



REPUBLIC OF KENYA



Lwali v Chitechi (Civil Appeal 138 of 2023) [2024] KEHC 8858 (KLR) (18 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8858 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 138 OF 2023
SC CHIRCHIR, J
JULY 18, 2024**

BETWEEN

DENNIS XAVIER BWIRE LWALI APPELLANT

AND

MWANAIIDI BUSHURU CHITECHI RESPONDENT

RULING

1. Through the Notice of Motion dated 5th September 2023, brought pursuant to Sections 1A,1B, 3A, 79 G and 95 of the *Civil Procedure Act* and order 9 Rule 9 and order 50 Rule 6 of the *Civil Procedure rules* the Applicant seeks for the following orders:
 - a) That the Honourable court be pleased to grant leave for Messrs.Otieno & Amisi Advocates to come on record on behalf of the Appellant herein in place of Messrs. Siganga & company Advocates.
 - b) That consequent to Order 1 above, the Honourable Court be pleased to extend the time for filling of appeal from the judgment delivered on 25/05/2023 in Mumias CMCC E122 of 2021 and or admit the appeal filed herewith out of time.

The Applicant's case.

2. In his supporting affidavit, the applicant stated that he was aggrieved by the judgment of Hon. Thomas Obutu, delivered on 25/05/2023 and that he has filed the Appeal, albeit of time, and without the prerequisite leave.
3. In regard to reasons for the delay, the Applicant's explanation is that his insurers were only notified about the delivery of judgment on 30/06/2023, which day happened to have been the last day of the stipulated period for filing Appeals. He further states that he appointed another firm of Advocates to procure the judgment; that efforts to follow up the judgment was futile , but once they obtained



a copy, the Appeal was filed immediately. It is submitted that the delay was not intentional; that the circumstances were outside his control

The Respondent's case.

4. The respondent states that the applicant was duly represented during trial and his then Advocates ought to have appealed on time; that the application for leave to appeal out of time is merely an afterthought.
5. He further states that according to his advocate , on 27/7/2023 their respective Advocates recorded a consent on the agreed party and party costs
6. The respondent further points out that the applicant has not provided any evidence to show that there was any challenge in obtaining a copy of the judgment.
7. On the proposed Appeal, the respondent asserts that that the same has no chance of success , and there is no evidence that the applicant would suffer any loss if the orders sought are denied.
8. The Application was canvassed by way of written submissions.

Applicant's written submissions

9. The Applicant submits that the need for leave before a party changes his Advocate after delivery of judgment, is a requirement of the law , pursuant to Order 9 rule 9 of the [Civil procedure rules](#).
10. It is further submitted that the respondent has not demonstrated that he will suffer any prejudice if the orders sought are granted.
11. The Applicant submits that failure to file the Appeal on time was that of the former Advocate and that the said mistake should not be visited on the Applicant.
12. The Applicant argues that it is evident that as soon as the copy of the judgment was obtained, remedial measures were immediately undertaken .
13. It is further argued that the Appeal has high chances of success as the trial court failed to take into account the fact that comparable injuries should attract comparable awards.
14. It is finally argued that the right to be heard is cardinal and should take precedence over any other considerations.
15. The Applicant has cited a number of Authorities to buttress his submissions which I have perused.
16. The Respondent did not file any submissions

Determination

17. The only issues for determination are whether the current Advocates should be allowed to come on record on behalf of the Applicant, and whether the Applicant is deserving of the enlargement of time to file the Appeal.
18. The plea to come on record has not been contested, and the need for leave is a requirement under Order 9 Rule 9 of the [Civil procedure Rules](#). It is hereby allowed.



19. On the prayer for leave to file the Appeal out of time, Section 79G of the [Civil Procedure Act](#) provides as follows:

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.

20. The decision to extend time for filing an Appeal is discretionary and like any other judicial discretion there are principles governing the exercise of the said discretion. In the Court of Appeal case of [Omar Shurie v Marian Rashe Yafar](#) (Civil Application No. 107 of 2020) UR it was held:

“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 considers 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.”

21. In the case of [Nicholas Kiptoo Arap Salat vs IEBC & 7 others](#) (2014) e KLR the Supreme Court expanded the principles. It held 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 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. Where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents, if extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time”

22. The Applicant stated that Judgment by Hon. Thomas Obutu was delivered on 25/05/2023 and that the insurers were notified of the judgment on the last day of appeal , which was on 30/06/2023.

23. The Respondent on the other hand has argued that there is no evidence to show that the Applicant made attempts to procure a copy of the judgment.

24. I have seen the letter in question. Although it is dated 19th June 2023, it was delivered to the Applicant’s Insurer on 30th June 2023. It is further noteworthy that despite the judgment having been delivered



on 25th February 2023, the letter of notification was done on 19th June 2023 and finally delivered to the Insurance company on 30th June 2023 as aforesaid. That was about a month after the delivery of Judgement.

25. It is evident therefore that by the time the insurance company was getting the notification of the Judgement, the stipulated period of filing Appeals had lapsed.
26. I have also seen the emails exchanged between the Applicant and his current Advocates , and from the exchanges , it emerges that as at as at 25/8/2023, the court file was yet to be traced.
27. It is therefore evident that the delay was partly caused by the delay in communication by the previous Advocates and by the tracing of the court file.
28. In view of the aforesaid I am satisfied that “good and sufficient cause” for not filing the Appeal within the stipulated period has been shown.
29. I have also considered the arguability of the Appeal. The Appeal is majorly against the award of ksh.1,800,000 on general damages. I have compared the award against the injuries as reflected on the judgment and am of the view that, prima facie, the Applicants may have an arguable Appeal.
30. The respondent has submitted that the Application, if allowed, should be conditional upon the Applicant depositing the entire decretal sum or paying half of it to the respondent. However, the Applicant has not sought for stay of execution pending Appeal, and therefore nothing bars the respondent from instituting execution proceedings.
31. For the aforesaid reasons I find that the Application is merited and it is hereby allowed.
32. For the inconvenience that has been caused to the respondent , he is entitled to costs.
33. In the end , I proceed to make the following orders:
 - a). The firm of Otieno and Amisi Advocates is hereby granted leave to represent the Appellant, and the said Law Firm is deemed to have been properly on record at the time of filing the memorandum of Appeal
 - b). The Memorandum of Appeal filed on 7th September 2023 is hereby admitted and the same is deemed to have been filed within stipulated time.
 - c). The costs of this Application assessed at ksh. 15,000 is hereby awarded to the Respondent . The costs will be paid before directions on the Appeal are taken.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 18TH DAY OF JULY 2024.

S. CHIRCHIR

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of :

Godwin- Court Assistant.

Mr. Otieno for the Applicant.

