



Ayege & 2 others (Suing as administrator of Ayege N Ogot - Deceased) v South Sugar Co Limited (Miscellaneous Civil Application E231 of 2023) [2024] KEHC 8317 (KLR) (2 April 2024) (Ruling)

Neutral citation: [2024] KEHC 8317 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
MISCELLANEOUS CIVIL APPLICATION E231 OF 2023**

RPV WENDOH, J

APRIL 2, 2024

BETWEEN

SIPROSA ACHIENG AYEGE, ELSA ATIENO AYEGE & TERESA ATIENO AYEGE (SUING AS ADMINISTRATOR OF AYEGE N OGOT - DECEASED) APPLICANT

AND

SOUTH SUGAR CO. LIMITED RESPONDENT

RULING

1. The an application dated 14/9/2023 seeks the following orders: -
 1. The applicants be granted leave to appeal out of time against the whole of the judgement of Hon. Kamau dated 13/5/2021 in PMCC No. 96 of 2014;
 2. That the memorandum of appeal annexed hereto and marked X be deemed as duly filed upon payment of the requisite filing fees;
 3. That costs be provided for.
2. The application is based on the grounds on its face and the supporting affidavit of Ezekiel Oduk, Counsel who has conduct of this matter on behalf of the applicants. He deposed that judgement was delivered on 13/5/2021 without prior notice and in absence of Counsel; that he has since communicated with the applicants who are aggrieved by the decision; that he has prepared a memorandum of appeal but the time for lodging the appeal has lapsed; that the judgement raises serious grave misdirection and it is important that the court looks into the propriety of the decision. Counsel urged that no prejudice will be suffered if the application is allowed as the delay was beyond the control of the applicants.



3. The application is not opposed. The applicants filed written submissions dated 22/11/2023 and asked this court to allow their application as prayed.
4. Section 79G of the *Civil Procedure Act*, provides that the time for filing an appeal from the Subordinate court to the High Court is 30 days. The same provision gives the High court discretion to enlarge time for a party to file an appeal out time if there are good and sufficient reasons.
5. According to applicants' Counsel, the hearing before the trial court was concluded and a mention date was slated for 13/4/2021 for submissions. The judgement was delivered on 13/5/2021 without notice to the parties. It seems that Counsel may have discovered the existence of the judgment in August 2023 as it was submitted that the instant application was filed 30 days thereafter.
6. In determining whether leave to appeal out of time should be granted, I am guided by the binding decision of the Court of Appeal in *Edith Gichungu Koine v Stephen Njagi Thoitbi* (2014) eKLR Odek JA rendered himself as thus:-

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

7. On the period of delay, the impugned judgement was delivered on 13/5/2021 by Hon. R.K. Langat but not Hon. Kamau as deposed by Counsel. The instant application was filed on 14/9/2023. This is a delay of approximately 2 years and 4 months. The applicants' reason for the delay was that there was no notice issued to the Counsel on when the judgement would be delivered.
8. Looking at the judgement of the trial court, there is no coram which was entered by the Magistrate. I have perused the lower court file and that the date was taken in absent of counsel and there is no evidence that while was issued to the parties..
9. However, that does not absolve the applicants from being vigilant and following up on a matter which they have an interest in. I am not convinced that the applicants have given a proper reason on why they wish to commence this appeal two years later. Counsel knew that he had a pending judgement and it could not have taken two years to follow up on the same. In my view, the period of delay of over 2 years has not been explained succinctly and no proper reasons have been advanced on the delay.
10. Whether the applicants have an arguable appeal: I have considered the judgement being appealed against. The trial Magistrate dismissed the suit on the basis that there were no letters of administration ad litem produced by the applicants to demonstrate that they had the capacity to sue on behalf of the deceased.
11. In the applicants' draft memorandum of appeal, the applicants contend that the learned Magistrate erred as there was a document tendered which showed that the applicants' substituted the deceased on or about 12/8/2016.
12. According to the judgement, the plaint was amended on 27/10/2019. It would be of interest to consider if perhaps at the time of amendment there were no letters of administration ad litem to substitute the deceased. I find this is an arguable ground. The respondent has not opposed the application to demonstrate what prejudice it is likely to suffer if the application is allowed.
13. In the end, I allow the application and make the following orders: -



1. The applicants do file and serve the draft Memorandum of Appeal within 7 days hereof after payment of the requisite court fees;
2. The applicants to prepare, file and serve the record of appeal within 30 days hereof;
3. Costs to abide the appeal;
4. Mention before Deputy Registrar on June 5, 2024 to confirm filing appeal.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 2ND DAY OF APRIL, 2024

R. WENDOH

JUDGE

Ruling delivered in the presence of:-

Ms. Theuri for the Applicants.

Mr. Odhiambo for the Respondent.

Emma and Phelix Court Assistants.

