



REPUBLIC OF KENYA



KENYA LAW
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Muchiri v Pal (Civil Appeal 54 of 2023) [2024] KEHC 2225 (KLR) (6 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2225 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL 54 OF 2023
LM NJUGUNA, J
MARCH 6, 2024**

BETWEEN

GIBSON MUKUNDI MUCHIRI APPLICANT

AND

CLIMATE PAL RESPONDENT

RULING

1. The applicant has filed an exparte summons dated 27th October 2023, being supported by the grounds set out on the face of the application as well as the facts deposed in the supporting affidavit thereof. The orders sought are as follows:
 - a. That the court be pleased to deem the memorandum of appeal herein dated 25th September 2023 and amended on 27th October 2023 to have been filed out of time with court leave; and
 - b. That the costs be in the cause.
2. It is the appellant's case that he inadvertently miscalculated the 30 days within which he was supposed to file the appeal. That by the time he realized his mistake, 4 days had already passed since the end of the 30 days allowed. He urged the court to admit the appeal out of time in the interest of justice as he is ready to expeditiously prosecute his appeal.
3. The application was opposed through a replying affidavit in which the respondent deposed that under Section 79G of the *Civil Procedure Act*, the applicant has not demonstrated good cause for the appeal to be allowed out of time. That the appeal does not raise any triable issues to be considered by the court. That if the application is allowed, the respondent will suffer great prejudice as the decretal amount has already been settled. That the applicant did not serve the respondent with the memorandum of appeal within 7 days as required under Order 42 Rule 12 of the Civil Procedure Rules. That the application is an afterthought and should not be considered by the court.
4. The application was canvassed by way of written submissions.



5. The applicant submitted that the appeal was filed barely 2 days after the end of the 30 days statutory period allowed for appeals. That the delay was occasioned due to work pressures and that the same is not inordinate and is excusable. That the applicant has an arguable appeal and should be given a chance to be heard. That the respondent has not demonstrated what prejudice it will suffer if the application is allowed. He urged the court to allow the appeal and deem the appeal on record as filed out of time with the leave of court.
6. The respondent submitted that the applicant prepared a memorandum of appeal dated 25th September 2023 and filed it without the leave of court on 27th September 2023 and by this time, the timeline for filing had already lapsed. That the 30 days of appeal started running from 22nd August 2023 and so the 30th day fell on 21st September 2023. That the appeal was filed 6 days late and cannot be deemed to be properly on record. Reliance was placed on the case of *Nicholas Kiptoo Korir Arap Salat v. Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR where the court held that an appeal filed out of time without the leave of court cannot be deemed as properly on record through an application for leave filed after the fact. It also relied on the cases of *Hamam Singh & Others v Mistri* [1971] EA 122 and *County Executive of Kisumu v County Government of Kisumu & 8 Others* [2017] eKLR and urged the court to dismiss the application.
7. The issues for determination are whether the appeal filed out of time should be admitted and deemed as filed out of time with the leave of court.
8. In considering whether or not to grant leave to appeal out of time, the applicant must satisfy the court that the application for leave had been brought timeously and without delay, but if there is delay then it is for good reason and that if the court does not grant the order sought then the applicant will suffer prejudice because the appeal makes an arguable case. This prayer is to be granted on a discretionary basis and may be denied where the court thinks that there is no good reason why the appeal was not filed within time.
9. Section 79G of the *Civil Procedure Act* provides:

“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 a good and sufficient cause for not filing the appeal in time.”
10. Similarly, in the case of *Edith Gichungu Koine v Stephen Njagi Thoithi* [2014] eKLR the court held thus:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision 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.”
11. The impugned judgment was delivered on 22nd August 2023 and the memorandum of appeal is dated 25th September 2023 and amended on 27th October 2023. The application herein is dated 27th October 2023 and filed on 01st November 2023. Surely there is a delay in filing the appeal and the application herein. The applicant argued that the delay in filing the appeal is because he miscalculated the timeline and was overwhelmed with work, only to realize that the timeline had passed. The respondent has



produced proof that it has settled the decretal amount according to the findings of the trial court. It was its argument that it will suffer prejudice if the application is allowed. The applicant has not denied that the decretal sum has been paid. The applicant cannot have his cake and eat it at the same time.

12. The sequence in which the applicant has filed the documents herein is in question. The memorandum of appeal was filed out of time without the leave of court. Through this application, the applicant is seeking to remedy this wrong by asking the court to deem the appeal as duly filed with leave of court. It does not work that way. According to Section 79G of the *Civil Procedure Act*, the applicant is required to satisfy the court that there is sufficient reason for the delay in filing the appeal before the allowing the same to be filed, and not the other way around. In the case of *Nicholas Kiptoo Korir Arap Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR the court held that a document filed without leave of court, for which leave should have been sought, should be expunged from the court's record.
13. In my view, the application herein is an afterthought and is targeted at hoodwinking the court into correcting an error that has been occasioned by the applicant and his advocate. In any event, the decretal amount has been settled and the respondent has proved as much. I am not persuaded that the applicant is deserving of the orders sought and it is an abuse of the court process.
14. Therefore, I find that the application lacks merit and it is hereby dismissed with costs to the respondent.
15. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 06TH DAY OF MARCH, 2024.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondent

