



**Guardian Coach Limited v TS (Minor Suing Through His Father & Next Friend AMO)
(Miscellaneous Case E034 of 2023) [2024] KEHC 9502 (KLR) (8 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9502 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
MISCELLANEOUS CASE E034 OF 2023**

TA ODERA, J

JULY 8, 2024

BETWEEN

GUARDIAN COACH LIMITED APPELLANT

AND

**TS (MINOR SUING THROUGH HIS FATHER & NEXT FRIEND
AMO) RESPONDENT**

RULING

1. By a notice of Motion Application dated 8.4.24 and filed through the firm of Kimondo Gachoka & Company Advocates, filed under section 3A, 79 G and 95 of the *Civil Procedure Act* order 22 rule 22, order 42c rule 6, order 50 rules 6 and order 51rules 1 and 3 of the *Civil Procedure Rules* and all the enabling provisions of law. The Appellant/Applicant herein seeks the following orders: -
 1. Spent
 2.spent
2. That the honourable court be pleased to grant leave to the applicant to appeal out of time against the Judgment Kisii Kisii CMCC NO. 746 of 2018 delivered on 8.4.24.
3. That the honourable court be pleased to grant stay of execution in Kisii CMCC 746 of 2018 till hearing and determination of this appeal.
4. That the Honourable court be pleased to grant stay of assessment of costs in Kisii CMCC 746 of 2018 till hearing and determination of this appeal.
5. That this Honourable court be pleased to order that the applicant furnishes security in the form of bank guarantee for the decretal amount pending hearing and determination of this appeal.
6. Costs be in the cause.



The application is based on the grounds that:

- i. Judgment was delivered on 21.2.24
 - ii. The court file was misplaced in the court registry and was recovered on 28.3.24
 - iii. The applicant is aggrieved by the judgment intended to be appealed from.
 - iv. The application has been made timely without undue delay.
 - v. The applicant is likely to suffer substantial, irreparable loss and damage as there is likelihood that the applicant will be unable to recover the decretal sum if paid.
 - vi. The applicant has a meritorious appeal with high chances of success
 - vii. Unless the application is allowed the intended appeal will be rendered nugatory.
7. The Application was supported by an Affidavit sworn by Everline Ogato counsel for the applicant who reiterated the grounds on the face of the application and attached a copy of the judgment, the memorandum of appeal and bank Guarantee – “EO 1.2 &3 respectively. 2023. The respondent did not file any response despite notice.

Determination

I have carefully considered the application the law. The issues arising for determination are:

- i. Whether the applicant has met the conditions for leave to extend time.
 - ii. Whether the applicant has met the threshold for grant of stay pending appeal.
8. On the conditions for granting leave to extend time to appeal out of time, section 79G of the [*Civil Procedure Act*](#), which stipulates 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 anytime 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.”

The applicant moved the court under section 79 G of the [*Civil Procedure Act*](#) and the respondent argued that under the said section an appeal must have been filed for leave to file it out of time to be granted. My interpretation of the proviso to Section 79 G of the [*CPA*](#) is that Section 79 G allows the court the discretion to courts to grant leave to a party who has not filed an appeal at all to file an appeal out of time and also to deem an appeal which has been filed out of time without leave of the court as duly filed appellant who has filed. The only condition attached to the said proviso is that an applicant must show sufficient cause for the delay.

9. On whether there was inordinate delay in filling the application, the applicant said that the judgment was delivered on 21.2.24 and thereafter file could not be traced in the registry for the applicant to get a copy of the judgment till 28.3.24.



10. On the issue of chances of the appeal to succeed. I have seen the draft memorandum of appeal, the same challenges quantum and I find that the same raises arguable issues,
11. Though the applicant blames the registry for the delay, no certificate of delay from the registry has been annexed to show that indeed the file could not be traced. The right to be heard is fundamental and the courts should not deny this right unless it is shown that the applicant was out to deliberately delay the case or obstruct the course of justice. The delay was for about ½ months and though it is not inordinate, the reason given by the same is not plausible is not plausible and I dismiss it as an afterthought.
12. I find that no sufficient cause has been shown in support of the prayer for
13. In the upshot I find no merit in the application and I proceed to dismiss it with costs
14. File is closed

DATED, DELIVERED AND SIGNED AT KISII THIS 8TH DAY OF JULY 2024.

T.A ODERA

JUDGE

In the presence of:

No appearance for the applicant

Oigo Court Assistant

