



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

David v Vikash Enterprises Limited & another (Miscellaneous Application E310 of 2021) [2023] KEHC 572 (KLR) (Civ) (9 February 2023) (Ruling)

Neutral citation: [2023] KEHC 572 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS APPLICATION E310 OF 2021
JN MULWA, J
FEBRUARY 9, 2023

BETWEEN

JOHN MBWIKA DAVID APPLICANT

AND

VIKASH ENTERPRISES LIMITED 1ST RESPONDENT

BENSON MUSYOKA MAINA 2ND RESPONDENT

(Originating from the judgement in Milimani CMCC No. 2593 of 2019 delivered on the 23rd of April 2021.)

RULING

1. Judgment in the trial court, Milimani CMCC No 2593 of 2019 was delivered on the 23rd of April 2021. Section 79 G of the [Civil Procedure Act](#) provides for 30 days upon which an appeal may be filed from the decree or order appealed from. There is however 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.
2. Among the reasons that a court may consider grant of an order to extend time are: -
 1. The period of delay
 2. Reasons for the delay
 3. Arguability of the appeal
 4. Decree of prejudice which could be suffered by the respondent if extension is granted.



The above principles have been applied by courts over time, in numerous decisions by the superior courts.

3. By an application dated June 24, 2021, the applicant John Mbwika David sought orders for extension of time to file an appeal out of time. The said appeal ought to have been filed on or before the 23rd of May 2021.
4. The application is based on provisions of sections 1A, 1B, and 3A of the *Civil Procedure Act*, and order 42 rule 6 and order 51 rule (1) of the *Civil Procedure Rules*; and affidavit sworn by Musili Mbiti Advocate having conduct of the matter on behalf of the applicant.
5. The reasons stated for the delay are stated as misplacement of the applicant's file in the Advocates offices which was found after the 30 days' window had expired, and that the advocates take full blame for the delay as instructions to lodge the appeal had been received within the statutory 30 days period.
6. In opposing the application, the respondents filed undated grounds of opposition stating that the reason given is a lame excuse only made to delay enjoyment of the fruits of judgment by the respondent, nor does the intended appeal raise any arguable appeal.

The applicant filed submissions dated July 19, 2022 to buttress its case for grant of the orders sought. The respondents did not file submissions.

7. I have considered the above and the cited authorities. In *Philip Chemwolo & another vs Augustine Kubede* (1982 – 88) KAR 103 it was held;

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right”

8. The court notes that there is a delay of 30 days from the 30 days' window to the date of this application which has not been explained at all. The applicant has not told the court when the applicant's file was traced. Though not explained, 30 days' delay cannot be excessive to warrant a denial of the orders sought.

The Supreme Court of Kenya in *Nicholas Kiptoo Korir Vs IEBC & 7 others* (2014) e KLR held that extension of time is a discretion of the court, that a party who seeks extension has the burden of laying a basis to the satisfaction of the court, and whether the application has been brought without unreasonable delay – see also *Scania East Africa Limited & 2 others Vs Patrick Mutisya Kyalo* (2022) e KLR.

9. I have considered that the delay of 30 days is not inordinate. I have also considered the draft memorandum of appeal that in my view raises issues of excessive quantum of damages as well as apportionment of liability which are arguable.
10. To that extent then, and there being no serious objections to the grant of the orders by the respondent, I am minded to allow the application, but upon terms stated here below:
 - a. That the applicant is granted leave to file appeal out of time;
 - b. That the applicant shall file and exchange the memorandum of appeal within 7 days of this ruling;
 - c. That the record of appeal shall be filed within 60 days of filing of the memorandum of appeal;



d. The applicant shall bear costs of this application

Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2023.

J. N. MULWA

JUDGE

