



**Ambalasi v Lovega (Miscellaneous Application E046 of 2022)  
[2023] KEHC 694 (KLR) (10 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 694 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
MISCELLANEOUS APPLICATION E046 OF 2022  
PJO OTIENO, J  
FEBRUARY 10, 2023**

**BETWEEN**

**CHRISPINE MACHIMBO AMBALASI ..... APPLICANT**

**AND**

**HERMAN LOVEGA ..... RESPONDENT**

**RULING**

1. The Applicant's claim seeking damages for personal injury was listed for mention before the trial court on the February 27, 2018 when his advocate failed to attend court and the matter was dismissed for want of prosecution. The applicant was aggrieved, changed advocates and applied for reinstatement of the matter by an application to that effect but by a ruling dated February 29, 2021, that application was equally dismissed and the earlier dismissal of the case upheld.
2. The Applicant did not give up in his pursuit and has now filed the current application dated March 23, 2022 and filed in court on the March 28, 2022. The reasons given for failure to file the appeal in time is that the Counsel sought for proceedings which were never supplied till about the March 4, 2022 by which time the time to file the appeal had lapsed.
3. When served, the Respondent resisted the application by swearing and filing a Replying Affidavit by Patricia Mugambi, a Legal Officer with the Respondent's Insurer, whose position was that the application was bad for inordinate and inexcusable delay and that the reason given for delay was not true.
4. The deponent calculated the period of delay from the February 27, 2018 and came up with period of 20 months deemed inordinate and inexcusable. He added that even the period between February 19, 2021 and the date the application was filed was almost two (2) years and noted that own annexure by Applicant reveal that the proceedings were ready and collected by one Laureen on July 12, 2021. It was therefore contended that there was no valid reason to extend time to file the appeal. Nothing was



said about the Applicant's position that on the date the suit was dismissed, it was merely coming up for mention and not hearing and that the drastic order of dismissal ought not have been made.

5. As directed by the Court, the Applicant filed submissions on December 19, 2022 while the Respondent did so on the November 21, 2022.
6. The Court has had the benefit of perusing the two sets of submissions and the Court's task is to determine whether a case has been made out to merit the Applicant being granted orders of enlargement of time to file an appeal.
7. With the appreciation of the constitutional right to access justice coupled with the principle that default to take a step within the set timelines should not be the only reason to shut out a party for the seat of justice<sup>1</sup>, the remedy of extension of time is a key pillar in the administration of justice and false as a discretionary power that is exercised on set and crystalised principles and not in a vacuum and at whim. Overtime therefore, the Kenyan Superior Courts have made it trite that extension of time to appeal is not a right, but an equitable remedy available only to the deserving party who must satisfy the Court that the reason for delay is plausible, that a prejudice would visit him if time is not enlarged while none would visit the Respondent if time is extended and that the application has been brought expeditiously<sup>2</sup>.
8. It is the burden and onus of the Applicant to satisfy the Court that the delay was plausibly explained and the same was not inordinate. What is not contested is the fact that upon delivery of the ruling on February 19, 2021, the request for proceedings was made on February 26, 2021 and the proceedings were readied and collected on behalf of the Applicant's Counsel on the July 12, 2021 yet the application was lodged March 28, 2022 about eight (8) months later. The time to be reckoned with is the time for delay by the Applicant; the period he was able to act but did not act. I consider that period to be calculated from the date the ruling was availed to the Counsel. It is a period of about 8 months.
9. Whether a delay is inordinate is considered with regard to the peculiar circumstances of each case because no two cases are always the same. As said before the very rationale for the power to extend time or indeed excuse a default is to meet the ends of justice and avoid abuse the due process of the Court. One other additional consideration and which is always a sway on the discretion of the Court is what case awaits urging once time is extended. It calls for the evaluation of the benefit to be derived, in the interests of due administration of justice, if additional judicial time, as a resource, was to be availed to the Applicant so that not every frivolity is entertained.
10. In this matter it is alleged, and not denied, that on the date the suit was dismissed the matter was not due for hearing but mention. In fact the proceedings of February 27, 2018 confirm the Applicant's contention.
11. That was the central point for consideration in the application for setting aside. The application for setting aside was questioning the propriety of the dismissal order not only on the justification for failure to attend court but also on whether a dismissal order could be properly made on a date fixed for mention. In its determination, the Court said:-

“It would be expected that a suit at its nascent stage would elicit interest from the Plaintiff and even the defendant seeking the same to be disposed of expeditiously.

<sup>1</sup> Bupinder Singh Dogra v Coast Development Authority [2019] eKLR

<sup>2</sup> Kenya Revenue Authority v Mount Kenya Bottles [2022] KE SC 3 KLR



One year and eight months later the plaintiff emerges seeking reinstatement of the suit. The lapse herein cannot be solely attributed to the advocate. The client should equally bear responsibility and seek to know the status of his case in court.

I do not find merit in the application dated October 15, 2019 and the same is dismissed with costs to the defendant.”

12. It is to this court clear that the crucial consideration was never given due regard and that to this court presents an arguable point on appeal.
13. It is therefore the finding of the Court that the delay is not ordinate and that there is an arguable point to be urged on appeal which should not be shut out merely on account of default by Counsel.
14. I do enlarge time by a period fourteen (14) days to enable the Applicant file and serve, not only the Memorandum of Appeal, but also Record of Appeal and Submissions. Once filed the Respondent shall file submissions within thirty (30) days thereafter.
15. The Deputy Registrar shall, upon the Record of Appeal being filed, place the file before a Judge for admission.
16. Time is of essence for filing the appeal and submissions.
17. On costs, even though the Applicant has succeeded, the need for the application was occasioned by his default and he should not be rewarded for such default on costs. For on that account it is directed that each party shall bear own costs.

**Dated, delivered and signed at Kakamega this 10<sup>th</sup> day of February 2023.**

**PATRICK J. O. OTIENO**

**JUDGE**

**In the presence of:**

**No appearance for the Applicant**

**Ms. Jeruto for the Respondent**

**Court Assistant: Polycap**

