



REPUBLIC OF KENYA



**Mwamu t/a Mwamu & Co Advocates v Odongo (Miscellaneous Application
130 of 2017) [2023] KEHC 102 (KLR) (18 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 102 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS APPLICATION 130 OF 2017
RE ABURILI, J
JANUARY 18, 2023**

BETWEEN

JAMES AGGREY MWAMU T/A MWAMU & CO ADVOCATES APPLICANT

AND

ALFRED OKEYO ODONGO RESPONDENT

RULING

1. The applicant's Notice of Motion dated January 17, 2022 seeks the following reliefs:
 - a. That the honourable court be pleased to admit the applicant's application for reference and deem it as duly filed.
 - b. That the honourable court be pleased to make such orders as it deems necessary to safeguard the ends of justice.
 - c. That the costs and incidentals to this application be provided for.
2. The application is grounded on the fact that the court delivered its ruling on 22/9/2021 directing the applicant to file his reference within 14 days as of that date in the presence of the applicant's associate one Ms Ogola. That after the directions and before she could comply, her child fell sick which situation compelled her to be away from work for 3 weeks by which time the period allowed to file the reference had lapsed by 3 days. That they already filed their reference which he wishes to be admitted as duly filed. She therefore asserts that the delay was not inordinate and caused by circumstances beyond her control.
3. The application is further supported by the affidavit of Y.A Ogola Advocate sworn January 17, 2022 and a further affidavit sworn on February 23, 2022.
4. The respondent opposed the application through a replying affidavit sworn on January 27, 2022 by Ms S. Akinyi Advocate and grounds of opposition dated February 21, 2022.



5. The deponent for the respondent contends that counsel's child was admitted on September 23, 2021 and discharged on September 29, 2022 and therefore there still was ample time to file the reference given the time given had not lapsed and that even then, there are other associates who could take up the matter by preparing the application. She therefore contends that the delay is inordinate and not satisfactorily explained.
6. In the grounds of opposition, the respondent terms the application as an abuse of the court process and that the remedy is a hearing and determination of a reference against the ruling of deputy registrar dated August 10, 2018.
7. By directions of the court, the application was canvassed by way of written submissions. The applicant complied and submitted that the Applicant delayed by only 3 days due the circumstances that were beyond Counsel's control. She therefore implores the court to be guided by the provisions of article 159 (2)(d) of the Constitution and the overriding objectives under the Civil Procedure Act. She further relied on the cases of Utalii Transport Company Limited & 3 others v NIC Bank Limited & another [2014] eKLR, Agip (K) Limited v Highlands Tyres Limited [2001] eKLR, Moses Mwangi Kimani v Shammii kanjirapparambil Thomas & 2 others [2014] eKLR and Ivita v Kyumba (1984) KLR 441.
8. As to whether the respondent will suffer prejudice, it was submitted that the respondent has not demonstrated any prejudice that he stands to suffer if the application is allowed.
9. On the issue of costs, it was submitted that the court awards costs at its discretion and in most cases, costs follow the event.

Analysis and determination.

10. I have considered the application and the responses thereto as well as the applicant's written submissions. Although the court did not receive submissions from the respondent's counsel, I have considered the replying affidavit and the grounds of opposition and the relevant law bot statutory and case law material to this type of application which is not new to this court. The following stand uncontroverted; that the court delivered its ruling on September 22, 2021 allowing the applicant 14 days to file and serve his reference, which was filed on October 15, 2021. Clearly, the reference was filed out of time. The explanation tendered is that counsel on record was befallen by a sick child who was admitted in hospital on September 23, 2021.
11. In the view of the respondent, the delay is inordinate and not satisfactorily explained.
12. The duty of this court is to ascertain whether the delay is inordinate and if reasons advanced for the delay suffice. The application is premised on the provisions of sections 1A, 1B and 3A of the Civil Procedure Act which are commonly known as the overriding objectives or the oxygen principles which mandate the court to aid in the administration of justice. The court of appeal (Omolo, Bosire and Nyamu JJ.A) in Abdirahman Abdi v Safi Petroleum Products Ltd & 6 others [2011] eKLR had the following to say about the overriding principles of the law:

“The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice...

In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the Appellate Jurisdiction Act, cap 9 Laws of Kenya, and later, article 159 (2) (d) of the Constitution of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court



is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure.”

13. In that case, the applicant sought to expunge a notice of appeal filed one day out of time. The court having regard to the provisions of article 159 of the Constitution and the overriding objectives under the Appellate Jurisdiction Act found that the delay was excusable.
14. As to what amounts to inordinate delay, the Court of Appeal in Cecilia Wanja Waweru v Jackson Wainaina Muiruri & another [2014], eKLR held that:

“There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case. We are of the considered view that the learned judge in considering the application, should have looked at the appellant’s conduct from the time the appeal was filed up to the date the application for reinstatement was filed...”
15. The explanation tendered for the delay is sickness of the advocate’s child. The advocate seized of the matter nonetheless endeavoured to file her application as soon as she was back to work running 3 days late.
16. The question is whether that can be said to be inordinate delay and if so, whether the explanation as given is excusable. Further, whether justice can still be done despite the delay.
17. In my humble view, the respondent’s contention that there are other associates who could have taken up the task is equally taken into consideration. However, counsel has deposed that she is the one who was seized of the matter and was present when the ruling was delivered granting her firm 14 days to file the reference. When her child fell ill, she had a primary parental responsibility of attending to the child, considering that the wellbeing of that child is of paramount importance and especially where it concerns life and limb. It would be absurd for this court to adversely comment on the sickness of a child when that sickness is not being feigned as evidence of admission into hospital is evident and to hold that the advocate should have left her child and given priority to the filing of the application.
18. It is not uncommon for counsel to fall sick or to be indisposed from time to time and more often than not, the courts have had to adjourn cases hence, delay in the hearing and determination of cases because of that alleged indisposal even without evidence of that indisposal. Even in law firms where there are many associates, it was not demonstrated that the advocate seized of the matter was negligent or that she deliberately failed to give the brief to her associate to handle the matter and file the application.
19. My considered view on the issue of delay is that the same was not inordinate and from the applicant’s counsel’s conduct, I am satisfied that she took steps to comply with the order as soon as it was practicably possible. The explanation offered for the delay is excusable as the events leading to the delay were beyond the applicant’s control.
20. In light of the above, I am inclined to allow the application and order that the application dated January 17, 2021 is hereby allowed. The reference dated October 14, 2021 is hereby deemed as duly filed and served upon the respondent who shall have 14 days of today to file and serve a response thereto. The applicant shall then have five days of the date of service within which to file and serve a further affidavit if need be together with written submissions. The respondent shall then have 5 days of the date of



service to file and serve a supplementary affidavit if any together with written submissions. Mention on 14/2/2023 to fix a ruling date on the reference. Each party shall bear their own costs of the application.

Dated, Signed and Delivered at Kisumu this 18th Day of January, 2023

R.E. ABURILI

JUDGE

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