



**Kamundu v Thuku & another (Miscellaneous Application
116 of 2021) [2023] KEHC 3619 (KLR) (2 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 3619 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS APPLICATION 116 OF 2021
MM KASANGO, J
MAY 2, 2023**

BETWEEN

RACHAEL KAMURA KAMUNDU APPLICANT

AND

JOHN KIMOTHO THUKU 1ST RESPONDENT

DOMINIC NJUGUNA KIRUMA 2ND RESPONDENT

RULING

1. The Applicant's Notice of Motion dated 21st May, 2021 prays for leave to be granted to the Applicant to file an appeal out of time from the Ruling by E. Riyani (SRM) in Thika Chief Magistrate's Court, Civil Case No.56 of 2020.
2. The background of this matter is that the Applicant filed the case, Civil Case No.56 of 2020 before the Thika Magistrate's Court in February, 2020. The case was fixed by consent of all parties for hearing on 24th February, 2021. On that day, the Applicant and her Advocate failed to attend court and the suit was dismissed for non-attendance. The Applicant by application dated February 25, 2021 filed before Thika Magistrate's Court applied to set aside the dismissal order and for the reinstatement of the suit. The application was dismissed with costs on April 1, 2021. The Applicant is by the present application before this court seeking leave to appeal out of time against that Ruling of Thika Magistrate's Court, that is the Ruling which that court declined to reinstate the dismissed suit.
3. The Applicant ought to have filed her appeal within the statutory provided period of 30 days from the date of the Ruling. That is the requirement provided under Section 79G of the [Civil Procedure Act](#), as follows:

“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.

4. The principles that need to be considered by the court when considering an application for leave to file an appeal out of time were considered by the Supreme Court in the case of *Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others* [2014] 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.
 7. ...”
5. It is clear from the above principles that extension of time to file an appeal out of time is not a right. The Applicant was required to satisfy this court that it has a basis why the time to file an appeal should be extended; and ought to have explained the delay in filing the proposed appeal.
6. The Applicant’s only explanation why she failed to file her appeal within the requisite period is contained in one paragraph of the affidavit in support of the application, that is:

“That a copy of the said Ruling was made available to us on 20th April, 2021 by email whereby we tried contacting the proposed Appellant unsuccessfully.”
7. What I make out of the above deposition is that the Ruling, the subject of the proposed appeal, was availed to the advocate of the Applicant on 20th April, 2021. By then there were yet ten more days before the expiry of the 30 days of appeal as provided under section 79G of the *Civil Procedure Act*. I further find from that deposition that the advocate was unable to contact the Applicant after receipt of a copy of that said Ruling.
5. It follows from the above that the Applicant may not be part of the present application seeking leave to file an appeal out of time. That is, the Applicant’s instructions to file an appeal has to date not been obtained. It is therefore not surprising that the affidavit in support of the application was sworn by Jonathan Ngumo Mbogo advocate. I am inclined, in view of what I discern, to agree with the sentiments of the Respondent that it would seem the Applicant has lost interest in her case. It is indeed my holding that the Applicant has failed to explain the delay, in the first instance of failing to file the appeal within requisite period and, in secondly I find there is no explanation in the delaying the filing of the present application under consideration, which was filed on 25th May, 2021; that is a month after



a copy of the Ruling was provided to the Applicant's advocate. For the reasons set out above I find the application before me is devoid of merit.

Disposition

6. My conclusion is that the application dated May 21, 2021 but filed May 25, 2021 is without merit. The application is dismissed with costs.
7. I order this file to 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

Ruling delivered virtually.

MARY KASANGO

JUDGE

