



Mutungi & another (Suing as legal representative of Jospheh Mutungi Musembi (Deceased)) v Ukamba Christian Community Service (Miscellaneous Application 297 of 2021) [2023] KEHC 18435 (KLR) (22 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18435 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS APPLICATION 297 OF 2021**

**FR OLEL, J
MAY 22, 2023**

BETWEEN

**PATRICK MUSEMBI MUTUNGI 1ST APPELLANT
VIRGINIA NGINA KIVUVA 2ND APPELLANT
SUING AS LEGAL REPRESENTATIVE OF JOSPEH MUTUNGI MUSEMBI
(DECEASED)**

AND

UKAMBA CHRISTIAN COMMUNITY SERVICE RESPONDENT

RULING

1. The application before this court is the Notice of Motion application dated October 26, 2021 brought pursuant to provisions of section 79G of the *Civil Procedure Act*, Order 51 rule 1 and 3 of the [Civil Procedure Rules](#) and all other enabling provision of law. The main prayers sought by the applicants are for;
 - I. That this honourable court be pleased to grant the applicant leave to lodge an appeal out of time against the whole judgment of Hon Y.A. Shikanda delivered on November 24, 2016 in civil suit No 25 of 2016.
 - II. Upon grant of leave to appeal out of time, the memorandum of appeal lodged herein be deemed duly filed and served upon the respondent
2. The application is supported by the grounds on the face of the said application and the supporting affidavit of Patrick Musembi Mutungi dated October 25, 2021. The respondent opposed the said application by filing their Grounds of opposition dated May 18, 2022.



3. The Appellants averred that they are the personal representatives of the late Joseph Mutungi Musembi and vide a plaint dated 7/12/2015 had sought compensation for his death which arose due to a road traffic accident. They instructed Mulyungi & Mulyungi Associate's Advocates to file a suit and peruse the matter, which case was dismissed on November 24, 2016. The applicants were informed and they instructed their advocate to appeal the said judgment but unfortunately the file was closed and archived in the said advocate's office. The mistake was only realized on October 21, 2021 when the applicant visited the advocate's office to inquire about his appeal and realized that the same had not been filed.
4. The delay in filing the appeal was occasioned by mistake of counsel and the said mistake ought not to be visited upon the applicant. They further submitted that they have an arguable appeal which is meritorious and stands a good chance of success as demonstrated in the Memorandum of Appeal proposed to be filed. The respondent would not be prejudiced and could be compensated by way of thrown away costs. Further the applicant had shown good cause why the application ought to be allowed and it was justified if the application could be allowed to avoid injustice and hardship resulting from inadvertence, accident and excusable mistake or error. The final issue raised by the applicant was that the court had a constitutional mandate to protect and safe guard the applicant's constitutional right to be heard on appeal.
5. The Respondent did oppose this application through their grounds of opposition dated May 18, 2022. The stated that the delay in filing this application was inordinate, inexcusable and not merited. The averments made by the applicant were not within his knowledge and the application was an abuse of the process of court and did not meet the legal threshold for the orders sought.

Applicants Submissions

6. The applicant submitted that they were the legal representatives of the deceased, who sustained fatal injuries as a result of a road traffic accident involving the respondent motor vehicle. They filed a suit in the lower court and by a judgment delivered on 24.11. 2016 the trial magistrate dismissed the suit on the basis that the applicants had failed to prove their case on a balance of probabilities. The applicants instructed the advocate to appeal but unfortunately, he did not and closed the applicants file. They only realized this on October 21, 2021 when they visited the advocate's chambers to inquire as to the status of the appeal.
7. The applicant submitted that under section 79G of the *civil procedure Act*, the court had unfettered discretion to admit an appeal filed out of time as long as a good and sufficient cause had been shown why the appeal was not filed on time . The court ought to consider the length of delay, the chances of the appeal succeeding, if leave was granted, and the degree of prejudice that would be occasioned upon the respondent. Reliance was placed on *Paulon Musili Wambugu v AG & 2 others* {2015} eKLR.
8. The applicants stated that they had a good reason as to why the appeal was not filed and that the delay in filing the appeal was caused by their former advocate who was given instructions to appeal but inadvertently marked the matter as closed and placed the file in the archives of his office. They did not realize that the appeal had not been filed until October 21, 2021 when they visited the advocates chambers only for them to realize that the appeal had not been filed. They submitted that mistake of counsel ought not to be visited upon the client. They placed Reliance on *Nuru Ruga Ali & another v Commodity House Ltd & 3 others* {2021} eKLR & *Hamam Singh & others v Mistri* {1971} EA 122
9. The applicant final submissions were that their appeal had a good chance of success as the trial court wrongly faulted them for not calling an eye witness and overly relied on the respondents witnesses who were biased and therefore unable to give a truthful account of what transpired. There were a myriad of authorities' which stated that where there were conflicting version's to an accident both parties were



equally to blame. The applicants relied on *Hussein Omar Farah v Lento Agencies* {2006} eKLR to buttress this position.

