



**Njunge v Njuguna & another (Miscellaneous Application
E047 of 2023) [2024] KEHC 9968 (KLR) (3 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 9968 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
MISCELLANEOUS APPLICATION E047 OF 2023**

SN MUTUKU, J

JUNE 3, 2024

BETWEEN

NEHEMIAH K. NJUNGE APPLICANT

AND

STEPHEN MICHINO NJUGUNA 1ST RESPONDENT

MUTAHI ISABELLA WARUGUKU 2ND RESPONDENT

RULING

1. Nehemiah K. Njunge, the Applicant, has brought a Notice of Motion dated 10th August 2023 anchored under Order 42, Order 50 Rule 6, Order 51 Rule 1 of the [Civil Procedure Rules](#) and Section 1A, 1B, 3 and 3B, 79G and 95 of the [Civil Procedure Act](#) and all other enabling provisions of the law, seeking the following orders:
 - i. Spent.
 - ii. That this Honourable Court do extend the orders issued on 2nd May 2023 directing the Applicant to file his appeal within 30 days from the said date.
 - iii. That costs of the application be in the cause.
2. The Applicant has advanced grounds in support of the application on the face of this application that this court directed that the Applicant do file his appeal within 30 days from the date of those directions; that these directions were issued in the absence of the Applicant; that failure to comply with those directions was not intentional but an honest mistake which should not be visited upon the Applicant.
3. In the Supporting Affidavit, the Applicant has deposed that he moved this court through a Notice of Motion dated 13th March 2023 seeking to orders to file appeal out of time. The court allowed that application on 2nd May 2023 and directed the Applicant to file the appeal withing 30 days from that



date, but these orders were not complied with leading to lapse of the period within which the appeal should have been filed.

4. He has stated that failure to comply is not intentional; that after filing the application he followed up the matter seeking directions, but he was informed that the matter would be placed before a judge for directions and that he would be notified. He was not notified. He followed the matter and noted that the file had orders already issued. He has stated that he is ready and willing to abide by the directions of the court.
5. The Application is opposed through a Replying Affidavit sworn by John Maina Ngechu, advocate for the Respondent, on 15th November 2023 in which it is deposed that this court is functus officio after granting the Applicant leave to file the Appeal on 2nd May 2023; that the orders sought are discretionary upon satisfactory explanation of the reasons for non-compliance which has not been done.
6. The Application was canvassed through written submission. The Applicant filed his submissions on 4th December 2023 in which he has submitted that he has advanced sufficient reasons to warrant grant of the orders he is seeking in that after filing the application he followed up with the Registry where he was informed that he would be notified once the orders were issued which was not done; that he came to know about the orders after the time allowed to file the appeal had lapsed.
7. The Applicant relied on *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR where the court found that the discretion to extend time is unfettered and that it is incumbent upon the applicant to explain the reasons for the delay in complying with the court order. He invited this court to find that failure to comply was not intentional and that the Respondent will not suffer prejudice.
8. The Respondent has submitted through submissions filed on 22nd February 2024 that it is trite law that in exercising the powers donated to the Court under Order 50 Rule 6 of the *Civil Procedure Rules*, the primary consideration has always been the length of the delay, the reasons for the delay and if prejudice would occur and the prospects of success.
9. It was submitted that the lower Court's judgment was delivered on 29th November 2022; that Section 79G of the *Civil Procedure Act* provides that an appeal from the subordinate court should be filed within 30 days; that the Applicant did not file the appeal within this period; that this court granted him leave to file the appeal out of time on 2nd May 2023 but the Applicant failed to comply with those directions.
10. The Respondent relied on *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, Civil Application No. 251 of 1997 where the Court of Appeal stated that:

“It is now well settled that the discretion 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: firstly, 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.”
11. It was submitted that failure to be served with the order by the Court is not good reason to grant the Applicant any further orders; that the Applicant has not demonstrated that they made any attempts to follow up with the Court for the directions and that equity aids the vigilant. It was submitted that the Respondent has already paid the judgment sum to the Applicant's advocates and would be prejudiced if the orders sought are granted.



Determination

12. I have considered this application which has been opposed. The application seeking to file appeal out of time was filed on 20th April 2023. The orders allowing the same and granting 30 days within which to file the appeal were issued on 2nd May 2023. Those orders were not complied with. Time within which to file the appeal elapsed.
13. The Applicant filed the application seeking extension of time within which to file an appeal on 20th April 2023. The court in Machakos (Muigai, J) granted him the orders on 2nd May 2023. He did not comply, and he is arguing that he was not notified by the court that the application had been allowed. When he finally learned of the orders, they had lapsed and he came back to court in this application which he filed on 10th August 2023. That is a period of 3 ½ months after the first application.
14. To my mind, this is an indication of someone who is not vigilant. He was already late in filing the appeal and he came to court seeking an extension of time. I would have thought that he would have been camping at the court following up on the matter to get the orders. He slept on his rights and the explanations he has offered are not convincing. It is unexcusable for a party to file a matter under certificate of urgency and go home to sit tight waiting for the court to notify him. Such a party makes a follow-up relentlessly until he gets feedback from the court as to the orders granted.
15. The delay is inexcusable. The Applicant slept on his rights. As argued by the Respondent, equity aids the vigilant. Without good and sufficient reasons being advanced to warrant exercise of this court's discretion, it is my finding that the Applicant cannot benefit from the orders of this court.
16. The Respondent has stated that payment was done to the Applicant and a copy of a cheque number 016976 dated 10th August 2023 attached to the Replying Affidavit. The Applicant has not controverted that evidence.
17. It is my finding, after consideration of the arguments by the Applicant and the Respondent, that the Applicant has not satisfied this court why it should exercise its discretion in his favour. This application therefore stands dismissed with costs to the Respondent. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 3RD JUNE 2024.

S. N. MUTUKU

JUDGE

