



Amakobe v Qasim and Yahya Limited & 2 others (Miscellaneous Civil Application E260 of 2023) [2024] KEHC 7077 (KLR) (Civ) (13 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7077 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E260 OF 2023**

CW MEOLI, J

JUNE 13, 2024

BETWEEN

JAMES HAGGAI AMAKOBE APPLICANT

AND

QASIM AND YAHYA LIMITED 1ST RESPONDENT

HABEL SONGOI 2ND RESPONDENT

CHARTLESS AUCTIONEERS 3RD RESPONDENT

RULING

1. For determination is the motion dated 02.05.2023 by James Haggai Amakobe (hereafter the Applicant) seeking *inter alia* that the Court be pleased to enlarge time for the lodging of an appeal against the judgment delivered in the lower court on 04.05.2022 and that the memorandum of appeal dated 22.08.2022, attached to the application be deemed as duly filed. The motion is expressed to be brought under Section 38(1) of the Small Claims Court Act, Section 79G and Section 95 of the Civil Procedure Act (CPA), Order 9 Rule 9, Order 42, Order 50 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules (CPR) among others. On the grounds thereon, as amplified in the supporting affidavit sworn by Applicant.
2. The gist of his depositions is that being aggrieved with the decision of the trial Court in Nairobi SCC Comm. No. E251 of 2021 (hereafter the lower Court claim) delivered on 04.05.2022, he intends to challenge it by way of appeal ; that he had instructed the firm of Anyanzwa J. S. Advocates to represent him in the matter before the Small Claims Court but at the delivery of the decision on 04.05.2022, erstwhile counsel on record was absent from Court ; and as a consequence he was not informed of the outcome thereof. That being a vigilant litigant, he followed up and upon perusing the Court file,



found that his claim as against Qasim and Yahya Limited, Habel Songoi and Chartless Auctioneers (hereafter the 1st, 2nd & 3rd Respondent) had been dismissed.

3. He goes on to depose that he wrote emails on 26.05.2022 and 03.06.2022 requesting for a copy of the judgment and proceedings for purposes of lodging an appeal. That frustrated at the pace of things, he wrote a letter to the Office of the Judiciary Ombudsman and instructed present counsel on record to equally attempt to obtain the said documents. He asserts that a certified copy of the judgment and proceedings were finally received on 05.08.2022 but due to the tension and uncertainty that came with the General Elections, counsel was unable to collect the same until 17.08.2022.
4. He further avows that delay herein was caused by preparation of proceedings, compounded by inadequate representation by erstwhile counsel. That without a copy of the forestated documents he was unable to make an informed decision or issue instructions on whether to lodge an appeal. He states that his counsel on record had earlier filed an application dated 16.09.2022 seeking to come on record however when the same eventually came up for hearing on 16.03.2023, it was dismissed for non-attendance due to counsel's inadvertence of mis-diarizing the said hearing date. That owing to the foregoing counsel promptly moved the Court seeking to reinstate the application dated 16.09.2022 however the same was dismissed on grounds that no orders could issue as leave had not been granted to the present counsel to come on record for the Applicant.
5. He therefore averred that the delay was not intentional and was occasioned by circumstances outside his control and the mistake and or error of counsel should not be visited upon him. Nor his appeal or right thereto prejudiced due mistake of erstwhile counsel. In conclusion, he asserts that the delay herein is not inordinate or inexcusable and that no prejudice would be occasioned to the Respondents if the motion is allowed.
6. The 1st and 3rd Respondent oppose the motion through a replying affidavit sworn by Omondi T. Ochieng, counsel on record for the 1st and 3rd Respondent herein. He views the motion as incompetent, frivolous, vexatious, bad in law and an abuse of the Court process, intended to waste precious judicial time and resources. He confirms that this is the third attempt by the Applicant to have the matter dealt with by this Court in seeking leave to appeal out of time. That the Applicant's allegation of being unaware of the lower Court Judgement are false and can be ascertained from his emails to the Court within the 30-day window within which to lodge an appeal. He further asserts that other than being aware of the judgment, the Applicant incessantly engaged his firm on a post judgment compromise and had advised him to consult his advocate if he was dissatisfied with the decision of the trial Court.
7. That the decision to move the Court after the lapse of more than a year since the judgment of the lower Court was delivered is an afterthought and an act of bad faith, aimed at denying the 1st and 3rd Respondent from enjoying the fruits of successful litigation. Counsel further attacks the reasons advanced by the Applicant concerning representation as baseless and contrary to the express provisions of Section 79G of the *CPA*. That the Applicant has further not demonstrated that there exists an arguable appeal with a high chance of success and or demonstrated what substantial loss he is likely to suffer if the orders sought are not granted. In summation, counsel states on a without prejudice basis to his earlier deposition that if the Court were inclined to allow the motion, the same ought to be on condition that the Applicant provides security as to costs equivalent to the amount sought before the trial Court.
8. The motion was canvassed by way of written submissions. Counsel for the Applicant began by restating the contents of his affidavit material. Addressing the question whether the intended appeal is arguable, counsel relied on the decisions in *Nicholas Salat v Independent Electoral & Boundaries Commission & 7 Others* [2014] eKLR, *Thuita Mwangi v Kenya Airways* [2003] eKLR and *George*



