



REPUBLIC OF KENYA



**Okwanyo v Sidian Bank Limited & another (Miscellaneous Application E982 of 2023)
[2024] KEHC 8900 (KLR) (Commercial and Tax) (18 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8900 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E982 OF 2023**

PM MULWA, J

JULY 18, 2024

BETWEEN

JOHN MORARA OKWANYO PLAINTIFF

AND

SIDIAN BANK LIMITED 1ST RESPONDENT

NOREEN AUCTIONEERS 2ND RESPONDENT

RULING

1. For determination is the applicant's Notice of Motion application dated 14th November 2023 brought under Order 42 Rules 6 of the [Civil Procedure Rules](#) and Sections 1A and 1B of the [Civil Procedure Act](#).
2. The applicant prayed for the following orders:
 - “1. Spent.
 2. Spent
 2. That the Court be pleased to grant the applicant herein leave to appeal and file his memorandum of appeal out of time against the judgment of the Small Claims Court (Hon. Judith Omollo, Senior Resident Magistrate and Adjudicator) delivered on 29th May 2023 in Nairobi Small Claims Court Commercial Case No. E809 of 2023.
 3. Costs of the application.”



3. The application is supported by the applicant's affidavit sworn on 14th November 2023 and is based on the grounds that on 29th May 2023 the Small Claims Court delivered a judgment which the applicant was dissatisfied with and hence instructed the firm of M'Njau & Mageto Advocates to appeal.
4. The applicant averred that the appeal was not filed within the requisite 30 days from the date of judgment but this was an honest and unintended mistake on the part of counsel and which ought not be visited upon him. That the applicant later moved with speed by appointing the firm of C.B. Keya & Company Advocates who filed the instant application.
5. The applicant also filed submissions dated 5th April 2024 and contended that he was ready to offer security as the court may deem and that no prejudice will be suffered by the respondent if the orders sought are granted. He submitted that there was no inordinate delay in filing this application; that the court should be hesitant to close the door to the corridors of justice and that the intended appeal raises serious issues such that if the orders sought are not granted he will suffer substantial loss and damage. The applicant cited the case of *Peter Kariuki Boro and Another vs Charles Nyandoro* (2020) eKLR, for the proposition that the extension to appeal out of time is not a matter of course and the court has to consider a number of factors including the period of delay, reason for the delay, chances of the appeal succeeding and/or the arguability of the appeal and the prejudice likely to be suffered by the respondent if the application is allowed.
6. The 1st respondent opposed the application by the replying affidavit of its Senior Legal Officer, Jackline Ndung'u sworn on 26th November 2023. She urged that the application herein is without merit and has been brought extremely late in the day. The 1st respondent contended that the applicant was out to frustrate it by all means, a fact which was demonstrated by his lodging a complaint with the Central Bank of Kenya. The respondent urged that the proposed memorandum of appeal raised no point in law as is a requirement for appeals from the decisions of the Small Claims Court.
7. The 1st respondent then filed submissions dated 17th April 2024 buttressing what it avers in the replying affidavit. The case cited was that of *Leo Sila Mutiso vs Rose Hellen Wangari Nairobi* Civil Application No. 251 of 1997 – that the decision whether to extend the time for appealing is essentially discretionary.

Analysis and Determination

8. Appeals from a subordinate Court to the High Court ought to be filed within thirty (30) days of the making of the decision sought to be challenged. Extension of time is a matter of discretion and the law gives this Court jurisdiction to extend time upon application (Section 79 G of the *Civil Procedure Act*).
9. The discretion to extend time must be exercised within the established principles of the law and the factors to be considered when determining an application seeking leave to appeal out of time were well laid out by the Court of Appeal in *Omar Shurie Vs Marian Rashe Yafar (Civil Application No. 107 of 2020)*, thus:
 - i) the length of the delay
 - ii) the reason for the delay
 - iii) the chances of the appeal succeeding if the application is granted
 - iv) the degree of prejudice to the respondent if the application is granted.
10. On the length of delay the judgment sought to be challenged was delivered on 29th May 2023. The instant application was filed on 14th November 2023, about five and a half months later. To this Court's mind, this delay period is inordinate.



11. The Court must however consider the reasons for the delay before making a final determination on whether the inordinate delay is unexplained. The applicant claims that after the judgment was delivered, he promptly instructed a firm of advocates to institute an appeal but they did not. The applicant termed this failure as an honest and unintended mistake on the part of the former advocates and which ought not be visited on him. I have given due consideration to this reason and find the same to be very casual and not satisfactory. It is one thing to allege one had an advocate who they blame for an omission, but another to prove that they had instructed one. The applicant had a duty to follow up on the filing of the appeal once he had given instructions to counsel. After all, it was his case.
12. In *Nicholas Kiptoo arap Korir Salat V. IEBC* (2014) eKLR Sup. Ct. Application No. 16 of 2014 the Supreme Court aptly stated that “extension of time is not a right of a party; a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court. Of paramount importance, the reason for delay must be explained to the satisfaction of the Court. Further, the application for extension must be brought without undue delay and it must be demonstrated if the respondent will not suffer prejudice if extension is granted.”
13. Based on the above reasons, the Court does not find that the applicant has advanced any good and sufficient cause for the delay of five and a half months.
14. On the Chances of the appeal succeeding, the applicant has annexed a draft Memorandum of Appeal raising 9 grounds of appeal which challenge the trial Court’s finding. An arguable appeal is not one which must necessarily succeed and it is not for this Court, at this stage to go into the merits of the appeal. Suffice it to say upon perusal of the draft memorandum of appeal, this is an appeal from the Small Claims Court, none of the grounds raise a point of law.
15. Lastly, on what prejudice likely to be suffered by the 1st respondent, it is contended that litigation must come to an end and that a party deserves closure. That the applicant lodged different complaints against the 1st respondent with the regulatory body, the Central Bank of Kenya, besides the case in the lower court. My view is that the trouble may be for the 1st respondent to engage its Advocates every other time, but this can be compensated by an award on costs. No real prejudice is to be suffered if the Court grants leave to appeal out of time.

Disposition

16. The Court considers that in the circumstances of the case, the applicant has not advanced any good reasons to warrant the granting of the orders sought. Accordingly, the application dated 14th November 2023 lacks merit and is dismissed with costs.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF JULY 2024.

.....

P. MULWA

JUDGE

In the presence of:

Ms. M’Mbifwa for applicant

Mr. Dondo for respondents

Court Assistant: Carlos

