



**Osumba v Macao Properties (Miscellaneous Civil Application
E339 of 2023) [2024] KEHC 8798 (KLR) (19 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8798 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CIVIL APPLICATION E339 OF 2023**

HM NYAGA, J

JULY 19, 2024

BETWEEN

FREDRICK H.A. OSUMBA APPLICANT

AND

MACAO PROPERTIES RESPONDENT

RULING

1. The Application before this court is a notice of motion application dated 9th August, 2023 brought pursuant to the provisions of Section 1A, 1B, 3A, 79 G and 95 of the Civil Procedure Act and Order 42 of the Civil Procedure Rules. The Application seeks the following orders:-
 - a. Spent
 - b. That the Honourable Court be pleased to grant the Plaintiff /Applicant leave to appeal out of time against the Judgement of Honorable Daisy Mose, Senior Resident Magistrate, Nakuru delivered on 12th May, 2023.
 - c. That the Memorandum of Appeal annexed herewith be deemed as duly filed upon payment of the requisite fees.
 - d. That the Costs of this Application be provided for.
2. The Application is premised on grounds on its face and supported by an Affidavit of George Korongo, the applicant's advocate dated 9th August, 2023.
3. It was deposed that judgment in the lower suit was scheduled to come up on 12th May, 2023 and upon attending court on that day he was informed that the said judgment was not ready and it will be delivered on notice. However, the judgment was delivered on May 12, 2023 without their knowledge.



4. The advocate further deponed that on 28th February, 2023 he wrote a letter to court requesting for the matter to be fixed for judgment but he was notified that the magistrate was on transfer and that the judgment will be delivered on notice, and on 3rd September, 2023, upon making a follow up through phone calls with the court clerk he was apprised that the judgment had already been delivered on 12th May, 2023.
5. He deposed that immediately he requested for a copy of the typed and certified proceedings, the judgment and Decree vide letters addressed to the executive officer dated 22nd September, 2023, 25th July, 2023 and 7th August, 2023 but only a copy of the judgment was availed. By then the statutory time within which to file an appeal had lapsed. He avers that since their client is dissatisfied by the judgment delivered, this court ought to exercise its discretion and grant the extension sought.
6. It is further averred that the delay in filing this Appeal was not intentional but the same was caused by non-communication of the trial court on judgment date and the Applicant has an arguable and meritorious Appeal with a good likelihood of success.
7. It was also deponed that this application had been made without undue delay and no prejudice will be occasioned to the Respondent should the Application be allowed. That the Applicant is bound to suffer irreparable prejudice, loss and damage unless the orders sought are granted and that it was in the interest of justice to grant the orders sought.
8. The Respondent did not file any response or participate in the proceedings despite being duly served.

Analysis & Determination

9. The sole issue for determination is whether the application seeking leave to appeal out of time is merited.
10. 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 good and sufficient cause for not filing the appeal in time.”
11. Section 95 of the [Civil Procedure Act](#) provides thus: -

“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.”
12. The Applicant approaching the Court under this section must demonstrate “good and sufficient cause” for not filing the appeal in time.
13. In [Thuita Mwangi v Kenya Airways](#) [2003] eKLR, the Court of Appeal while considering Rule 4 of the *Court of Appeal Rules* which was in *pari materia* with Section 79G of the [Civil Procedure Act](#), reiterated its decision in [Mutiso v Mwangi](#) [1997] KLR 630 as follows:

“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 general the matters which this court



takes into account in deciding whether to grant an extension of time are first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

14. While the discretion of the court is unfettered, the Applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court’s discretion in his favor.
15. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat v IEBC and 7 others* [2014] eKLR set out the principles applicable in an application for leave to appeal out of time. The Court state inter alia that:

“The underlying principles a court should consider in exercise of such discretion include;

 1. Extension of time is not a right of any 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 a case- to-case basis;
 4. Whether there is a 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 if the extension is granted;
 6. Whether the application has been brought without undue delay.
16. These principles were also considered in the earlier case of *Leo Sila Mutiso v Rose Hellen Wangeri Mwangi* Civil Appeal 255/ 1997, where the court held as follows: -

“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 takes into account 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.”
17. These principles were also reiterated in *First American Bank of Kenya Ltd v Gulab P. Shah & Others* HCC 2255/2000 [2002] IEA 65 and listed them as follows: -The explanation if any, for the delay;The merits of the contemplated action, whether the appeal is arguable;Whether or not the respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the applicant.
18. I will therefore proceed to determine whether the Applicant has advanced plausible grounds for delay in filing the appeal.
19. From the record, it is the applicant counsel’s contention that judgement was slotted to be delivered on 12th May, 2023, and upon attending court on this day, he was informed that the same will be delivered on notice but it was delivered on that day without notice and in their absence.



20. I have perused the lower court proceedings and the judgement. I have noted that the judgment was first slated for delivery on 13th December 2022. This did not happen and I do note that there are no proceedings of the said date. It is likely, as deponed by the applicant, the trial magistrate went on transfer. There is nothing to show that the court issued any notice of delivery of the judgment, despite there being several written requests by the applicant through his advocate to be given a date for it.
21. The recorded coram in the judgement clearly shows that the judgment was delivered in the absence of the parties.
22. I am persuaded the Judgment was delivered without notice to the Applicant/ his advocate and find that the reason advanced as to why the appeal was not filed on time is well explained.
23. As to the question of delay, after discovering on 3rd September, 2023 that judgment had been delivered in his absence, the applicant deponed that he immediately requested for a copy of typed and certified proceedings, Judgement and decree but only the copy of the Judgement was availed. The Applicant filed his Memorandum of Appeal on 4th September, 2023 and the instant application on 5th October, 2023. I find that the Applicant expeditiously filed this application upon learning of the delivery of the Judgment.
24. With regard to whether the intended appeal is arguable, I am alive to the fact that in deciding an application of this nature, the court must be careful not to delve into the merits of the case as that is under the purview of the appellate court after hearing the merits of the same. The court should therefore only be concerned with the question of whether or not the appeal will be rendered nugatory.
25. A cursory look at the Memorandum of Appeal shows that the grounds raised therein are triable. The essence of considering whether the appeal raises triable issues is to avoid the same being rendered nugatory should the decision of the appellate court overturn that of the trial court. I therefore find that the Appellant's Appeal is arguable.
26. The other limb is whether the Respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the Applicant. The answer is in the affirmative. I find that no prejudice will be caused to the Respondent that cannot be compensated by an award of costs if the Application is allowed.
27. The extension of time is an equitable remedy and considering the Applicant has an arguable appeal, I hold that he is entitled to the order sought, so that he can ventilate his appeal.
28. In sum, the Application dated 9th August, 2023 is allowed in on the following terms;
 - a. The appellant/applicant's application to appeal out of time is allowed.
 - b. The Memorandum of Appeal is to be filed and served within the next 14 days from the date of this ruling.
 - c. The appellant/applicant to file and serve the record of appeal within the next 45 days.
 - d. Costs of this Application to abide the outcome of the Appeal.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 19TH DAY OF JULY, 2024.

H. M. NYAGA

JUDGE

In the presence of:



C/A Jeniffer

Ms. Juma for Applicant

No appearance for Respondent

