



**Gichuhi v Karuga (Miscellaneous Application E022 of 2022)
[2024] KEHC 9703 (KLR) (2 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9703 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
MISCELLANEOUS APPLICATION E022 OF 2022
SN MUTUKU, J
JULY 2, 2024**

BETWEEN

EUNICE MUTHONI GICHUHI APPLICANT

AND

MWAURA KARUGA RESPONDENT

RULING

1. This Ruling relates to a Notice of Motion dated 10th April, 2022 under section 79G, section 1A & B, 3A of the *Civil Procedure Act*, Order 50 Rule 6 of the *Civil Procedure Rules* 2010, Article 159(2)(d) of *the Constitution* of Kenya 2010 and all other enabling provisions of the law, for orders that:
 - i. Spent.
 - ii. That this Honourable Court be pleased to grant leave to serve Notice and Record of Appeal out of time and that the Annexed Memorandum of Appeal be deemed as duly filed.
 - iii. That costs be provided for.
2. The Applicant has advanced grounds in support of the Application that judgement was delivered in court on 22nd January, 2022 where the trial court dismissed her petition for divorce; that she is elderly and has been single handedly providing for the minor and as a result she was overwhelmed with bills and expenses and that when the judgement was delivered she had urgent priorities.
3. She has stated that she desired to appeal immediately but she was unable to do so; that she delayed in filing the appeal for reason that her advocate did not have a practicing certificate for the year 2022 and that she had to wait for her counsel to obtain the said certificate.
4. The Respondent opposed the Application through a Replying Affidavit dated 21st June, 2022 in which it is deposed that the averments by the Applicant are full of falsehoods and unverified information; that paragraphs 4,5 and 6 of the supporting affidavit are not relevant to this application and that as regards



paragraph 8 of the supporting affidavit, there are many advocates and for one to await an advocates' practicing certificate status is ridiculous.

5. The Respondent stated that the application is an afterthought, an abuse of court process and full of speculation; that the applicant does not have an arguable appeal and that the inordinate delay is unexplained and hence the application should be dismissed with costs.

Parties' Submissions

6. The Application was canvassed by way of written submissions. The Applicant filed her submissions dated 23rd September, 2022. She argued that Article 48 of *the Constitution* guarantees every person access to justice and that under Article 50(1) of *the Constitution*, every person has a right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court.

7. She submitted that she filed an appeal one day late and has approached this court for extension of time as stipulated in Section 79G; that the delay was not inordinate; that there is no evidence showing that the Respondent would be prejudiced if the extension is granted; that it is not uncommon for clients to instruct their counsel who procrastinate on filing court processes and only act when time for such filing has lapsed. She relied on *Belinda Mural & 9 others v Amos Wainaina* [1978] eKLR, where the Court of Appeal, citing the case of *Shah H. Bharmal & Brithers v Kumar*[1961]EA 679, held that:

“Mistakes of a legal adviser may however amount to ‘sufficient cause under the East Africa Rule.”

8. It was her submission that this Court has jurisdiction to enlarge time, however, the discretion must be exercised judiciously and not capriciously. The Applicant relied on the Court of Appeal in CA 71/2016 *Charles Karanja Kuru v Charles Githinji Muigwa*, where it was held that:

“Having expressed ourselves as herein above the other issue that falls for consideration is whether the appeal filed out of time on 24th October, 2014 could be deemed as being properly on record. There is a plethora of authorities from the High Court which interpret the proviso to Section 79G of the *Civil Procedure Act* to mean that an appeal filed out of time can be admitted as being properly on record once extension of time is granted. Emukule, J. in the *Gerald M'limbine v Joseph Kangangi* [2009] eKLR stated that-

“My understanding of the proviso to section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal and at the same time seek leave of court to have an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the court’s permission to admit a non-existent appeal out the stipulated period. To do so would actually be an abuse of the court’s process under Section 79B”.

