



REPUBLIC OF KENYA



**Ndubi v Nyasani (Miscellaneous Civil Application E019 of 2023)  
[2024] KEHC 8473 (KLR) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 8473 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
MISCELLANEOUS CIVIL APPLICATION E019 OF 2023**

**WA OKWANY, J**

**JUNE 20, 2024**

**BETWEEN**

**ERICK NYAGECHI NDUBI ..... APPLICANT**

**AND**

**JUSTUS NYASANI ..... RESPONDENT**

**RULING**

1. This ruling is in respect to the Application dated 25<sup>th</sup> October 2023 wherein the Applicant seeks the following orders for leave to appeal against the Ruling delivered by the Chief Magistrate at Nyamira on 5<sup>th</sup> September 2023 out of time. The Applicant also seeks the costs of the Application.
2. The Application is supported by the Applicant's Affidavit and is premised on the grounds that: -
  1. The Applicant has moved this honourable Court with speed and without delay.
  2. That Ruling was delivered in Nyamira CMCC NO. 27 of 2021 on 5<sup>th</sup> September 2023.
  3. That the Applicant was desirous of immediately appealing against the Ruling but he has been constrained by the requirement for certified copies of the Ruling and typed proceedings of the trial court.
  4. That it has been a challenge to obtain the said documents from the registry.
  5. That despite requesting for them through a letter dated 18<sup>th</sup> September 2023, the Applicant is yet to be furnished with the certified copies of the Ruling and the typed proceedings.



6. That the Applicant is alive to the fact that the certified copies of the Ruling and the typed proceedings are mandatory requirements for filing an appeal.
  7. That it is therefore necessary for the Applicant to obtain the said certified copies of the Ruling and the typed proceedings before instituting the appeal.
  8. That the statutory limitation period for filing an appeal is 30 days which has since lapsed.
  9. That for the Applicant to be allowed to file the Appeal out of time, leave has to be sort from the Court.
  10. That it is in the interests of justice that this honourable Court grants the Applicant leave to file the appeal out of time.
  11. That the Applicant has moved the honourable Court in good faith.
  12. That the Respondent will not suffer any prejudice if this Application is allowed.
  13. That the Applicant on the other hand will suffer a great injustice if the prayers he seeks in the Application are not granted.
  14. That allowing this Application meets the ends of justice.
3. In response, the Respondent filed Grounds of Opposition dated 24<sup>th</sup> November 2023 and a Notice of Preliminary Objection on the same date. In the Grounds of Opposition, the Respondent states:
1. The Application is fatally defective, unnecessary, vexatious and misconceived and an abuse of the court process.
  2. The Application is an afterthought.
  3. The delay is inordinate, intentional and contumelious and therefor inexcusable.
  4. The delay is an abuse of the court process.
  5. There is substantial risk to fair trial and causes serious prejudice to the Respondent.
  6. The Applicant will cause grave injustice to the Respondent if allowed.
  7. It will be in the interests of justice to dismiss the Application.

### **Background**

4. The Applicant sued the Respondent in NYAMIRA CMCC No. 27 of 2021 and matter proceeded for hearing, partly, after which the Applicant sought adjournments to enable him call a motor vehicle assessor. The trial court granted him final adjournments on two occasions. On 14<sup>th</sup> February 2022, the trial court dismissed the suit for want of prosecution after non-attendance by the Applicant and his Counsel.
5. The Applicant then applied for the reinstatement of the suit and when the application came up for hearing on 9<sup>th</sup> May 2022, the applicant was once again absent thereby leading to the dismissal of the application for want of prosecution.



6. The Applicant once again made an application to reinstate the dismissed Application of 9<sup>th</sup> May 2022. On 19<sup>th</sup> January 2023, the Applicant changed Counsel and the Respondent's Advocates proceeded to peruse the court record to confirm compliance with Order 9 Rule 9 which led to the filing of the Preliminary Objection. The trial court upheld the Preliminary Objection in its Ruling dated 7<sup>th</sup> September 2023 which led to the present Application.
7. I have considered the Notice of Preliminary Objection dated 24 November 2023 in response wherein the Respondent states that the instant application should be struck out/dismissed for violating the mandatory provisions of Order 9 Rule 9 of the Civil Procedure Rules. According to the Respondent, the Applicant's advocate is not properly on record and should therefore be denied audience.
8. The Applicant filed a further affidavit sworn by Samuel N. Mainga in response to the Notice of Preliminary Objection. The deponent avers that he was the Applicant's former Counsel in NYAMIRA CMCC No. 27 of 2021 and that the Applicant does not owe him any legal fees and that he does not object to the firm of Gichaba H.M.M & Company Advocates representing the Applicant.
9. The PO and the application were canvassed by way of written submissions.

### **The Applicant's Submissions**

10. The Applicant's submissions with respect to the Preliminary Objection and the Grounds of Opposition were dated 8<sup>th</sup> April 2024 and filed on 18<sup>th</sup> April 2024. Counsel submitted on behalf of the Applicant that Order 9 Rule 9 of the Civil Procedure Rules which the Respondent anchored his Notice of Preliminary Objection aimed to prevent litigants from changing advocates without settling any outstanding legal fees as explained in the case of Francis Omondi Odhiambo vs. Hippolitus Omondi Ochieng (2022) eKLR, arguing that the Applicant was innocent of such mischief. Counsel submitted that their Application was merited and was supported by Section 95 and 79G of the [Civil Procedure Act](#) which allowed for courts to exercise their discretion in granting leave to appeal out of time upon an Applicant giving satisfactory reasons and stated that their reasons were sufficient and dismissing the Application would be to defeat the ends of justice.

