



**Gachango v Karanja (Civil Appeal 276 of 2023)
[2024] KEHC 12958 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12958 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 276 OF 2023
SM MOHOCHI, J
OCTOBER 24, 2024**

BETWEEN

DOMINIC NJUGUNA GACHANGO APPLICANT

AND

ANTHONY KAMAU KARANJA RESPONDENT

RULING

1. The Appellant/Applicant in the Notice of Motion application dated 25th October, 2023 is seeking for orders of leave to file an appeal out of time against the judgment delivered on 11th August 2023 in Nakuru Small Claims Court SCCC No. E077 of 2023 and for the Costs of the Application to abide by the Appeal.
2. The Application was served on the Respondent through their counsel in the Trial Court and an affidavit of service filed on 20th February, 2024. There was no response from the Respondent.
3. The Applicant filed a Memorandum of Appeal and the Record of Appeal as well on the same date

Applicants Case

4. The Applicant in the supporting affidavit of the same date deposed that judgment in Nakuru SCCC No. E077 of 2023 was delivered on 11th August 2023. The Applicant being aggrieved with the said decision, is itching to lodge an appeal against the said decision. It was his contention that the statutory period within which to file appeal had already lapsed on 11th September, 2023. The Applicant further contends that he was unable to file an appeal within the requisite time due to delay in getting certified copies of proceedings from the registry despite making a request vide letter dated 15th August, 2023.
5. It is the Applicant's argument that the right of access of justice would be made possible if the extension of time is granted. The Applicant further states that the Court has jurisdiction to determine



decisions from Subordinate Courts and power to extend time within which such appeals are filed. He added that the Respondent does stand to suffer no prejudice upon grant of the orders sought.

Applicant's Submissions

6. The Applicant filed submissions on 18th June, 2024 and he relied on Section 79G of the [Civil Procedure Act](#) which has a proviso 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.
7. The Applicant further relied on the case of Edward Njane Nganga & another vs Damaris Wanjiku Kamau & another [2016] eKLR; where the Court propounded that there were no limits to the number of factors a Court would consider provided they are relevant. According to the Applicant the reasons deposed in his affidavit have demonstrated good and sufficient cause.
8. The Applicant also contends that that the intended appeal has a high probability of success as the issues raised are arguable and relied on Hon. John Njoroge Michuku & another –vs- Kentazuga Hardware Limited [1998] eKLR. The Applicant submitted that the Respondent will not be prejudiced, since the Application is unopposed.

Analysis and Determination

9. Having given due consideration to the pleadings and submissions filed in this application. The sole issue for determination is whether the Applicant's application has met the threshold to warrant issuance of the prayer to enlarge time within which to appeal.
10. The timelines for filing an appeal with the High Court to challenge the decision of a Subordinate Court and the mandate to extend time is derived from Section 79G of the [Civil Procedure Act](#) which 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 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. The takeaway from the phrasing of Section 79G is that before a prayer for extension of time is considered, the Applicant must satisfy to this Court that he had good and sufficient cause for seeking to file the appeal out of time. The question to be answered is whether sufficient justifiable cause has been advanced for the delay and whether the delay was inadvertent and excusable.
12. The Supreme Court in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others {2014} eKLR set out the guiding principles applicable in an application for leave to appeal out of time. It stated inter alia:-
 - i. 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;
 - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;



- iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - v. Whether there will be any prejudice suffered by the respondents if the extension is granted
 - vi. Whether the application has been brought without undue delay; and
 - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."
13. The Trial Court delivered its Judgement on 11th August, 2023 and the deadline would have been on or around 10th September, 2023. This Application was filed on 2nd November, 2023 therefore the delay was for about 52 days. The explanation advanced by the Applicant for the delay was in obtaining certified copies of the proceedings.
 14. The Applicant requested for the certified copy of proceedings vide letter dated 14th August, 2023. Evidence of dispatch or receipt by the Court has not been advanced. Nevertheless, the certified copies of proceedings were available on 18th September, 2023 as per Annex "DNG-2" which was about a week past the statutory period within which to file appeal.
 15. The Supreme Court further in the case of County Executive of Kisumu vs County Government of Kisumu & 8 Others [2017] eKLR expounded and held:-
 - “26. However, we hasten to add that a ground of delay of getting typed proceedings is not a prima facie panacea for a case of delay whenever it is pleaded. Each case has to be determined on its own merit and all relevant circumstances considered. It is worth reiterating that in considering whether or not to extend time, the whole period of delay should be stated and explained to the satisfaction of the court.
 27. In the present case, while there is indeed a certificate of delay from the Deputy Registrar of the Court of Appeal, this alone does not suffice for the Court to indulge the applicant and grant an extension. The proceedings were availed to the applicant on 4th December, 2015. It filed its application more than two months later....?”
 16. Going by the foregoing authority, due diligence would dictate that after getting copies of the proceedings, the Applicant would move the Court immediately and if there was a challenge in moving Court, the same should have been explained to the satisfaction of the Court. The Applicant has not demonstrated why he took so long in filing this application despite the typed proceedings being available for about 43 days.
 17. Putting blame on the Court is far-fetched as the delay was obviously withing the Applicant’s control he did not exercise all due diligence to pursue his interests. It is evident that the Applicant was the author of his misfortunes and not the Court registry as claimed. The delay of 43 days in my view is inordinate and inexcusable and the reasons given by the Applicant for the delay are also not plausible.
 18. Section 38 of the Small Claims Court provides that:-
 1. A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.
 2. An appeal from any decision or order referred to in subsection (1) shall be final.



19. Without delving in to the merits or demerits of the Appeal, on a perfunctory look on the grounds of appeal in the Memorandum of Appeal, I have noted that the appeal does not raise any arguable grounds of appeal on matters of law. The chance of the appeal succeeding are in short supply as the grounds set forth fall outside the provisions of Section 38 as they touch on points of facts.
20. In the circumstances, I am not persuaded to exercise the Courts discretion in favour of the Applicant. The Notice of Motion dated 25th October, 2023 is without merit and I hereby dismissed. There shall be no orders as to costs.

It is so ordered.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 24TH DAY OF OCTOBER 2024

MOHOCHI S.M.

JUDGE

