Mombasa in 2008. The court awarded a sum of Ksh 7,299, 365. By any standards, this is not a small amount. The issues raised are not idle.
3. It was unnecessary to file submissions and as such the court proceeded on the basis of the documents filed so far. Before I deal with the submissions and the substance of the Appeal, it is necessary to deal with prayer one.
4. The firm of Munene Wambugu and Company Advocates is not on record in this matter. The Appeal was filed properly by the firm of Matheka Wandai and company advocates. Other than the issue of leave, there is no other question in the matter. It is unnecessary to seek leave in the high court. Whereas



the Civil procedure rules provide for leave after judgment, this only relates to the file in which judgment has been entered.

5. There has been uncalled and unnecessary anxiety in the interpretation of order Rule of the Civil Procedure Rules. The *raison d'être* for the Rule is to provide for continuity in proceedings. This is to avoid unsuccessful parties in the lower court being unable to serve the Appeal process when the advocates acting in the lower court that their instructions are limited to the lower court. It gives them the burden of ceasing to act afterward. It has its roots in election petition practice where personal service was required during some period in our dark history. The elected members will go underground and later turn up after the petition for service has lapsed. This can be clearly seen from an argument in the case of *Stanley Livongo Livondo V Raila Amolo Odinga & 2 others [2008]* eKLR which may not be understood in the current constitutional dispensation, where the court stated as doth: -

“This decision, by a bench constituted of five eminent Judges of Appeal, became the subject of considerable debate within legal and judicial circles. The argument sought to be advanced was that there may be circumstances where it is simply not possible to effect “personal” service for example on a sitting President whose security detail would not allow personal service, or where a person deliberately hides or evades service. In those situations, the Court of appeal held that other modes of service could be utilized. Hence, in *Abu Chiaba Mohamed vs Mohamed Bakari (2005)* eKLR the Court of Appeal stated:

“Did *Kibaki vs Moi* establish any proposition that even where it be proved that a party was hiding with the sole purpose of avoiding personal service, yet such a party must still be personally served? The decision established nothing of the kind. At page 37 of the judgment in *Kibaki vs Moi*, the Court stated:-

“..... Section 20 (1) (a) of the Act does not prescribe any mode of service and in those circumstances, the courts must go for the best form of service which is personal service. Before this Court, the appellant did not offer any reason why he did not go for personal service though in the High Court, it had been contended that the 1st Respondent in his capacity as the President, is surrounded by a massive ring of security which is not possible to penetrate. But as the Judges of the High Court correctly pointed out no effort to serve the 1st Respondent was made and repelled

The decision clearly recognized that if personal service which is the best form of service in all areas of litigation, is not possible, other forms may be resorted to.”

6. Such decisions form the bedrock of ensuring there is a party to be served. It does not mean that a party is bound to instruct the same advocate to mount an appeal. The rule as regards judgment was meant to protect Advocates from losing unpaid fees. In those days, one could instruct auctioneers to execute only to find that a client filed a notice of change compromised the judgment, and disappeared with the money.
7. An appeal that has not proceeded does not have such risks. In the circumstances it is unnecessary to grant leave since the said firm is properly on record.
8. The respondent replied to the said Application stating that the suit was filed 14 years ago. The same address at the summons was served is the same one the Applicant uses.
9. There was a dispute on whether special damages of Ksh 5,250,000/- were payable. This is not the province of the court hearing extension of time. The Respondent through their Advocates stated that



this matter has been in court for 14 years. They do not address what kept the case in court for 14 years. They do not in any case attribute delay to any of the factors for extension of time.

10. I note the length of time to be short. The explanation is plausible. In any case, the Respondent has admitted that the claim was defended by the Respondent's insurers.
11. The insurer's interest was limited to 3,000,000/= and attendant interest. The Applicant was left exposed. The insurer had nothing to worry about the amounts since their liability is capped by section 5(b)iv of *Insurance (Motor Vehicles Third Party Risks) Act*, cap 405, which states as follows: -

“In order to comply with the requirements of section 4, the policy of insurance must be a policy which—

insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road: Provided that a policy in terms of this section shall not be required to cover—

(iv) liability of any sum in excess of three million shillings, arising out of a claim by one person.”

12. The insurance neither cared nor had an interest on any amounts over 3,000,000/=. I believe the Applicant's position that they only discovered on 29th January 2024. The delay is thus fully explained.

Analysis

13. I have perused the Application and the response thereto. Both parties are agreed on the status of the matter. The only question is whether those facts will make the court rule one way or another.
14. The issue before me is whether the delay in lodging a Memorandum of Appeal has been satisfactorily explained. In am aware of the duty of this court in extension of time as set out by Waki, JA in *Seventh Day Adventist Church East Africa Ltd. & Another vs. M/S Masosa Construction Company Civil Application No. Nai. 349 of 2005* where he held that:

“As the discretion to extend time is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant; the period of delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with the time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors...In an application for extension of time, each case must be decided on its own peculiar facts and circumstances and it is neither feasible nor reasonable to lay down a rigid yardstick for measuring periods of delay as explanations for such delays are as many and varied as the cases themselves...The ruling striking out the appeal is not only necessary for exhibiting to the application for extension of time but also for consultations between the applicant's counsel and their clients and the fact that the ruling was returned to Nairobi for corrections is a reasonable explanation for the delay... Where the Respondent has already recovered all the decretal sum and costs attendant to the litigation, the right of appeal being a strong right which is rivalled only to the right to enjoy the fruits of judgement, no prejudice would be caused to the respondent who has enjoyed his rights in full if an opportunity is given to the applicants to enjoy theirs too, even if it is on a matter of principle.”



