



**Mighulo & another v Migano & 4 others (Civil Appeal
E008 of 2024) [2024] KEHC 7796 (KLR) (7 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7796 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KWALE
CIVIL APPEAL E008 OF 2024**

OA SEWE, J

JUNE 7, 2024

BETWEEN

BERTINA MIGHULO 1ST APPELLANT

CHARLES MCHANA ROMAN MWAKIO 2ND APPELLANT

AND

STEPHEN MKALA EUNICE MIGANU 1ST RESPONDENT

JANE WANJIRU KARANJA 2ND RESPONDENT

SAMUEL MBURU NDUNGU 3RD RESPONDENT

SAMUEL NJOROGE KAMAU 4TH RESPONDENT

JACOB THUO MUIRURI 5TH RESPONDENT

RULING

1. Before the Court for determination is the Notice of Motion dated 22nd March 2024. It was filed herein by the appellants, Bertina Mighulo and Charles Mchana Roman Mwakio, pursuant to the provisions of Sections 1A, 1B 3, 3A, 79G, 95 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya and Order 50 Rule 6 of the *Civil Procedure Rules, 2010*, for the following orders:
 - (a) That the time for filing an Appeal against the Judgment and Decree in Kwale CMCC No. E163 of 2021 be extended.
 - (b) That the Memorandum of Appeal dated 6th February 2024 be deemed as properly filed.
 - (c) That the costs of the application be provided for.
2. The application was premised on the grounds that, upon being advised on the 16th January 2024 that judgment had been delivered, the appellants requested to be supplied with a copy, which copy was



emailed to them on 23rd January 2024. Being dissatisfied with the judgment, the appellants prepared a Memorandum of Appeal and forwarded the same to the Kwale Registry for assessment of fees payable.

3. The appellants further contended that it was not until 28th February 2024 that they were able to complete the payment process; and that the filed Memorandum of Appeal was not forwarded to them until 5th March 2024. By that time the appeal period had already lapsed by 15 days. It was therefore their assertion that they are not to blame for the delay; and that the delay is not inordinate. They reiterated their desire to appeal the lower court's judgment and deposed that it is in the interest of justice and fairness that their application be allowed and the Appeal deemed duly filed.
4. In support of the application, the appellants relied on the affidavit of Mr. Joseph Karanja Kanyi, Advocate, sworn on the 22nd March 2024. The averments therein are essentially a replication of the grounds set out on the face of the application. The deponent also annexed copies of the email correspondence exchanged between the appellants and the Kwale Chief Magistrate's Court, among other documents, to buttress the appellants' assertions.
5. The application is unopposed. The record shows that the matter was fixed for hearing on 29th May 2024 and a Hearing Notice was duly served on the respondent. The matter proceeded ex parte in accordance with Order 51 Rule 14(4) of the *Civil Procedure Rules*. Nevertheless, the Court must be satisfied that sufficient cause has been shown for extension of time, because Section 79G of the *Civil Procedure Act*, is explicit that:

Every appeal from a subordinate court to the High Court shall be filed within a period of 30 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 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."

6. It is plain therefore that the Court, when considering an application such as the instant one, has unfettered discretion; and therefore need only concern itself with whether sufficient cause has been shown to warrant such exercise of discretion. For this reason, the principles laid down by the Supreme Court in *Nicholas Kiptoo Korir arap Salat vs. IEBC & 7 Others* 2014] eKLR are pertinent; namely:

The 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.”

7. The same principles were enunciated in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, by the Court of Appeal as hereunder:

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

8. Accordingly, for purposes of determining whether the appellants are entitled to the discretion of this Court, I have considered the application for extension of time to appeal under the following parameters:

- (a) whether there is a good and reasonable explanation for the delay;
- (b) whether the application has been brought without undue delay;
- (c) whether the proposed appeal is arguable, and
- (d) whether any prejudice will be suffered by respondent.

9. The appellants have demonstrated that they promptly applied for a copy of the judgment and thereafter commenced the process of filing their Memorandum of Appeal, but that the delay was occasioned by the court registry staff. Their assertion remains uncontroverted and therefore is convincing proof that sufficient cause has been made for extension of time. They have already filed their Memorandum of Appeal and it does raise arguable issues, such as whether the lower court ignored binding authorities and consequently arrived at the wrong conclusion on liability, and costs.

10. In terms of prejudice that will likely befall the respondents, none was brought to the attention of the Court, granted that the respondents opted not to defend the application.

11. In sum, I am satisfied that the appellants have made sufficient justification for the orders sought. Indeed, in *Banco Arabe vs. Bank of Uganda* 1999. 1 EA 22, that:

The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors, lapses should not necessarily debar a litigant from the pursuance of his rights and unless lack of adherence to rules renders the appeal process difficult and inoperative. It should seem that the main purpose of litigation, namely, the hearing and determination of disputes should be fostered rather than hindered.”

12. In the result, I find merit in the application dated 22nd March 2024. The same is hereby allowed and orders granted as hereunder:

- (a) That leave be and is hereby given to the appellants to file their appeal out of time against the Judgment and Decree passed in Kwale CMCC No. E163 of 2021.
- (b) That the Memorandum of Appeal dated 6th February 2024 be and is hereby deemed duly filed.
- (c) That the costs of the application to be costs in the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 7TH DAY OF JUNE 2024.



OLGA SEWE
JUDGE