### **The Respondent's Submissions**

11. Counsel submitted on behalf of the Respondent that the firm of Gichaba H.M.M. & Company Advocates was not properly on record because of failure to comply with Order 9 Rule 9 of the Civil Procedure Rules and cited the case of Njue Ngai vs. Ephantus Njiru and Ano, CA 20 of 2015, Nyeri in which the Court held that the Rules were intended to bar a Plaintiff from bringing a fresh suit whose suit was dismissed under Rule 4 (1), for want of prosecution. Counsel also cited Stephen Mwangi Kimote vs. Murata Sacco Society (2018) eKLR where Kemei J. held that Order 9 was meant to impose orderliness in civil proceedings and any change of advocate ought to comply with the Rules.
12. Counsel submitted that the reasons furnished for failing to file the appeal on time were insufficient as one did not need typed proceedings to prepare a memorandum of appeal and that the letter requesting for typed proceedings was insufficient as the Applicant had the option of perusing the court record and preparing a Memorandum of Appeal if he was truly desirous of appealing. It was also submitted that Counsel for the Applicant ought to have sought leave to appeal against the Ruling of the court in dismissing their application as he consulted the client on whether to appeal or not but he failed to do so and therefore to allow this Application would occasion prejudice to the Respondent. Counsel argued that reintroducing this matter by allowing the Application would be to clog the wheels of justice since the Applicant had already been afforded ample opportunity in the lower court and failed to



prosecute the case by allowing 2 years of inactivity on the suit. Counsel urged the Court to dismiss the Application and uphold the preliminary objection for contravention of Order 9 Rule 9.

13. Having considered the grounds of the pleadings filed herein together with the parties' respective written submissions. I find that the issues for determination are whether the PO and the Application are merited.

i. Preliminary Objection

14. What constitutes a PO was discussed in *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 where it was held that: -

“.....a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated:

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

15. The gist of the PO is whether there was compliance with Order 9 Rule 9 of the Civil Procedure Rules which states that: -

9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgement has been passed, such change or intention to act in person shall not be effected without an Order of the Court –

a. Upon an application with notice to all parties; or

b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

16. The above provision was intended to cure the mischief of litigants changing counsel haphazardly and denying them their hard-earned fees. In *S.K. Tawadi vs. Veronica Muehlmann* (2019) eKLR, the court observed thus:-

“In my view the essence of Order 9 Rule 9 of the CPR was to protect advocates from mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace them.”

17. In the instant case, I note that the Applicants former advocate swore an affidavit to confirm that he had no objection to the representation of the Applicant by his new advocates. It is my finding that there is no mischief on the part of the Applicant in changing his lawyers and that his new advocates are properly on record.

ii. Application for leave to appeal out of time.



18. The principles governing the granting of leave to appeal out of time are spelt out in Section 79G of the *Civil Procedure Act* thus: -

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 a good and sufficient cause for not filing the appeal in time.

19. Section 95 of the *Civil Procedure Act*, on the other hand, states as follows: -

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.

20. In *Edith Gichungu Koine vs. Stephen Njagi Thoithi* [2014] eKLR (Odek JJA) the Court of Appeal held thus:-

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

21. Similarly, in *Thuita Mwangi vs. Kenya Airways Ltd* [2003] eKLR the Court of Appeal outlined the following considerations in an application for leave to appeal out of time: -

- “(i) The period of delay;
- (ii) The reason for the delay;
- (iii) The arguability of the appeal;
- (iv) The degree of prejudice which could be suffered by the Respondent if the extension is granted;
- (v) The importance of compliance with time limits to the particular litigation or issue; and
- (vi) The effect if any on the administration of justice or public interest if any is involved.”

22. In the instant case, I note that the Ruling that the Applicant seeks to appeal against was delivered on 7<sup>th</sup> September 2023. The present Application was filed on 25<sup>th</sup> October 2023 and a Notice of Appeal filed on the same day. The period in between the date of delivery of the Ruling and the filing of the notice of Appeal is about 48 days. The Appeal window period is 30 days.

23. I have considered the background of this case and I note that it paints the Applicant as an indolent litigant who has all along been reluctant to proceed with his case thereby leading to the dismissal of the main suit and his subsequent applications for reinstatement for want of prosecution. It is noteworthy that even the Notice of Appeal was filed outside the stipulated period. Furthermore, the Applicant did



not file a Certificate of Delay from the registry to support his claim that the delay in filing the appeal was occasioned by the delay by the registry to supply him with the certified copies of the proceedings.

24. In sum, I am not satisfied that the Applicant has furnished this court with plausible reasons for the delay in filing the intended appeal or the Notice of Appeal so as to warrant the exercise of this court's discretionary powers to grant leave to appeal out of time. Consequently, I find that the instant application is not merited and I therefore dismiss it with costs to the Respondent.

25. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS AT NYAMIRA THIS 20<sup>TH</sup> JUNE 2024.**

**W. A. OKWANY**

**JUDGE**

