



**Mwalenga v Kilogho (Suing as the administrator of the Estate of Rophus
Mwadime Kilogho – (Deceased) (Miscellaneous Civil Application
E029 of 2022) [2023] KEHC 17850 (KLR) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17850 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
MISCELLANEOUS CIVIL APPLICATION E029 OF 2022**

GMA DULU, J

MAY 18, 2023

BETWEEN

VIVIAN MBONE MWALENGA APPLICANT

AND

**MACKRINA SHIGHARE KILOGHO (SUING AS THE ADMINISTRATOR
OF THE ESTATE OF ROPHUS MWADIME KILOGHO –
(DECEASED) RESPONDENT**

RULING

1. Before me is an application brought by way of Notice of Motion dated 4th November, 2022 filed under Section 1A, 1B, 3 and 3A, 79G and 95 of the [Civil Procedure Act](#) (Cap.21) and Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rule 1 and 3 of the [Civil Procedure Rules](#) 2010.
2. The application has five (5) prayers, some of which have been spent as follows:-
 1. (Spent).
 2. That the court be pleased to grant leave to the applicant/intended appellant to appeal out of time against the judgment of the Hon. Chief Magistrate Court civil Suit No. 134 of 2021 and judgment delivered on 29th August, 2022.
 3. (Spent).
 4. (Spent).
 5. That costs of the application abide the outcome of the intended appeal.
3. The application has grounds on the face of the Notice of Motion that the delay was occasioned by the advocates not obtaining copy of the judgment in time, and the court registry not registering the



Memorandum of Appeal which was sent via court e-mail. It is also a ground that the application is timely, and that the respondent will not suffer prejudice if the application is allowed.

4. The application was filed with a supporting affidavit sworn on 4th November, 2022 by Nannungi Mariat Counsel for the applicant, as well as another supporting affidavit sworn on the same 4th November, 2022 by Vivian Mmbone Mwalenga the applicant/intended appellants. Both supporting affidavits amplify the grounds of the application.
5. The application was opposed through a replying affidavit sworn by Mackrina Kilogho filed on 20th November, 2022.
6. The application was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Kimondo Gachoka & Company Advocates for the applicant/intended appellant, as well as the submissions filed by Wachenje & Mariga LLP Advocates for the respondent. Both counsel have relied on decided court cases.
7. This being an application for leave to appeal out of time, it is governed by the provisions of Section 75G of the Civil Procedure Act (Cap.21), which provides as follows:-

75G 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.’
8. This application was filed on 7th November, 2022, while the judgment of the trial court was delivered on 28th August, 2022, a period of more than two months.
9. The applicant has given the reason that the delay was due to the failure in obtaining copy of the judgment in time, and getting instructions from the clients by the advocate. The second reason was given as delay in the registry registering the Memo of Appeal, which was sent by court mail.
10. I note that no particulars were given or disclosed by the applicant on the actual activities or actions taken and dates of such actions, which would clarify to this court that the applicant/intended appellant was not to blame for the delay and noted all efforts possible to appeal within time, but for circumstances beyond their control.
11. That said, I am mindful of this court’s duty in the enforcement of the Bill of Rights under Article 22 and 23 of the Constitution, as well as Article 50 which relates to the right to fair hearing.
12. In my view, each case has to be considered on its own special circumstances, in determining applications for extension of time to appeal.
13. In the present case, the applicant has filed a draft Memorandum of Appeal which I have perused, and it shows an arguable appeal. The decree is a money decree, and the applicant has made efforts through an applications for stay of execution, which has however not been successful because of technical reasons.
14. Having considered the circumstances of this case, I will go by the provisions of Article 159(2)(b) of the Constitution by allowing the applicant his right to be heard in his appeal as, in the circumstances of this matter. I am of the view that the respondent will not suffer any prejudice, because the money decree can still be enforced subject to the appeal.



15. I thus allow the application, and grant leave to the applicant to appeal out of time in the following terms:-

1. I grant leave to the applicant to appeal out of time.
2. The applicant will file appeal within fifteen (15) days from today.
3. If the applicant does not appeal within the period allowed in (2) above, the costs of this application, will be paid to the respondent by the applicant. If the applicant files the appeal, costs of this application will follow the determination of the appeal. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 18TH DAY OF MAY 2023 AT VOI, VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Ms. Nannungi for the applicant

Mr. Wachenje for respondent

Otolo court assistant

