



**Tego v Tego (Miscellaneous Civil Application E005 of 2023)
[2024] KEHC 1501 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1501 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
MISCELLANEOUS CIVIL APPLICATION E005 OF 2023**

JN NJAGI, J

FEBRUARY 8, 2024

BETWEEN

OSHE TEGO APPLICANT

AND

HIRBO AMBA TEGO RESPONDENT

(Being an application for leave to file appeal out of time)

RULING

1. The applicant has filed an application dated 5th September 2023 seeking that he be granted an extension of time within which to file an appeal out of time against the judgment delivered in Moyale Kadhi’s Court Succession Cause No. E012/2020. The application is premised on grounds on the face of the application and supported by the affidavit of the applicant. The application was strongly opposed by the respondent vide a replying affidavit sworn on the 30th October 2023.
2. It is common ground on both sides that the Applicant had on the 5th August 2022 filed before this court an application in Misc. Civil Application No. E017 of 2022 seeking for leave to file its appeal out of time. The court allowed the application on 30th March 2023 on condition that the appeal was filed within 7 days from the date of the ruling. The Applicant did not comply with the directions of the court. He has now come back to this court seeking for the same prayers.
3. The Applicant says he filed the earlier application through his former advocates who assured him that they will keep him updated of the progress made in the matter. That the advocates later informed him that the application had been allowed and that they had filed the appeal. The advocates later ignored to pick his calls. He instructed his current advocates who made enquiries at the court registry and found that no appeal had been filed pursuant to the orders of this court issued on 30th March 2023. He says that it is his former advocates who are to blame for failure to file the appeal as directed by the court.



4. In opposing the application, the respondent stated in his replying affidavit that the reasons advanced for failure to file the appeal are incredulous and frivolous. That the applicant has not adduced any evidence to show that he was not indolent and that he followed up with his advocate or registry to ensure that the appeal was filed within the required timelines.
5. The respondent contends that if the applicant's advocate was to blame for being professionally negligent to his client, the proper recourse is for the applicant to claim damages from his advocate and not to seek to abuse the court's process by delaying the right of the respondent to enjoy the fruits of the judgment. The respondent contends that the conduct of the applicant does not deserve another discretion of the court. That the application is an abuse of the process of the court and is prejudicial to him as he had started executing the decree. That the application is aimed at hindering the succession process. The respondent urged the court to dismiss the application with costs.

Submissions

6. The Applicant through his current advocates submitted that he has sufficiently explained his failure to file the appeal as previously ordered. That the interest of justice dictates that parties be allowed to ventilate their issues on appeal. That the estate in the matter is yet to be administered and as such no party will be unduly prejudiced if the matter goes to appeal.
 7. It was further submitted that the court has unfettered discretion to allow an application for leave to file an appeal out of time. On the unfettered discretion of the court, the applicant relied on the decision in the case of [Charles N. Ngugi v ASL Credit Limited](#) (2022) eKLR.
 8. The Respondent on the other hand submitted that the applicant was indolent in the way he conducted his matter as six months had lapsed after he was granted leave to file the appeal before he brought up this application. That had the applicant been diligent enough he would have realized that his former advocates had not filed the appeal. The respondent cited the case of [Michael Muriuki Ngubuini v East African Building Society Ltd](#) (2015) eKLR where the court while citing [Savings and Loans Ltd v Susan Wanjiru Muritu](#), Milimani HCCC No.397 of 2002, where the court held that:

...it is trite that a case belongs to a litigant and not her advocate. A litigant has a duty to pursue the prosecution of his or her case. ...It is the duty of the litigant to constantly check with her advocate the progress of her case.
 9. The respondent submitted that where an advocate by some inexcusable delay deprives a client of his cause of action, the proper recourse for the client is to claim damages against such advocate. In this respect the respondent relied on the case of [Three Ways Shipping Services \(Group\) Ltd v Mitchell Cotts Freighters \(K\) Ltd](#) (2005) eKLR.
 10. It was submitted that the applicant has not given a plausible explanation for far the delay. That in the absence of such, any exercise of discretion becomes injurious, arbitrary, capricious and whimsical. In support of this the respondent relied on the case of [Andrew Chemaringo v Paul Kipkorir Kibet](#) (2018) eKLR.
 11. Finally, it was submitted that this is a second application to file appeal out of time. That litigation must come to an end and therefore the respondent should be allowed to enjoy the fruits of the judgment.
- Analysis and Determination
12. I have considered the grounds in support of the application, the grounds in opposition thereto and the submissions by the respective advocates for the parties. The issue for determination is whether the application for the applicant to be granted leave to file an appeal out of time is merited.



