



Thiongo & 2 others v M'mugambi (Miscellaneous Civil Application E013 of 2023) [2023] KEHC 3348 (KLR) (20 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3348 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS CIVIL APPLICATION E013 OF 2023**

TW CHERERE, J

APRIL 20, 2023

BETWEEN

DAVID WAHOME THIONGO & 2 OTHERS APPLICANT

AND

STEPHEN GIKUNDA M'MUGAMBI RESPONDENT

RULING

1. By a judgment dated March 23, 2022, the court in Meru CMCC No 87 OF 2019 dismissed the Applicants' case in which they were seeking damages as against the Respondent on the ground that it was time barred and ordered that Applicant bear the costs of the suit.
2. By a notice of motion dated February 28, 2023 and filed on March 01, 2023 supported by an affidavit sworn by David Wahome Thiongo (1st Applicant) on February 28, 2023, Applicants seek leave to appeal to appeal the judgment dated dated March 23, 2022 out of time.
3. The application is premised on the rounds among others that the suit was filed only 7 days out of time and that the failure to inform them of the outcome of their case by their counsel who is since deceased ought not to have been visited on the Applicants.
4. Respondent opposed the application vide a replying affidavit filed on February 08, 2023 mainly on the ground that the explanation by the Applicants that their counsel did not inform them about the outcome of the case is unmerited since Applicants had an obligation to make a follow up of their case with their advocate.

Analysis and Determination

5. I have considered the notice of motion in the notice of preliminary objection dated February 08, 2023, affidavits on record and submissions and cited cases filed on behalf of the parties and I have deduced the following issues for determination:



1. Whether the firm of Hillary Sandi & Co Advocates is properly on record for the Applicants
2. Whether Applicants have made out a case for leave to appeal out of time

Whether the firm of Hillary Sandi & Co. Advocates is properly on record for the Applicants

6. The Preliminary Objection raised by the Respondent touches on the *locus standi* of the firm of Hillary Sandi & Co Advocates to represent Applicants after delivery of judgment in the trial court.
7. The provisions of Order 9 Rule 9 of the *Civil Procedure Rules* make it mandatory that change of Advocates after judgment has been entered must be through an order of the court upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate (See *Violet Wanjiru Kanyiri v Kuku Foods Limited* [2022] eKLR).
8. The lower court matter and this miscellaneous application are separate suits. In my considered view, the firm of Hillary Sandi & Co Advocates neither required any consent from the advocate that acted for the Applicant in the lower court nor leave of court to act for the Applicant in this matter. The Preliminary Objection is unmerited and it is overruled.

Whether Applicants have made out a case for leave to appeal out of time

9. The impugned ruling herein was delivered on March 23, 2022 and the instant application was filed on March 01, 2023 about one year after delivery of the impugned judgment. Under Section 79G of *Civil Procedure Act*, an appeal from a subordinate court to the high court should be filed within a period of 30 days from the date of the decree or order appealed against provided that an appeal shall 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.
10. Having approached the court one year after the impugned judgment was delivered, the onus is on the Applicants to demonstrate that the delay was reasonable, justified and that the Respondent will not suffer any prejudice if the order is not granted.
11. The principles that govern the exercise of discretion in an application for extension of time are well known. In *Githuaka v Nduriri* [2004] 2 KLR at page 68 and in the oft-cited case of *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi* Civil Application No. Nai. 255 of 1997 [1999] 2 EA 231 which was a decision of the Court of Appeal in which the judge stated as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted”.
12. In *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR, the Court of Appeal stated that:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”



13. The Applicants in this matter have explained that the judgment was delivered by email and they only learnt about its delivery this year which was long after their previous advocate Mr B G Kariuki had passed on.
14. There is no dispute that the Applicants' previous advocate Mr Mr B G Kariuki is since deceased. Although Applicants do not disclose exactly when they learnt about the impugned judgment, their explanation for delay in filing the appeal is reasonable in the circumstances.
15. In *Muchugi Kiragu v James Muchugi Kiragu & Another* [1998] eKLR, the Court of Appeal had the following to say as regards the Court's discretion to extend time to file appeal out of time:

“Lastly, we would like to observe that the discretion granted under rule 4 of the Rules of this Court to extend the time for lodging an appeal is, as is well known, unfettered and is only subject to it being granted on terms as the Court may think just. Within this context, this Court has on several occasions, granted extension of time, on the basis that an intended appeal is an arguable one and that it would therefore, be wrong to shut an applicant out of Court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances, inexcusable and that his opponent was prejudiced by it.”

16. On the degree of prejudice to the respondent, I am called upon to balance the competing interests of the parties, that is, the injustice to the Applicants, in denying them an extension, against the prejudice to the Respondent in granting an extension. The Applicants are aggrieved by the judgment of the trial court. It has not been demonstrated that Respondent will suffer any prejudice in the event that Applicants are allowed to appeal out of time. I therefore find that it would not be in the interest of justice to penalize the Applicants for the mistake made by their previous counsel. In arriving at this decision, I find succor from the decision in *Philip Chemwolo & Anor. Vs Augustine Kubende* (1982 – 88) KAR 103 where Apaloo J (as he then was) rendered himself thus,

“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 merits”.

17. The upshot is that the notice of motion dated February 28, 2023 and filed on March 01, 2023 is allowed and it is hereby ordered:
 1. The firm of Hillary Sandi & Co. Advocates is properly on record for the Applicants
 2. Applicants are granted leave to file an appeal against the judgment in Meru CMCC NO. 87 OF 2019 out of time
 3. The Memorandum of appeal be filed and served on the Respondent within 14 (fourteen) days from the date hereof.
 4. The record of appeal be filed and served not later than 30 days from the date of filing the Memorandum of appeal
 5. Costs of this application to abide by the outcome of the intended appeal.

DATED AT MERU THIS 20TH DAY OF APRIL 2023

WAMAE T W CHERERE

JUDGE



Appearance

Court Assistant - Morris Kinoti

For Applicants - Mr Sandi for Hillary Sandi & Co Advocates

For Respondent - Mr Mungai hb for Ms Nelima Associates & Co Advocates