Odbiamba Omwidha v Co-operative Bank Kenya Ltd [2018] eKLR. To support the submission that this Court has unfettered discretion to enlarge time to facilitate the lodging out of time of an appeal demonstrated to be arguable.

9. Concerning reasons advanced by the Applicant, counsel called to aid the decisions in *King Woolen Ltd & Anor v Kaplan & Straton Advocates* [1993] KLR 273 as cited in *Republic v Silas Mutuma Marimi & 2 Others* [2016] eKLR, *Francis Mugo & 22 Others v James Bress Muthee & 3 Others* [2005] eKLR and *Phillip Chemwolo & Another v Augustine Kubede* [1982-88] KLR 103 and reiterated the affidavit material in support of the motion, especially regarding ineffective representation by counsel. He submitted that the mistakes and or error of an advocate should not be visited upon the Applicant, who has demonstrated that he was diligent.
10. Citing the cases of *Njoroge v Kimani (Civil Application Nai. E049 of 2022)* [2022] KECA 188 (KLR) and *Mistry Premji Ganji (Investments) Limited v Kenya National Highways Authority* [2019] eKLR counsel argued that an explanation in respect of the delay has been offered. Contending that the time taken to prepare and avail copies of the certified judgment and proceedings should not be computed with regard to the statutory duration provided for in Section 79G of the *CPA*. It was further submitted that there was no delay in filing the present motion being related to the one filed on 16.09.2022 and dismissed due to inadvertence. In conclusion, counsel contended that the Respondents would not be prejudiced if the motion is allowed in the interest of justice.
11. On the part of the 1st and 3rd Respondent, counsel filed terse submissions on the singular issue whether this Court ought to exercise its discretion in favour of the Applicant. Invoking the provisions of Section 79G of the *CPA* and citing the decisions in *Mwaniki Murangiri v Ndwiga Murangiri Muruambuci & Another* [2019] eKLR, *Daphne Parry v Murray Alexander Carson* [1963] EA 546 and *Dilpack Kenya Limited v William Muthama Kitonyi* [2018] eKLR counsel submitted that the time to appeal lapsed on 04.06.2022 but it was not until 02.05.2023 that the instant motion was filed. That this delay is inordinate, and inexcusable, and reasons advanced by the Applicant unconvincing.
12. On whether the intended appeal is merited, it was summarily contended that the same has no chance of success because no basis has been laid by the Applicant regarding the issues intended to be raised on appeal. As to prejudice, counsel argued that it has been more than two (2) years since institution of the matter before the lower Court and that the 1st and 3rd Respondent as the successful litigants are entitled to enjoy the fruits of successful litigation. Counsel stated that the present motion is intended to drive the 1st and 3rd Respondent from the seat of justice, and ought to be dismissed with costs.
13. The 2nd Respondent did not participate in the instant proceedings by either filing a response or submissions.
14. The Court has considered the rival affidavit material and submissions in respect of the motion. The Applicant's motion essentially seeks enlargement of time for lodging of an appeal from the judgment delivered on 04.05.2022; and that the memorandum of appeal dated 22.08.2022, attached to the application be deemed as duly filed. The power of the Court to enlarge time for filing an appeal out of time is expressly donated by Section 79G, as well as generally, by Section 95 of the *CPA*. Section 79G of the *CPA* 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.”

15. The principles governing leave to appeal out of time are settled. The 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 *CPA*, 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.”

16. 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. The Supreme Court in the case of *Nicholas Kiptoo Korir Arap Salat* (*supra*) 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.