15. It is imperative to note the Supreme Court of Kenya decision (M.K. Ibrahim & S.C. Wanjala SCJJ) in *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others [2014]* eKLR where the learned Judges held as follows:-

- “(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 for 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) Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.

16. This is essentially a discretionary order. A discretionary order is that which you are able to convince the court, not on salient points of law, but pricking the court’s conscience. The question in the court’s mind will be, given the circumstances, are the factors and surrounding circumstances, in this case, such that ruling otherwise will be capricious and driving away from the seat of justice a person who should be firmly seated thereon.

17. Unless the Applicant drove themselves from the seat of justice, courts should be inclined to extend when the period is satisfactorily explained. Where circumstances show that a party has not driven themselves from the seat of justice, the seat was stolen from under them, granting the order will be more advised. Being discretionary is not the same as being at the whims of the court. Discretion must be such that a well informed and reasonable person, knowing all the facts, will not question the propriety of the order. In *Dilpack Kenya Limited v William Muthama Kitonyi [2018]* eKLR Odunga J. observed that:-

“In an application for extension of time, where the Court is being asked to exercise discretion, there must be some material before the Court to enable its discretion to be so exercised. Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the court why the discretion should nevertheless be exercised in his favour and the rule is that where there is no explanation, there shall be no indulgence. See *Ratman vs. Cumarasamy [1964] 3 All ER 933*; *Savill vs. Southend Health Authority [1995] 1 WLR 1254 at 1259*.

18. It follows therefore that the Applicants explanation for the delay is key in guiding the Court’s exercise of discretion on the issue of leave to appeal out of time. It is self-evidence that the Applicant’s insurance defended the case. The said insurance paid its portion and casually informed the Applicant to pay the balance. Their conduct does not appear to have taken into consideration the fact that the bulky of the judgment was payable by the Applicant. The respondent did not inform the Applicant in time that the judgment has been delivered.

19. It is true that the Applicant is under duty to show the reasons for delay. However short the period of delay, it must be explained. In *Alfred Iduvagwa Savatia vs Nandi Tea Estate & another [2018]* eKLR J. Mohammed JA. cited Aganyanya, JA in *Monica Malel & Another V. R, Eldoret Civil Application No. Nai 246 of 2008* where the Learned Judge stated;-

“When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show the



applicants are not quite sure of why the delay in filing the notice of appeal within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay.”

20. In this case, the delay was fully explained. I am so satisfied.
21. The jurisdiction of this court is laid out in Section 79G of the [Civil Procedure Act](#), which provides as doth: -

“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.

22. Therefore, in my view, without a valid reason, this court has no jurisdiction to extend time. It is not manna to dish out. It is exercise of discretion. Unless the court is properly moved, it has no power to exercise discretion. It is not by whim but through judicious consideration that such an Application is considered. I distill the factors to consider in dealing with such an application are: -

- a. The length of delay.
- b. The reason for delay.
- c. The animus of the applicant.
- d. The prejudice to the Respondent.

23. The Applicant has explained the delay. the reasons given were valid concrete and unassailable. The Applicant. The Applicant received an email on Monday and by Friday this Applicant had been filed. The applicant acted in good faith. There is no prejudice to the Respondent. The suit in the lower court was not prosecuted for 14 years. A delay for less than a month is not inordinate and prejudicial to the Respondent in any case, they have already consumed Ksh. 3,000,000/= from the insurance. It is not that they are empty-handed. Applicant delayed for less than 1 month. I note that the Court in [Asike-Makhandia J in Gerald Kithu Muchanje v Catherine Muthoni Ngare & another \[2020\]](#) eKLR stated that:-

“There is no maximum or minimum period of delay set out in law. However, a prolonged and inordinate delay is more likely than not to disentitle the applicant of such leave. Likewise, the reason or reasons for the delay must be reasonable and plausible. In [Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet \[2018\]](#) eKLR this Court stated:-

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

24. I have also to consider both parties. The Respondent is entitled to the fruits of the judgment while the Applicant has the right of Appeal which they had given away but seek the intervention of court to redeem it. In my view the injustice to the Applicant if the Application is dismissed exceeds the prejudice to the Respondent if the Application is allowed. In [Harris Horn Senior, Harris Horn Junior vs. Vijay](#)



Morjaria Nyeri Civil Appeal No. 223 of 2007 when confronted with similar arguments, the Court made observations therein inter alia as follows:

(32) As for the need to do justice to the parties before it, we have no doubt that this is the core business of the Court. However, a court of law cannot ignore principles of substantive law or case law governing the particular aspect of justice sought from its seat. Its primary role is to ensure that the justice handed out is kept anchored on both the law and the facts of each case.”

25. This is a proper application to allow.

Determination

26. The upshot of the foregoing is that I allow the Notice of Motion dated 2/2/2024.

- i. The firm of Wandai Matheka and Company is properly on record in the Appeal hence there is no need to grant leave.
- ii. Leave be granted to file an Appeal out of time. Time for filing of the Appeal is extended such that the memorandum of Appeal filed in this matter is deemed as properly filed.
- iii. Costs shall be in the Appeal.
- iv. The matter shall be listed on 16/4/2024 for admission of the Appeal.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 20TH DAY OF FEBRUARY, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of: -

Mr. Matheka for the Appellant

No appearance for the Respondent

Court Assistant - Brian

