



Mt. Kenya Java Wines and Spirits Limited v Machora & another (Miscellaneous Civil Application E031 of 2024) [2024] KEHC 12428 (KLR) (16 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12428 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS CIVIL APPLICATION E031 OF 2024
LM NJUGUNA, J
OCTOBER 16, 2024**

BETWEEN

MT. KENYA JAVA WINES AND SPIRITS LIMITED APPLICANT

AND

ANDREW NTABO MACHORA 1ST RESPONDENT

ROBINSON MOKAYA 2ND RESPONDENT

RULING

1. The applicant filed a notice of motion dated 27th May 2024, being supported by the grounds set out on its face and the facts deposed in the supporting affidavit thereof. The orders sought are as follows:
 1. That this honourable court be pleased to grant leave to the applicant herein to lodge an appeal out of time against the judgment and decree of Hon. S. Ouko delivered on 11th January 2024 in Runyenjes SPMCC No. 45 of 2018; and
 2. That the costs of this application be provided for.
2. The applicant stated that through the impugned judgment, the trial court awarded Kshs.3,202,529/= and found liability at 100% against the 1st respondent. That the 1st respondent who is the owner of the motor vehicle registration number KBQ 756W is vicariously liable for the actions of the 2nd respondent hence liability ought to be attached to both respondents. It urged that there has been a delay in lodging the appeal and the delay is due to heavy workload and lengthy internal processes within the company to authorise filing of the appeal. That the applicant is keen on prosecuting the appeal which has high chances of success as evidenced by the draft memorandum of appeal. That the respondents will not suffer any harm if the orders are granted.
3. Through a replying affidavit, the 1st respondent stated that applicant's advocate knew very well that the judgment was scheduled to be delivered on 09th November 2023 and he cannot feign knowledge of that



fact. That the applicant's advocate even sought for a copy of the judgment from the 1st respondent's advocate and he later confirmed receipt of the same. He stated that the time for lodging the appeal lapsed on 11th January 2024 and the delay between that date to when the application was filed has not been explained. He asked the court to disregard the excuse given for the delay as the applicant simply failed to prioritise the matter.

4. The application was canvassed by way of written submissions.
5. In its submissions, the applicant relied on section 75G of the *Civil Procedure Act* and the case of Nicholas Kiptoo Korir Arap Salat v. IEBC and 7 Others (2014) eKLR. It submitted that the application herein was filed 3 months after expiry of the timeline for filing the memorandum of appeal. It relied on the cases of Charles N. Ngugi v. ASL Credit Limited (2022) eKLR and Scania East Africa Ltd & 2 Others v. Patrick Mutisya Kioko (2022) eKLR where the court found that a 3 months period does not amount to inordinate delay.
6. It argued that the appeal has high chances of success since the trial court lay all the blame on the 2nd respondent who was the driver of the motor vehicle but did not lay any blame on the 1st respondent who is the registered owner of the motor vehicle. That the court should apply its discretion to grant the orders prayed for in the circumstances of the case and it relied on the case of Telkom Kenya Limited v. John Ochanda & 996 Others (2015) eKLR.
7. On his part, the 1st respondent submitted that in light of Section 75G of the *Civil Procedure Act*, the court does have discretion to grant leave to appeal out of time but the discretion must be applied judiciously. He relied on the cases of Nicholas Kiptoo Korir Arap Salat v. IEBC and 7 Others (2014) eKLR, Susan Ogutu Oloo & 2 Others v Doris Odindo Omolo (2019) eKLR and Omar Shurie v. Marian Rashe Yafar (2020) eKLR. He argued that the 4-month delay is inordinate and the reason given for the delay is not sufficient.
8. He relied on the cases of Aviation Cargo Support Ltd v. St. Freight Services Ltd (2014) eKLR, Edith Gichugu Koine v. Stephen Njagi Thoithi (2014) eKLR and David Rono v. Rahab Wanjiku Ndirangu & Another (2018) eKLR. He argued that the appeal does not have chances of success and that the costs of this application should not be awarded to the applicant in light of the court's findings in the case of *Haraf Traders Limited v Narok County Government (Civil Suit 1 of 2019)* [2022] KEHC 2357 (KLR).
9. The issue for determination is whether the application has merit.
10. It is trite that the court may grant leave to appeal out of time if there is a satisfactory explanation for the delay in lodging the appeal. 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 a good and sufficient cause for not filing the appeal in time.”
11. There is a 3-month delay between the time when the statutory allowed period lapsed and when the application herein was filed. In an attempt to explain the delay, the applicant's advocate stated that the company's internal processes for authorising filing of the appeal are lengthy such that by the time the filing was approved, the statutory period had already lapsed. The 1st respondent controverted this position and stated that the applicant simply failed to prioritize the appeal and that the excuse provided is not satisfactory. In the cases of Charles N. Ngugi v. ASL Credit Limited (2022) eKLR and Scania



East Africa Ltd & 2 Others v. Patrick Mutisya Kioko (2022) eKLR, I agree with the courts' findings that the 3 months delay period was not inordinate. The relief sought is granted based on the discretion of the court. However, the court does not apply its discretion capriciously but has to consider the rights of the parties. The right of the applicant to the orders sought is just as important as those of the respondents. I am also guided by the provision of Article 48 of the Constitution which assures access to justice to all persons.

12. Therefore, I find that the application has merit and it is hereby allowed with orders thus:
- a. Leave is hereby granted to the applicant to appeal out of time against the judgment and decree of Hon. S. Ouko delivered on 11th January 2024 in Runyenjes SPMCC No. 45 of 2018;
 - b. The applicant to file and serve the memorandum of appeal within 21 days of this ruling.
 - c. The costs of this application are hereby awarded to the respondents and assessed at Kshs.10,000/- for each to be paid within 7 days from the date of this ruling.
13. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF OCTOBER, 2024.

L. NJUGUNA

JUDGE

..... for the Applicant

..... for the 1st Respondent

..... for the 2nd Respondent

