



Ngii (Suing as the Administrator of the Estate of Carlos Mutemi Kalonzo - Deceased) v Mosque & 2 others (Miscellaneous Civil Appeal E001 of 2023) [2024] KEHC 4916 (KLR) (14 May 2024) (Ruling)

Neutral citation: [2024] KEHC 4916 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MANDERA
MISCELLANEOUS CIVIL APPEAL E001 OF 2023**

JN ONYIEGO, J

MAY 14, 2024

BETWEEN

MUTEMI MWAROKO NGII (SUING AS THE ADMINISTRATOR OF THE ESTATE OF CARLOS MUTEMI KALONZO - DECEASED) APPLICANT

AND

ROWDA MOSQUE 1ST RESPONDENT

MOHAMED SHEIKH OSMAN 2ND RESPONDENT

ODHIAMBO ANTHONY ODUOR 3RD RESPONDENT

RULING

1. The application for determination before me is a notice of motion dated 29.02.2024 in which the applicant sought for orders as follows:
 - i. Spent.
 - ii. There be an extension of time to file an appeal from the judgment delivered by Hon. P.W. Wasike on 27.07.2023 out of time.
 - iii. Upon grant of prayer (ii) above, the memorandum of appeal annexed hereto be deemed as duly filed.
 - iv. Costs be in the cause.
2. The application was supported by the affidavit of the applicant sworn on 29.02.2024 averring that the impugned judgment was delivered on 27.07.2023 and the memorandum of appeal filed on 26.08.2023 but paid for on 29.09.2023. Noting that the time stipulated within which an appeal ought to be filed is thirty days, the applicant urged this court to exercise its discretion and enlarge time for filing the



appeal herein. It was stated that the main reason for the delay was the migration of court services at the Mandera High Court sub registry from both physical and email filing to e-filing.

3. The application was grounded on the fact that the applicant filed before the trial court a suit seeking for compensation against the defendants for the loss of his child. That by a judgment delivered on 27.07.2023, the trial court dismissed his suit basing its determination on wrong principles of the law.
4. The respondent in opposing the said application filed a replying affidavit sworn on 29.02.2024 deponing that the only driving force to this appeal is the fact that the advocate on record for the applicant was condemned to pay costs in person. That section 79G provides for timelines within which an appeal from a subordinate court may be filed.
5. It was urged that the appeal herein was filed outside the statutory period of 30 days and no sufficient cause was demonstrated to this court to exercise its discretion. It was averred that the application herein is an afterthought and therefore, the same ought to be dismissed with costs to the respondent.
6. The court directed that the application be canvassed by way of written submissions. The applicant by his submissions dated 25.03.2024 urged in reference to two issues for determination; whether the appeal has high chances of success and; whether the application herein ought to be allowed. It was contended that during the hearing of the suit herein, substantial breaches both in law and facts were occasioned by the trial court in reaching the impugned judgment.
7. That issues such as the jurisdiction of the trial court and illegalities of contracts were not factored thus leading to a miscarriage of justice. Given that the applicant lost his only child in an act allegedly caused by the respondents herein, it is only mete that the application be allowed. Reliance to that end was placed on the case of *Ngei v Kibe & another Civil Appeal E359 of 2021* [KECA] 243 (KLR) where it was held that the court has wide discretion to extend time.
8. On the second issue, it was urged that the applicant was gravely aggrieved by the decision of the court hence the need to prefer an appeal. That the memorandum of appeal was filed within the stipulated time as provided for by the law but payment of the same delayed for the reason that the Judiciary at that time was migrating to the digital platform hence the confusion on where to make payment hence the delay herein. This court was therefore urged to allow the prayers as sought.
9. The 1st and 2nd respondents on the other hand filed submissions dated 25.03.2024 urging that this court ought not grant its discretion for the reason that the applicant did not demonstrate satisfactorily the reasons for the seven-month delay before filing the appeal herein. Reliance to support the same was anchored on the case of *APA Insurance Co. Ltd vs Michael Muturi* [2016] eKLR where the court was of the view that before leave is issued, the court ought to be guided by the consideration of factors such as period of delay, reasons for the delay and the degree of prejudice to the respondent if the application is granted. This court was therefore urged to disallow the application herein.
10. Having considered the application together with the response thereof, the only issue which germinates for determination is whether the applicant has met the criteria for extension of time.
11. The law governing appeals from the subordinate court to the High Court, is Section 79G of the *Civil Procedure Act* which provides that appeals of such nature must be filed within a period of 30 days from the date of the decree or order from which the appeal lies. The proviso to the said section however allows for extension of time to appeal where good and sufficient cause has been shown.