17. The foregoing principles govern motions of the nature before the Court. However, upon considering the material and records before it, the court takes the view that the motion turns not on the substance, but on procedural improprieties disclosed herein. Although these lapses were not addressed by any of the parties, this court as a court of law cannot shut its eyes to them.
18. The pertinent facts as disclosed by a review of the record and Case Tracking System (CTS) are that the decision of the lower Court which is also the subject of the present motion was delivered on



04.05.2022. On 16.09.2022 via Nairobi HC Misc. E554 of 2022, a first application was lodged by the Applicant. By his said motion the Applicant sought inter alia that leave be granted to the firm of Osundwa & Co. Advocates to come on record for the Applicant after judgment and the enlargement of time for the filing of an appeal from the judgment delivered on 04.05.2022. The Applicant confirms that when the said motion eventually came up for hearing on 16.03.2023, it was dismissed for non-attendance by his erstwhile counsel.

19. Subsequently, the Applicant moved the Court in the same matter vide the motion dated 28.04.2023 seeking inter alia that the order issued on 16.03.2023 dismissing his application be set aside, and that the motion dated 16.09.2022 be reinstated for hearing. The motion was placed before this Court on 28.04.2023 under certificate of urgency. The court made the following order thereon: -

“Motion dated 27.04.2023 considered. The dismissed motion contained a prayer for leave to the firm of Osundwa & Co. Advocates to come on record for the Applicant. There is no indication on the record that such leave was granted, or that in lieu thereof, an appropriate consent was filed. No orders therefore can issue.”

20. Rather than amend the motion above to include the prayer for leave for new counsel to come on record and hence pursue reinstatement of the dismissed motion, the Applicant instituted the instant fresh proceedings five days later through his present advocates. The Court is at a loss as to why the Applicant abandoned the reinstatement motion and preferred in this cause, a motion similar to the one earlier dismissed by this court, that was essentially seeking the same prayers sought in the present application, namely, leave to file appeal out of time.
21. Could it be that the Applicant’s counsel erroneously, perceived the ex parte orders issued on 28.04.2023 in Nairobi HC Misc. E554 of 2022 as substantively determining the reinstatement motion dated 27.04.2023? It is not clear, but as matters now stand, the proceedings in Nairobi HC Misc. E554 of 2022 are still live as a review of the CTS indicates that the motion dated 27.04.2023 has not been withdrawn. More significantly, the motion in the said cause dated 16.09.2022 seeking enlargement of time, as also sought by the instant motion, stands dismissed. In the circumstances, it was not open to the Applicant to file a fresh motion where a similar motion in respect of the same subject matter has been dismissed.
22. These sort of blunders not only dissipate the court’s time but also result in unnecessary legal costs, delay and confusion. They are inexcusable especially where a party is represented by counsel, as in this case. The Court of Appeal in *Tana and Athi Rivers Development Authority v Jeremiah Kimigbo Mwakio & 3 Others*, [2015] eKLR no doubt adverting to the overriding objective in Section 1A and 1B of the *CPA* made the following remarks:

“From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel’s duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side...”

23. The manifest impropriety of instituting two concurrent proceedings in respect of the same matter whether deliberate or not borders on the abuse of the court process. The Applicant is not acting in person; he is represented by counsel who ought to know better. The Court of Appeal in *Energy*



Regulatory Commission v John Sigura Otido [2021] eKLR addressing the subject of abuse of the court process observed that; -

“We start with the issue of alleged abuse of the court process. What is the meaning of “abuse of the court process?” That term has been the subject of consideration in a number of decisions by this Court and other Courts. In *Muchanga Investments Ltd vs Safaris Unlimited (Africa) Ltd & 2 Others* (supra) this Court observed that it is difficult to comprehensively list all possible forms of conduct that constitute abuse of judicial process. The Court cited the Nigerian case of *Sarak v Kotoye* [1992] 9 NWLR 9Pt 264 where abuse of judicial process was defined as follows:-

“The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. It’s one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice...”

25. The same Court went on to cite examples of abuse of judicial process which include: -

- “(a) Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.
- b. Instituting different actions between the same parties simultaneously in different courts even though on different grounds.
- c. Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent’s notice.”

24. In the circumstances, the present cause does not warrant any further consideration by the court. The motion dated 2.05.2023 is hereby struck out with costs to the 1st and 3rd Respondents.

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

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Ms. Shikanda h/b for Mr. Osundwa

For the 1st and 3rd Respondents: Ms. Wangare h/b for Mr. Gachie

C/A: Erick

