



**Mwasya v Victory Farms (Miscellaneous Application 223 of 2021)  
[2023] KEHC 17428 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17428 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
MISCELLANEOUS APPLICATION 223 OF 2021**

**A MSHILA, J**

**MAY 12, 2023**

**BETWEEN**

**JOHN KIMANZI MWASYA ..... APPLICANT**

**AND**

**VICTORY FARMS ..... RESPONDENT**

**RULING**

1. The court is called upon to determine the application dated September 25, 2021, seeking leave to file an appeal out of time against the ruling of the Honourable P Gichohi, CM delivered on March 30, 2021.
2. The application is premised on the grounds that the office file was misplaced and could not be traced in the office before the lapse of the 30 days' period. The delay in filing the appeal is less than 4 months and thus not inordinate, no prejudice will be suffered by the Respondent if the orders sought are granted. The intended appeal raises valid triable issues with very high chances of success.
3. The application is supported by the annexed affidavit of Musili Mbiti sworn on September 25, 2021 the advocate in conduct of the matter in which he reiterates the grounds of the application.
4. In opposing the application, Christine Anyango filed the replying affidavit sworn on February 8, 2022, in which she depones the delay in filing the current application is inordinate, the reason adduced for the late filing are not satisfactory, the appeal has no real chance of success. The trial court lacks the jurisdiction to determine the suit as filed by the Applicant.
5. The parties were directed to canvass the application by filing and exchanging written submission.

**Applicant's Submissions**

6. Counsel filed written submissions dated March 8, 2022 on behalf of the Applicant he submits the operative part of the law which answers the question of enlargement of time is Section 79G of the [Civil Procedure Act](#).



7. Counsel submits the delay was not intentional and neither was the Applicant indolent. That a reasonable explanation has been offered by the Applicant. The intended appeal has high chances of success.
8. Counsel urged the court to exercise its discretion and allow the application as prayed.

### **Respondent's Submissions**

9. Counsel filed written submissions dated April 4, 2022, on behalf of the Respondent in which it was submitted that the Applicant does not deserve the equitable remedy sought as no satisfactory basis has been laid to the court to exercise its discretion. That counsel for the Applicant has deliberately failed to inform the court when the file was traced. Citing the case of *Tanga Auto Limited & Anor Vs Mary Nyokabi Gakuru* (2020) eKLR where the court held

“I am not convinced that the delay in filing the appeal was as a result of an inadvertent mistake on the part of the applicant’s previous lawyers... I do not think that a file can go missing in an advocate’s office for months. There is no reason given why the file was misplaced for instance movement of offices r such like thing.”

10. Counsel submits the Applicant has failed to explain efforts in trying to mitigate the misplaced file. The grounds of the appeal cannot be a basis of the appeal as the trial court determined the matter of jurisdiction and did not determine the matter on merit.
11. Counsel urged the court to dismiss the application with costs.

### **Issues for Determination**

12. Having considered the Applicants’ application, the Replying affidavit by the Respondent in opposition to the same and having also considered the respective written submissions filed by the parties. The only issue framed for determination is whether the applicant has demonstrated that the court should enlarge time within which to file the appeal.

### **Analysis**

13. The applicable law is found at Section 79G of the *Civil Procedure Act*, which section 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 from such period any time which the lower court may certify as having 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.”
14. The above section provides that an appeal may be admitted out of time if the court is satisfied that the applicant has adduced good and sufficient cause for not filing the appeal in time.
15. The Ruling in the trial court was delivered on March 30, 2021, while the current application was filed on September 25, 2021. The appeal was expected to have been filed within 30 days. The delay translates to five (5) months from the date of delivery of the Ruling by the trial court. The reason adduced by counsel for the applicant as to the delay is the misplacement of the subject file in their office.



16. On the other hand, counsel for the Respondent submits the reasons adduced are not sufficient to warrant the court exercise its discretion.
17. Having perused the attached Memorandum of Appeal it is noted that in the impugned ruling of the trial court that it downed its tools for lack of jurisdiction. It is trite law that jurisdiction is everything and court cannot determine a matter when it lacks the jurisdiction to. Therefore, this court has not been persuaded that the applicant has an arguable appeal with high chances of success.
18. Secondly no sufficient reasons have been adduced on the late filing of the Memorandum of Appeal and as cited in the case of:- *Tanga Auto Limited & Anor vs Mary Nyokabi Gakuru* (2020) eKLR where the court held:-

“I am not convinced that the delay in filing the appeal was as a result of an inadvertent mistake on the part of the applicant’s previous lawyers... I do not think that a file can go missing in an advocate’s office for months. There is no reason given why the file was misplaced for instance movement of offices r such like thing.”

19. It is this courts considered view, that the reasons adduced do not sufficiently explain the reason for the delay.

### **Findings and Determination**

20. In the circumstance this court finds the application dated September 25, 2021 is devoid of merit and it hereby dismissed with costs to the Respondent.

Orders Accordingly.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 12<sup>TH</sup> DAY OF MAY, 2023.**

**HON.A.MSHILA**

**JUDGE**