12. Section 95 of the Act further bestows this court with discretion to enlarge time. The said section provides thus; -
 - “95. 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.”
13. The principles upon which a court should exercise discretion and grant leave to appeal out of time are now settled. It therefore follows that, a court should take into account the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted. [See *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi* - Civil Application No. NAI 255 of 1997 (unreported).
14. As such, extension of time within which an appeal ought to be filed is a matter of judicial discretion. An applicant seeking enlargement of time to file an appeal must show that she has a good cause for doing so. The question therefore is whether the applicant has satisfied the above conditions.
15. As for the length of the delay, it is not disputed that the ruling of the trial court was delivered on 27.07.2023 and the application herein was filed on 29.02.2024 which is slightly over six (6) months from the date of the said ruling. In the case of *Jaber Mohsen Ali & Another vs Priscillah Boit & Another E & L No. 200 of 2012* {2014} eKLR the Court stated that what is unreasonable delay is dependent on the circumstances of each case. The court went further to state that, even one day after Judgment/Ruling could be unreasonable delay depending on the Judgment/Ruling of the Court and any order given thereafter.
16. The applicant urged that despite filing the memorandum of appeal on 26.08.2023 which was within time, he could not make payment for the same since the Judiciary at that time was migrating to e-filing. He further expressed the position that the delay in filing the application was due to poverty hence lack of funds to pay the advocate and also pay for the filing fees.
17. In the case of *Andrew Kiplagat Chemaringo vs Paul Kipkorir Kibet* [2018] eKLR, the court was of the view that 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 favourably be exercised.
18. In the instant case, the Memorandum of appeal was filed within the statutory period. Filing fees was however paid on 29-09-23 translating to a delay of 62 days. In-law, an appeal is deemed to be filed when the requisite fees is made. Therefore, the MOA is deemed to have been filed after 62 days and the application for leave to extend time made after 7 months. The delay in filing the appeal due to judiciary transition to e-filing is far fetched as courts were receiving and filing documents during that period. There was no proof or evidence from the court to confirm that for two months there was no filing done. Normally, when there is system failure, a party is supposed to seek exemption to file pleadings through manual banking of the necessary fees. In a nutshell, there was no evidence of such failure.
19. On the contradictory ground that the delay to file the application was due to poverty of the applicant, it is not convincing. If the applicant was able to engage a lawyer from the lower court, what would have stopped him from paying about 1500/= for the MOA? In my view, the delay was not justified. The lawyer did not do his job as expected.



20. As for the chances of the intended appeal succeeding, I have perused the draft memorandum of appeal. It is trite that in deciding whether an appeal is arguable or not, the court is bound to consider whether the said intended appeal raises a bona fide issue for determination. [See Commissioner of Customs vs Anil Doshi, {2017} eKLR]. I will however, acknowledge that although the delay was not reasonable, some effort was made to file the memorandum of appeal in time save for payment. This was counsel's mistake in not making payment within the shortest time possible. However, in the interest of justice, I will indulge the applicant to exhaust his legal redress especially where the life of his son is involved.
21. On the aspect of whether the appeal is arguable, I have perused the grounds on the draft memorandum of appeal and I find that the appeal arises from a case that led to loss of life. The applicant therefore has urged this court to consider the fact that the determination entered by the trial court was not sound and rules of evidence were not conformed to. In my view, the issues raised by the applicant are arguable; Nevertheless, it is essential to note that an arguable appeal does not necessarily mean an appeal that will or must succeed.
22. As for the prejudice which the respondents stand to suffer should leave be granted for the applicant to file an appeal out of time, I did not come across any credible evidence to indicate the prejudice that would befall them that cannot be compensated by way of costs. It should be noted that the right to be heard is provided for in our constitution and the applicant having expressed his intentions to be heard on appeal, it is paramount that he be granted the said opportunity.
23. In conclusion, it is my considered view that in the interest of justice, the application should be allowed. Accordingly, the application is allowed with orders that;
 - i. leave be and is hereby granted to the applicant to file the appeal out of time.
 - ii. That the memorandum of appeal filed herein be and is hereby deemed as duly filed.
 - iii. That the applicant to serve the record of appeal within 30 days from the date of delivery of this ruling.
 - iv. That the Deputy Registrar to call for the original file from the lower court.
 - v. That parties to file their submissions within 14 days after service of the record of appeal.
 - vi. That the applicant to bear costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 14TH DAY OF MAY 2024.

J. N. ONYIEGO

JUDGE