13. The application is made pursuant to the provisions of section 79G of the *Civil Procedure Act*, 2010 which provides as follows:

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.

14. This court has wide discretion to enlarge time under Section 95 of the *Civil Procedure Act* and Order 50 Rule 6 of the *Civil Procedure Rules*, 2010. The same provide as follows:

Section 95. Enlargement of time

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

Power to enlarge time [Order 50, rule 6.]

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

15. The factors that the court has to consider in deciding on whether or not to grant an application to file an appeal out of time are as was laid out in the case of *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi*, cited with approval by the Court of Appeal in *Tbuita Mwangi v Kenya Airways Ltd* [2003] eKLR where it was held:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. 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.”

16. In *First American Bank of Kenya Ltd v Gulab P. Shah & 2 others* [2002] eKLR, the court set out factors to be considered in granting such an application as follows:

1. The explanation if any for the delay;
2. The merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;



3. Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favorable exercise of discretion in favour of the Applicant.
17. The Supreme Court of Kenya in the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & Others* [2014] eKLR set the following guidelines for consideration in an application for enlargement of time:
- “(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 discretion to extend, is a consideration to be made on a case to case basis;
 - (4) Whether there is a reasonable reason for the delay, the delay should be explained to the satisfaction of the court;
 - (5) Whether there will be any prejudice suffered by the Respondent if the extension is granted;
 - (6) Whether the application has been brought without undue delay; and
 - (7)
18. It is therefore incumbent in an application for enlargement of time for the court to consider whether the application has been made without undue delay, the explanation for the delay and whether there will be prejudice suffered by the respondent if leave to file appeal out of time is granted.
19. The reason the applicant has given for not filing the appeal as ordered by the court is that he had left the matter in the hands of his advocates who informed him that the application to file the appeal out of time had been allowed and that he had filed the appeal. That he later came to learn that no appeal had been filed.
20. I have noted that the second application for leave to file appeal out of time was filed six months after the time granted by the court to file the appeal had lapsed. This shows indolence on the part of the applicant. Even though the applicant had an advocate it was his duty to make a follow up with his advocate to ensure that the appeal was filed within the time granted by the court. The question is whether this amounted to inordinate delay.
21. In considering what amounts to inordinate delay, the court in *Utalii Transport Company Limited & 3 others vs. NIC Bank Limited & another* [2014] eKLR held thus;
- Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the Court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying Court’s mind on the delay, caution is advised for Courts not to take the word ‘inordinate’ in its dictionary meaning, but in the sense of excessive as compared to normality.



” The court in *Stecol Corporation Limited v Susan Awuor Mudemb* [2021] eKLR observed that:

“.....it is not uncommon for clients to instruct their counsel who procrastinate on filing court processes and only wake up when time for such filing has elapsed. Courts have over time excused parties where such delay is not inordinate as is in this case and even in cases where there is inordinate delay, depending on the circumstances of each case and reasons for the delay, courts have accorded parties an opportunity to be heard on appeal. Furthermore, there is no evidence to demonstrate what prejudice the Respondent will suffer if the Applicant is granted extension of time.”

22. It is my finding that the applicant was let down by his former advocates who failed to file the appeal within the time granted by the court. I do not think that it is proper for the applicant to be punished for a wrong committed by his former advocates. I also do not think that the delay of six months in filing the appeal is inordinate as to cause the applicant to be denied an opportunity of being heard on appeal. The respondent has not shown that the delay has caused him any prejudice in as far as the hearing and determination of the appeal is concerned. In my view justice can still be done despite the delay. The respondent can be compensated by way of costs for any delay. I am thereby inclined to allow the application. In doing so, I am reminded of the sentiments of the Court of Appeal in *Kamlesh Mansukhalal Damki Patni Vs Director of Public Prosecution & 3 Others* [2015] eKLR where it was stated that:

“It suffices to comment that a court of law should be hesitant at closing the door to the corridors of justice prior to a litigant being heard on his complaint...”

23. However, since this is the second application on the same subject matter, I consider it fair and just for the applicant to pay the respondent the costs of this application.
24. The upshot is that the Applicants’ Notice of Motion application dated 5th September 2023 is allowed in the following terms:
1. The Applicant to file and serve his Memorandum of Appeal within 14 days from the date hereof in default whereof the application herein shall stand dismissed with costs.
 2. The Applicant to pay the Respondent throw away costs of Ksh.10,000/= before the filing of the appeal failure to which the orders granted in order No. 1 herein shall stand vacated.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF FEBRUARY, 2024

J. N. NJAGI

JUDGE

In the presence of:

Mr. Ringera for Applicant

Mr. Matiba for Respondent

Court Assistant –

30 days R/A.