Analysis & Determination

10. I have carefully considered the Application, Supporting Affidavit, the Respondent's Grounds of opposition and the applicant's submissions and discern that the only issue arise for determination is whether this court should extend time and allow the applicant to appeal out of time.
11. This application was filed in court on November 5, 2021, while the judgment against which the appellant seeks to appeal against was entered on November 24, 2016. By virtue of provisions of section 79G of the *Civil Procedure Act*, the appellants were to file their appeal within 30 days. The applicants were thus a good five {5} years late in filing the said application.
12. Applications for extension of time are governed under provisions of Section 79G of the *Civil Procedure Act* and Order 50 rule 6 of the *Civil Procedure Rules*.

Section 79G of the *Civil Procedure Act* provides that;

“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 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 maybe admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal on time.

Order 50 Rule 6 of the *Civil Procedure* provides that;

“where a limited time has been fixed for doing any act or taking of any proceedings under these rules, or by summary notice or by order of the court, the court shall have power to enlarge time upon such terms (if Any) as the justice of the case may require, and such enlargement maybe ordered although the application for the same is not made until after the expiration of time appointed or allowed.”

13. Extension of time is not a right of a party. It is an equitable remedy that is only available to deserving parties at the discretion of the court, which discretion has to be exercised judiciously and not on whim, sympathy and/or caprice. The court also has to consider the period of delay, reasons for the delay, chances of appeal succeeding and finally the decree of prejudice to the respondent.
14. In the case of *Salat v Independent Electrol and boundaries commission & 7 others* the supreme court held that the following factors were to be considered in an application to extend time to appeal out of time;
 - a. Extension of time is not a right of a party. It is an equitable remedy that is only available to deserving parties at the discretion of the court.
 - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
 - c. Whether the court ought to exercise the discretion to extend time, is a consideration to be made on a case to case basis.
 - d. Whether there is reasonable reason for the delay, which ought to be explained to the satisfaction of the court.



- e. Whether there would be any prejudices suffered by the respondent if the extension was granted.
 - f. Whether the application had been brought without undue delay; and;
 - g. Whether in certain cases, like election petition, public interest ought to be considered for extending time.
15. Also in *Leo sila Mutiso v Rose Hellen Wangari Mwangi* Civil Application No 255 of 1997{Unreported} the court of Appeal expressed itself thus;
- “It is well settled that the decision whether or not to extend 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 delay; secondly the reason for 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.”
16. Giving consideration to the above guiding factors, I do find that this application has been filed after an inordinate delay of five (5) years after the judgment was issued and no proper reason has been advanced as to why the applicant slept on his right for so long. There is no affidavit filed by their former advocate to explain why he closed his file yet he had been instructed to appeal and further no explanation too has been given by the applicants why the too slept on their right from November 24, 2016, when the judgment was delivered to October 21, 2021 when they purported to have gone to the advocate to inquire about their file. This is a period of about 5 years. see *George Mwende Muthoni v Mama Day Nursery and Primary School* Nyeri CA No 4 of 2014 (UR) where extension of time was declined as the applicant failed to explain a 20-month delay.
17. The applicants also submitted that mistake of counsel should not be visited on the applicant. But as already stated above, the said advocate did not file an affidavit to support the applicant’s contention that the failure to file the appeal was due to his mistake and the applicant’s averments of what transpired at the advocate’s office can only be taken with a pinch of salt. But even if it were true that there was mistake of counsel, this court cannot still finds that the applicants too were indolent and sat on their right for a period of over five (5) years before visiting their advocate and this obviously disentitles them from the orders sought.
18. In the said Salat case {supr} the supreme court also did observe that;
- “Extension of time being a creature of equity, one can only enjoy if he acts equitably; He who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time lapse. Extension of time is not a right of a litigant against a court but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it.”
19. On the possibility of the appeal succeeding, this court finds that this is a secondary issue. As held in *Athuman Nusura Juma v Afwa Mohammed Ramadhan* (2016) eKLR
- “Whether the intended appeal has merits or not is not an issue to be determined by a court when dealing with an application of this nature but by the court dealing with the merits of the appeal, that is why the requirement that the intended appeal be arguable is preferred with the word(possibly).”



Disposition

20. Taking all relevant factors into consideration I do find that this application is wholly unmerited and find it fit for dismissal. The same is hereby dismissed with costs of Ksh 30,000/= payable to the respondent.

21. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 22ND DAY OF MAY 2023.

RAYOLA FRANCIS

JUDGE

Delivered on the virtual platform, Teams this 22nd day of May, 2023.

In the presence of;

.....for Appellant

.....for Respondent

.....Court Assistant

