



Njoroge v Transchem Pharmaceutical Ltd & another (Civil Case 461 of 2013) [2024] KEHC 5796 (KLR) (Civ) (13 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5796 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 461 OF 2013

CW MEOLI, J

MAY 13, 2024

BETWEEN

REBECCA WAMBUI NJOROGE PLAINTIFF

AND

TRANSCHEM PHARMACEUTICAL LTD 1ST DEFENDANT

NATION MEDIA GROUP 2ND DEFENDANT

RULING

1. For determination at this juncture is the Notice of Motion dated 18th May, 2023 (the Motion) filed by Rebecca Wambui Njoroge (hereafter the Applicant) seeking an order for leave to file an appeal out of time as against the ruling delivered by this court on 30th March, 2023. The Motion is expressed to be brought under Sections 3A and 75G of the *Civil Procedure Act* (CPA) and Orders 22, 40, 42 (6) and 50 of the *Civil Procedure Rules* (CPR).
2. The grounds on the face of the Motion are amplified in the supporting affidavit sworn by the Applicant herself, averring that the following delivery of the aforesaid ruling, she instructed her advocates to lodge an appeal against it. She further averred that she was under the mistaken belief that the appeal had been timeously filed, only to realize upon undertaking a follow-up on 15th May, 2023 that no such appeal had been filed. It was her assertion that the delay in filing the appeal was occasioned by the fact that the advocate who had been handling the matter (Mr. Ajulu) resigned from the firm without notice and without performing a proper handover of his matters, including the present suit, thereby causing the matter to lie forgotten. It was similarly her assertion that the intended appeal raises arguable issues, with fair chances of success. That on the premise of those averments, it would be in the interest of justice for the court to allow the Motion as prayed.



3. Transchem Pharmaceutical Ltd (hereafter the 1st Respondent) opposed the Motion by putting in Grounds of Opposition dated 31st October, 2023 terming the Motion as misconceived, incompetent, bad in law, an abuse of the court process and the result of habitual indolence on the part of the Applicant. Consequently, the court was urged to strike it out with costs.
4. Nation Media Group (hereafter the 2nd Respondent) equally put in Grounds of Opposition dated 7th December, 2023 featuring the grounds hereunder:
 1. The Plaintiff has failed to give any or sufficient reason for this Honourable Court to exercise its discretion in her favour.
 2. The Court record will show that the Plaintiff has been indolent in the prosecution of this suit and equity does not assist the indolent.
 3. The Plaintiff is seeking an equitable remedy and has not come to Court with clean hands.
 4. The application herein has no merit.
 5. The application is bad in law. sic
5. When the parties attended court on 14th December, 2023 they were directed to file written submissions on the Motion. However, going by the record it is apparent that only the 1st Respondent complied. As at the time of writing this ruling, the court noted that neither the Applicant's nor the 2nd Respondent's submissions were availed for this court's consideration.
6. On its part, the 1st Respondent's counsel submitted that no proper reasons have been given for the delay in filing the appeal. Counsel further submitted that the explanation set out in the Motion is insufficient and merely speaks to the pattern of indolence on the part of the Applicant. Reference was made to the decision in *Malombe & another (Suing as the legal representatives of the Estate of Barnabas Malombe -Deceased) v Kavusi & another (Suing as the legal representatives of the Estate of Willy Muema Isika -Deceased)* (Civil Suit 127 of 20150 [2022] KEHC 10532 (KLR) (22 June 2022) where the court reasoned that a party who comes to court under the principle of 'mistake of counsel' as an excuse for the inaction in a matter, ought to present himself or herself with clean hands. That given the history of indolence in the present suit, the Applicant is undeserving of the exercise of the court's discretion in her favour. For those reasons, the 1st Respondent urged the court to dismiss the Motion, with costs.
7. The Court has considered the affidavit material supporting the Motion, the respective Grounds of Opposition and submissions on record. It is clear that the sole order sought therein is for leave to appeal out of time. The power of the court to enlarge time for filing an appeal out of time is expressly donated by Section 79G of the *CPA*, as well as Section 95 of the same Act. The proviso of Section 95 is echoed under Order 50, Rule 6 of the *CPR*.
8. Section 79G provides that:

“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.”



