



**Gitau v Mboya (Civil Appeal E681 of 2023)
[2024] KEHC 6984 (KLR) (Civ) (12 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6984 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL E681 OF 2023
JN MULWA, J
JUNE 12, 2024
IN THE MATTER OF THE DISCIPLINARY COMMITTEE
ESTABLISHED UNDER THE ADVOCATES ACT, 1989
IN THE MATTER OF THE DISCIPLINARY TRIBUNAL CAUSE NO. 161 OF 2021**

BETWEEN

JAMES GITAU APPELLANT

AND

APOLLO MBOYA RESPONDENT

RULING

1. The Appeal herein was filed on 24/07/2023 by the appellant James Gitau against the judgment of the Advocates Disciplinary Tribunal on the 20/03/2023 in which he seeks that his appeal be allowed and the judgment in Disciplinary Tribunal cause number 161 of 2021 be set aside among other reliefs. However the Memorandum of Appeal dated 20/07/2023 was filed way out of the prescribed period for lodging appeals being 30 days by dint of Section 79G of the [Civil Procedure Act](#).
2. By an Application dated 17/08/2023 the appellant/applicant approached the Court under Provisions of Section 79G, 1A, 1B, 3A of the [Civil Procedure Act](#), and orders 42 rule 1, order 51, rule 1 of the [Civil Procedure Rules](#) (CPR) as well as articles 47, 50 and 165 of the [Constitution of Kenya](#) seeking orders: -
 1. spent.
 2. That this court be pleased to grant leave to the applicant to appeal out of time against the judgment of the Tribunal delivered on 20/3/ 2023, and the appeal dated 20/7/2023 be deemed as duly filed within time.



The application is premised upon grounds stated at its face and affidavit sworn on an even date by the applicant and further affidavit sworn on the 31/10/2023 without leave of court, as well as written submissions.

3. In opposition to the application the Respondent filed a replying affidavit sworn on 14/9/2023 and submissions.

The court has considered the pleadings by both parties, submissions and cited authorities.

4. The appellant's reasons for its failure to file the appeal within the statutory period of 30 days are stated in the supporting affidavit to the application and further expounded in the submissions.
5. Briefly, the proceedings to facilitate filing of the appeal were requested for within six days of the impugned judgment. For avoidance of doubt, the applicant's further affidavit filed without leave of court is expunged from the record. When they were supplied there were glaring errors that were acknowledged by the committee/ secretariat of the Tribunal, and upon corrections, were again forwarded to the applicant on 23/06/2023, accompanied by a certificate of delay issued by the committee confirming that indeed the certified copies of the proceedings were eventually furnished to the appellant. It is dated 30/08/2023 and further confirming that the 90 days delay was necessary for the preparation and delivery of the proceedings.
6. On the part of the respondent, by its Grounds of Opposition dated 17/10/2023 and submissions of even date, several issues were raised. I have considered the same as well as the cited authorities.

Analysis and Determination.

7. Section 79G of the Civil Procedure Act provides 30 days for an aggrieved party to file an Appeal against a decision of a court or a tribunal. The proviso thereto however provides 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.
8. The issue that I have flag for determination is therefore whether the appellant has satisfied the court that he had or there existed good and sufficient reasons to persuade the court to admit the appeal out of time.
9. It is trite that the court is vested with discretion to extend time for filing an appeal. The parameters for exercise of such discretion were ably stated by the Court of Appeal in Tbuita Mwangi v. Kenya Airways Limited [2003] eKLR to include:
 1. Period of delay.
 2. Reasons for the delay.
 3. Decree of prejudice which may be suffered by the respondent if extension is granted.
 4. Importance of compliance with time limits.

Additionally, it is also trite that extension of time is not a right to a party and is only available to a deserving party, at the discretion of the court. See Mutiso v Mwangi [1997] KLR. 630 when the Court of Appeal reiterated the conditions that must be considered as stated in the Tbuita Mwangi case (supra). Further in Nicholas Kiptoo Korir v IEBC and 7 others [2014] eKLR, the Supreme Court of Kenya emphasized that a party seeking extension of time has the burden of laying a base to the satisfaction of the court and clearly explained whether the application was brought without unreasonable delay. See also the Board of Management of Muslim Girls Secondary School v Dennis



Kaskon Njomo and 2 others [2022] eKLR. The period of delay depends purely upon circumstances of each case as held in the. Nzoia Sugar Company Limited v. West Kenya Sugar Limited, [2020] eKLR so long as the reasons for delay are sufficiently explained, there is no set period of delay in law, and that what amounts to inordinate delay will differ from case to case.