9. The Applicant also relied on the case of *Kinyunjuri Mugata v Wotuku Muguta* [2018] eKLR the court held that:

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

10. The applicant relied on *First American Bank of Kenya Ltd v Gulab P. Shah & 2 Others* (Milimani) HCCC No. 2255 of 2000[2002]1EA 65. She also relied on *Nicholas Kiptoo Arap Korir Salat v Independent Electrol and Boundaries Commission & 7 others* on the factors to be considered as follows:

- “(1) Extension of time is not a right of a 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 on a case to case basis.
- (4) Whether there is 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 of the extension is granted.
- (6) Whether the application has been brought without undue delay; and
- (7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”

11. The Respondent filed his submissions dated 9th November, 2022 in which he has stated that according to section 79G a party ought to give sufficient cause for not filing the appeal in time; that sufficient cause has to be explained to the court; that the Applicant has not offered any good and sufficient cause why the appeal was not filed in time and that the reliance by the Applicant on a plethora of cases on the principles of sufficient cause does not amount to good cause for not filing the appeal in time.

12. The Respondent relied on *County Executive of Kisumu v County Government of Kisumu & others* [2017] eKLR where the Supreme Court of Kenya re-stated the principles for extension of time as set out in Nicholas Kiptoo Arap Korir Salat cited above in this Ruling. He reiterated that no basis has been given to this court for the 3 months delay in filing this application; that although the Applicant has annexed a draft memorandum of appeal she has failed to demonstrate to this court if such an appeal has any chances of success.

Determination

13. I have read the application, the grounds in support of the same and the Replying Affidavits as well as the submissions of the parties. The main issue for determination is whether the Applicant has met the threshold for grant of the orders she is seeking.
14. Some of the factors that the court considers in applications seeking extension of time include following:
- i. The period of delay.
 - ii. The reason for the delay.



- iii. An arguable 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.
 - vi. The effect if any on the administration of justice or public interest if any is involved (see *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR).
15. The Applicant told court that she was unable to file the appeal on time because she had various urgent priorities and did not realize time passing by and that she was also awaiting her counsel to obtain a practicing certificate to enable him to proceed with the matter.
16. From the records of the court file, judgment in this matter was delivered on 22nd January, 2022 and therefore the appeal ought to have been filed on or before 22nd February, 2022. It was filed on 16th May, 2022, a delay of 2 months and 15 days. In my view, depending on the reasons for that delay, this period may be considered unreasonable or not unreasonable.
17. Section 79G of the *Civil Procedure Act* provides that:
- 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.
18. It is upon the Applicant to satisfy this court that she had a good and sufficient cause for not filing the appeal within the time allocated by the law. Did the Applicant discharge that mandate? Is stating that she had other matters that required priority or that she was waiting for her counsel to apply for renewal of a practicing certificate good and sufficient cause for the delay in filing?
19. In *Njoroge v Kimani* (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling) it was held that:
- “An applicant for extension of time must show good and substantial reasons for the delay, and, prima facie, good cause why the intended appeal should be heard. Whilst the first leg requires a satisfactory justification, the second leg only requires one to show that the grounds of appeal are arguable. It is upon satisfaction of both the above that the court will use its discretion to grant the application.”
20. I have noted that the Applicant is mixing issues with other matters that are not relevant to this application as argued by the Respondent. My considered view, after careful consideration of the rival arguments is that it is not good enough to tell the court that the delay was due to other matters that the Applicant had to deal with on priority basis. It only means that this appeal was not a priority. Secondly, I find no sufficient grounds to the satisfaction of this court why I should allow this application. The Applicant has not even satisfied the court that her appeal is arguable.
21. For the above reasons I find this application without merit. Consequently, I dismiss the Notice of Motion filed in court on 16th May 2022 with costs to the Respondent.
22. Orders shall issue accordingly.



DATED, SIGNED AND DELIVERED THIS 2ND JULY 2024.

S. N. MUTUKU

JUDGE

In the presence of:

1. Mr. Mwaura for the Applicant
2. Mr. Kerongo for the Respondent