9. Under the provisions of Section 95 of the [CPA](#) and Order 50, Rule 6 of the [CPR](#), courts have discretionary power to enlarge the time required for the performance of any act under the Rules even where such time has expired.
10. The principles governing leave to appeal out of time are well settled. A successful applicant must demonstrate “good and sufficient cause” for not filing the appeal in time. In [Thuita Mwangi v Kenya Airways](#) [2003] eKLR, the Court of Appeal while considering Rule 4 of the [Court of Appeal Rules](#) which was in pari materia with Section 79G of the [Civil Procedure Act](#), reiterated its decision in [Mutiso v Mwangi](#) [1997] KLR 630 as follows:

“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 general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

11. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court’s discretion in his favor. On the question of the exercise of judicial discretion, the Supreme Court observed in the case of [Telkom Kenya Limited v John Ochanda and 996 Others](#) [2015] eKLR that:

“In instances where there is delay in filing the notice of appeal, this Court has inherent jurisdiction to admit such appeal, provided sufficient explanation is proffered for the cause of delay. The design and objective of the Supreme Court Rules is to ensure accessibility, fairness and efficiency in relation to this Court. Parties should comply with the procedure, rather than look to the Court’s discretion in curing the pleadings before it. This Court’s position is that the circumstances of each case are to be evaluated, as a basis for arriving at a decision to intervene, in instances where full compliance with procedure has not taken place....”

See also [Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 Others](#) [2019] eKLR.

12. The Supreme Court in the case of [Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others](#) [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The Court stated *inter alia* that:

“(T)he underlying principles a court should consider in exercise of such discretion include;

1. Extension of time is not a right of any 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 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.
7.”

See also *County Executive of Kisumu v County Government of Kisumu & 8 Others* [2017] eKLR.

13. On the period of delay, it is not in contention that the ruling in question was delivered by this court on 30th March, 2023; whereas the instant Motion was brought on or about the 18th of May, 2023. In the court’s view, the delay short of two (2) months cannot be deemed inordinate in the circumstances.
14. Concerning the reasons for the delay, the court considered the explanation given by the Applicant to the effect that the advocate who had conduct of the matter purportedly left suddenly his employment with the Applicant’s firm of advocates and without having undertaken a proper handover. That as a result, the file pertaining to the present suit was left unattended to and thus delaying the filing of the intended appeal.
15. While the court acknowledges the existing legal principle that the mistake of an advocate should not be visited upon the client as a matter of general principle, this principle does not apply in a blanket sense. It is also trite law that a suit/appeal ultimately belongs to the litigant and not the advocate; and thus; it is the litigant’s duty to pursue or otherwise take active steps to ensure the timely prosecution of his or her claim. This position was spelt out by the Court of Appeal in *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR when it held thus:

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”
16. Moreover, the Court of Appeal went on to render itself as follows in the case of *Tana and Athi Rivers Development Authority v Jeremiah Kimigbo Mwakio & 3 others* [2015] eKLR:

“While mere negligent mistake by counsel may be excusable, the situation is vastly different in cases where a litigant knowingly and wittingly condones such negligence or where the litigant himself exhibits a careless attitude (in *Mwangi v Kariuki* [1999] LLR 2632 (CAK)) Shah, JA. ruled that “mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant’s careless attitude.” The import of this is that while the mistake of counsel is excusable, if it is accompanied by a litigant’s carelessness and inactivity, then the refusal by court to exercise discretion in favour of such a party cannot be impugned.”
17. In the present instance, the court noted that despite asserting that she had given prompt instructions on the filing of an appeal and followed up on the status thereof, the Applicant did not tender any evidence in support those averments. Or to support her assertions that the delay was the direct result of inadvertence by the advocate who was handling her matter and who allegedly suddenly the firm without performing a proper handover of his cases. In the premises, the court cannot verify the explanation given by the Applicant for the delay in lodging an appeal in good time.



18. Moreover, the record herein is replete with evidence of previous delays in the suit, primarily because of non-compliance or tardiness on the part of the Applicant. In view of all the foregoing circumstances, the court is not persuaded to exercise its discretion in favour of the Applicant. The Notice of Motion dated 18th May, 2023 is hereby dismissed, with costs to the 1st and 2nd Respondents.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 13TH DAY OF MAY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: N/A

For the 1st Respondent: Mr. Ongeru

C/A: Erick