10. In my considered view, the appellant has shown by affidavit evidence and annexures that he did not sleep on his rights of appeal but actively pursued that right until the proceedings were eventually supplied and soon thereafter moved to file the Memorandum of Appeal four months after filing the Notice of Appeal. The delay has been explained in the court's satisfaction.
11. Whereas the Respondent submits that filing of a Memorandum of Appeal does not require typed proceedings, I wish to differ with these submissions. The cited authority Paul Njage Njeru V. Karija K. Mugambi rendered by a court of equal status is not binding on me but only persuasive and I decline to be so persuaded.
12. As to the format of filing the instant application, there are several schools of thought as to whether it ought to be by way of a Miscellaneous Application or should be filed in the substantive appeal. I am persuaded and it is my line of thought that whichever form a party decides to approach the court particularly when no individualized procedure is provided under any statute, any form is good so long as the intent and purpose is well spelt, that even a simple letter addressed to the court with the relief sought well spelt could be good enough. However it is good practice especially if an advocate is involved to adhere to the practice laid down in the CPR. Article 159 (2) (d) of the Constitution mandates that justice shall be administered without undue regard to procedural technicalities. In my considered view, the format of a pleading unless clearly set out is a procedural technicality that ought not deny a party justice before a court of law. In any event, there having been an appeal filed albeit out of time and without leave of court it would not have made sense to file a Miscellaneous Application to seek orders and reliefs that could be filed within the Appeal.
13. In the case of Charles Ngugi v. ASL Credit Limited [2022] eKLR cited by the Appellant, the court rendered that: -

“In my view, whether one files the Appeal first and seeks extension of time, all files the application for extension of time or files the Application for extension of time Contemporaneously with the Memorandum of Appeal amounts to the same thing. The Appeal cannot be heard until time is enlarged. There are just semantics which do not affect the core issue of extension of time.”
14. In the end and guided by and Provisions of Section 1A, 1B and 3A of the Civil Procedure Act that provides the duty and objectives of the Act and duty of the court to facilitate the just, expeditious, proportionate and affordable resolution of civil proceedings governed by the Act and at Section 3A to effectively exercise the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process.
15. The court further notes that a litigant should not be barred from his appeal rights due to errors, lapses or technicalities unless there is clear lack of adherence to rules that would render the appeal process difficult and inordinate. The main purpose of litigation is to accord all parties access to fair hearing as envisaged under Article 50 of the Constitution and that right should whenever necessary be fostered rather than hindered.



16. In *Mohammed Salim T/A Choice Butcher v. Nasserpuria Memon Jamat* [2013] eKLR the court expressed itself thus:

“The right of appeal must be balanced against an equally weighty right that of the Plaintiff to enjoy the fruits of judgment delivered in his favour. There must be a just cause for depriving the plaintiff that right....”

17. Finally, as observed in *Factory Guards Limited v. Abel Fundi Kitungi* [2014] eKLR.

“The policy of this Court is to apply the principles of the rule of law and exercise latitude in its interpretation of the rules so as to facilitate just determination of disputes on merit and thus facilitate access to justice for all and by all ensuring that deserving litigants are not shut out of the judgment seat”

18. Consequently, the Court finds the Application dated 17/08/2023 to be merited. The court will however not sanitize or endorse the Memorandum of Appeal filed out of time without leave of court.

The following orders shall therefore be issue;

1. The Appellant/ Applicant is granted leave to file Appeal out of time by filing a fresh Memorandum of Appeal within seven days of this Ruling and the Record of Appeal within 45 days of this ruling.
2. In default in adherence to the set timelines, order (1) above shall lapse automatically.
3. Circumstances of this matter dictate that each party bears its own cost of the Application.

Others accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF JUNE, 2024.

JANET MULWA

JUDGE

