



**Julius (Suing as Legal Representative of the Estate of Prince Prosper
Koome-Deceased) v Kinoti & another (Miscellaneous Application
37 of 2022) [2023] KEHC 3027 (KLR) (6 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3027 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS APPLICATION 37 OF 2022
EM MURIITHI, J
APRIL 6, 2023**

BETWEEN

**JANE KAGWIRIA JULIUS (SUING AS LEGAL REPRESENTATIVE OF THE
ESTATE OF PRINCE PROSPER KOOME-DECEASED) APPLICANT**

AND

JULIUS KINOTI 1ST RESPONDENT

EDWARD S.N NGUTARI 2ND RESPONDENT

RULING

1. There is before the Court a Notice of Motion under certificate of urgency dated June 22, 2022 brought under Sections 79 G and 95 of the *Civil Procedure Act* and Order 50 Rule 6 of the *Civil Procedure Rules*, where the Applicant seeks leave to appeal out of time against the whole judgment of EW Ndegwa (RM) delivered on January 19, 2022, in Githongo Civil Case No 39 of 2017.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Jane Kagwiria, the Applicant herein, sworn on even date. On January 19, 2022, the trial court delivered its judgment where it awarded her Kshs 291,250 plus costs and interests of the suit. At the time of the award, she was unable to raise the requisite filing fees to enable her instruct her advocates to lodge an appeal against the award. She is a widow, a woman of straw and she had other financial obligations. Although her business has not been doing well since Covid-19 struck, she has finally managed to raise the legal fees for filing the appeal, but the time for filing it has since lapsed, making this application necessary. She prays for the application to be allowed as she has a case with a high chance of success, and the Respondents will not suffer any prejudice.
3. The 1st Respondent has opposed the application vide his replying affidavit sworn by Mungai Jeremiah, his counsel on July 20, 2022. He avers that the decretal sum was fully paid to the Applicant when the



time for filing the appeal had not lapsed, and her allegations that she could not raise the requisite filing fees is untrue. In fact, the Applicant did file Meru HCCA No 23/2022 vide a memorandum of appeal dated February 16, 2022 and filed on February 17, 2022. The actions of the Applicant reek of indolence and the same is an afterthought and an act of bad faith. The Applicant is just an opportunist who is using the excuse of being a woman of straw to have a second bite at the cherry. He reiterates that there is no good and sufficient grounds advanced by the Applicant to demonstrate the reasons for the delay in filing the appeal in time to warrant grant of the orders sought. The 1st Respondent will suffer great prejudice if the application is allowed because he has already paid the decretal sum in full, and what remains outstanding is the party and party costs which will be paid upon receipt of a certificate of costs from the Applicant's Advocates. He urges the court to dismiss the application in order to bring this litigation to an end, because the Applicant has come to court with unclean hands and she should not benefit from equity or the discretion of the court.

4. The Applicant swore a further affidavit on August 10, 2022 denying the purported payment of the decretal sum to her Advocates. She urges the court not to drive her from the seat of justice unheard because she could not afford to instruct her advocate at the time.

Submissions

5. The Applicant urges that she is a woman of straw whose business was adversely affected by the Covid-19 pandemic and she was widowed in the same accident she is appealing against. She urges the court not to drive her from the seat of justice and condemn her unheard, and relies on [*Edith Gichungu Koine v Stephen Njagi Thoithi \(2014\) eKLR*](#) and [*Kamlesh Damki Patni v Director of Public Prosecution & 3 Others \(2015\) eKLR*](#).
6. The 1st Respondent urges that the application is an abuse of the court process and a non-starter which ought to be dismissed with costs, and cites [*Seyani Brothers & Co \(K\) Limited v Albanus Mwangi Muia \(2021\) eKLR*](#). He urges that the application was filed with inordinate delay of about 5 months and the reasons of the delay are vague, and cites [*Omar Shurie v Mariam Rashe Yafar \(Civil Application No 107 of 2020\)*](#), [*Susan Ogutu Oloo & 2 Others v Doris Odindo Omolo \(2019\) eKLR*](#), [*Scania East Africa Ltd & 2 Others v Patrick Mutisya Kioko \(2022\) eKLR*](#) and [*Dilpack Kenya Limited v William Muthama Kitonyi \(2018\) eKLR*](#). He urges that the intended appeal does not have high chances of success as the trial court rendered its judgment after a careful analysis of the evidence placed on record by the parties. He urges that he will suffer great prejudice if the application is allowed because he has already settled the entire decretal sum.

Analysis and Determination

7. The issues for determination are whether leave to appeal out of time should issue.
8. The principles for consideration on an application for extension of time to appeal out of time are that, the power is discretionary but the applicants must prove to the satisfaction of the court that the delay is not inordinate, reasons for delay are plausible, that the appeal is arguable and not frivolous and that the respondent will not be unduly prejudiced by the order being made. See [*Nicholas Kiptoo Korir Arap Salt v Independent Electoral & Boundaries Commission & 7 others \(2014\) eKLR*](#).
9. The judgment sought to be appealed against was made on January 19, 2022 while the instant application was filed on June 27, 2022. That delay of approximately 5 months cannot be termed to be inordinate and inexcusable.



10. The reason for that delay is attributed to the Applicant's inability to raise the requisite legal fees in order to instruct her counsel on appealing. This court finds that the reason for the delay has been explained to its satisfaction.
11. On the arguability or otherwise of the intended appeal, the grounds raised in the draft memorandum of appeal on the apportionment of liability and the paltry awards made by the trial court cannot be said to be frivolous.
12. On his part, the 1st Respondent contends that he will suffer greatly if the leave to appeal out of time is granted, because the entire decretal sum has already been paid the Applicant and/or her counsel. The court wishes to point out that the fact that the decretal sum has already been paid to the Applicant does not automatically take away her undoubted right to lodge an appeal against the trial court's decision. Besides, there was no undertaking by the Applicant that once the decretal sum had been paid in full, she would relinquish her right to appeal.

Orders

13. For the reasons set out above, the Court allows the Applicant's application dated June 22, 2022 in the following terms:
 1. The Applicant is hereby granted Leave to lodge her appeal out of time.
 2. The Record of Appeal to be filed within 60 days from the date hereof, in default of which the appeal shall stand as dismissed.
14. There shall be no orders as to costs.
15. Order accordingly.

DATED AND DELIVERED ON THIS 6TH DAY OF APRIL, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S. Kaumbi & Co. Advocates for the Appellant.

M/S G. N. Mugo for the 1st Respondent.

