



**Giachibu v Wainaina (Miscellaneous Application E201 of 2021)
[2023] KEHC 3932 (KLR) (2 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 3932 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS APPLICATION E201 OF 2021
MM KASANGO, J**

MAY 2, 2023

BETWEEN

JOHN WAMUYU GIACHIBU APPLICANT

AND

PETER CHEGE WAINAINA RESPONDENT

RULING

1. Gatundu Chief Magistrate’s Court in Civil Case No. 215 of 2019 delivered judgment on August 4, 2021. Any party aggrieved by that judgment ought to have filed an appeal before the High Court within 30 days of the date of that judgment. This is as provided under section 79G of the *Civil Procedure Act* (cap 21). That Section provides:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided 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.’ (Underlining mine)

2. Peter Chege Wainaina (Peter) who was the defendant before the trial court filed a Notice of Motion application dated September 20, 2021 seeking leave to file his appeal out of time and praying for stay of execution pending the intended appeal. The affidavit in support of that application was sworn by Anertia Salinder Gulenya Advocate. In support of the prayer for leave to file an appeal out of time, the deponent stated:-

“That the applicant/intended appellant has thoroughly perused the said judgment and are (sic) dissatisfied with the trial court magistrate’s calculation that summed up the



award of Kshs.600,000 for general damages Kshs.150,000 for future medical expenses and Kshs.119,941 for special damages.”

3. The applicant did not attempt to satisfy this Court, as required under section 79G of cap 21, that he has good and sufficient cause for not filing the appeal in time. It follows even as I consider this ruling, I do not know why the applicant did not file the appeal within the period set out in the above statute.
4. The applicant not only fail to consider the statutory imperative under cap. 21, to explain the day in filing the appeal, but also failed to bear in mind the principles required to be considered by the court as held by the Supreme Court in the case of Nicholas Kiptoo Korir Arap Salat V. Iebc and 7 others (2014) eKLR as follows:

“The underlying principles a court should consider in exercise of such discretion include;

1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case- to-case basis;
 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;
 6. Whether the application has been brought without undue delay.”
5. The application in view of the above highlighted shortcomings is devoid of merit. The applicant failed to appreciate that he was obligated to file his appeal within the period set out in statute. That obligation was discussed in the case of Dilpack Kenya Limited vs. William Muthama Kitonyi (2018) eKLR thus:-

“32. The Applicant however contended that it has a constitutional right to appeal. However, in Velji Shahmad Vs. Shamji Bros. And Popatlal Karman & CO. [1957] EA 438, it was held that:

“In the interests of the public the court ought to take care that appeals are brought before it in proper time and before the proper court or registry and when a judgement has been pronounced and the time for appeal has elapsed without an appeal the successful party has a vested right to the judgement which ought, except under very special circumstances, to be made effectual. And the Legislature intended that appeals from judgements should be brought within the prescribed time and no extension of time should be granted except under very special circumstances.”

Disposition

6. The notice of motion dated September 20, 2021, for reasons set out above is dismissed with no order as to costs. The stay of execution granted hereof is hereby lifted and vacated.



7. I order this file be closed.

DATED, SIGNED AND DELIVERED AT KIAMBU THIS 2ND DAY OF MAY, 2023

MARY KASANGO

JUDGE

Coram:

Court Assistant: Mourice/Julia

For applicant (Ngumo Mbogo & Co. Advocates :- N/A

For Respondent (Kimondo Gachoka & CO. Advocates:- N/A

COURT

MARY KASANGO

JUDGE

