



**Kibiti v Kenya Wildlife Services (Miscellaneous Application
E038 of 2022) [2023] KEHC 3200 (KLR) (14 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3200 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS APPLICATION E038 OF 2022**

EM MURIITHI, J

APRIL 14, 2023

BETWEEN

JAMES MWITI KIBITI APPLICANT

AND

KENYA WILDLIFE SERVICES RESPONDENT

RULING

1. Before the court is a notice of motion under certificate of urgency dated June 17, 2022 brought under section 79G of the *Civil Procedure Act*, order 50 rule 6, order 51 of the *Civil Procedure Rules*, and all other enabling provisions of the law, where the applicant seeks leave to appeal out of time against the whole judgment of Hon E. Ngigi (PM) in Isiolo CMCC No 14/2014 and the draft memorandum of appeal herewith to be deemed as properly filed.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of James Mwititi Kibiti, the applicant herein, sworn on even date. After the trial court had delivered its judgment on March 22, 2022, the applicant instructed his advocates to lodge the appeal. His advocates severally requested for the typed copy of the judgment which were only issued on June 10, 2022. It is for that reason that he seeks leave to file his appeal, which has a high chance of success, out of time.
3. The respondent has opposed the application vide its replying affidavit sworn by Isayah Mwenda Mwarania, its advocate on July 22, 2022. He avers that the applicant paid the court fees for the certified copy of the judgment on May 11, 2022 and the letter of March 24, 2022 has been belatedly manufactured to hoodwink the court of an alleged earlier request which is not supported by any court fees payment receipt. He feels that if the applicant had applied for the certified copy of the judgment in time, this otherwise meritless application would have been unnecessary. He avers that the copy of the judgment was typed and certified way back on April 22, 2022 and the applicant's failure to pay and collect it cannot be blamed on the trial court. He accuses the applicant of failing to explain the delay



for the period between April 22, 2022 when the judgment was certified and June 24, 2022 when the application was filed, and urges the court to dismiss the application with costs.

Submissions

4. The applicant urges that the delay in obtaining the typed judgment occasioned the delay to file the appeal within the prescribed time, and relies on *Diplack Kenya Limited v William Muthama Kitonyi*(2018) eKLR, *First American Bank of Kenya Ltd v Gulab P Shah & 2 others* (2002) 1 EA and *Vishva Stone Suppliers Company Limited v RSR Stone* (2006) eKLR.
5. The respondent urges that the applicant applied and paid for the judgment on May 11, 2022 long after the lapse of the statutory period for filing the appeal. It urges that there is no valid excuse for the delay and the court should not to be swayed by sympathy.

Analysis and Determination

6. The sole issue for determination is whether leave to appeal out of time should issue.
7. In order to succeed in his application for extension of time to appeal out of time, the applicant must prove to the satisfaction of the court that the delay is not inordinate, reasons for delay must be plausible, that the appeal is arguable and that the respondent will not be unduly prejudiced if the order is granted. See *Nicholas Kiptoo Korir Arap Salt v Independent Electoral & Boundaries Commission & 7 others* (2014)eKLR.
8. This court notes the delay from the date of the impugned judgment on March 22, 2022 to June 24, 2022 when the application was filed. That delay is attributed to the unavailability of the typed and certified copy of the said judgment. The record is clear that the certification of the said judgment was done on April 22, 2022. The applicant contends that he only received a copy of the said judgment on June 10, 2022, long after the statutory period to lodge the appeal had lapsed. The applicant indeed wrote to court on March 24, 2022 and May 11, 2022 requesting for a certified and typed copy of the impugned judgment and proceedings of the court. This court finds that the reason for the delay of approximately 3 months, has been satisfactorily explained.
9. On the arguability or otherwise of the intended appeal, this court notes that the grounds of appeal raised in the draft memorandum of appeal on liability and the weight of the pleadings are indeed arguable.

Orders

10. Accordingly, for the reasons set out above, the court allows the applicant's application dated June 17, 2022 in the following terms:
 1. Leave to appeal out of time against the whole judgment of Hon E.Ngigi (PM) in Isiolo CMCC No 14/2014 is hereby granted.
 2. The draft memorandum of appeal on record is deemed as properly filed upon payment of the requisite court fees.
 3. Costs in the cause.
- 11 Order accordingly.

DATED AND DELIVERED ON THIS 14TH DAY OF APRIL, 2023.

EDWARD M. MURIITHI



JUDGE

Appearances:

M/S Maitai Rimita & Co. Advocates for the Applicants.

M/S Mwenda Mwarania, Akwalu & Co Advocates for the Respondents.

