



**Ngayuni & another v Kabibi (Miscellaneous Civil Application
73 of 2019) [2023] KEHC 17724 (KLR) (17 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17724 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
MISCELLANEOUS CIVIL APPLICATION 73 OF 2019**

RM MWONGO, J

MAY 17, 2023

BETWEEN

WAMBUGU NGAYUNI 1ST APPLICANT

REGINA MUTHONI WAMBUGU 2ND APPLICANT

AND

DAVID MWAI KABIBI RESPONDENT

(In that case, Cherono, J.)

RULING

1. The applicant's motion now before me seeks that this Court do extend time and grant the Applicants leave to file an appeal against the judgment dated March 12, 2019 of the Senior Resident Magistrate Court sitting at Kerugoya, in Civil Case No 132 of 2015, David Mwai Kabibi v Wambugu Ngayuni & Another.
2. The application is based on the grounds: That the judgement was delivered on the March 12, 2019 and they were dissatisfied with it; That they promptly requested their Advocate to file an appeal as against that decision and he promised to do so but eventually did not act despite numerous promises to do so; That the application has been brought without any inordinate delay and has been made in good faith; That they had filed a similar application, (ELC Misc App No 12 of 2019) dated the May 28, 2019 seeking the leave of the court to appeal out of time but the application was inadvertently filed in the Environment and Land registry and was dismissed vide the ruling dated the October 11, 2019 in that the Court lacked jurisdiction of this matter; That they have an arguable appeal with high chances of success.
3. In addition to the grounds, the applicants deposed a lengthy supporting affidavit in which they repeat the grounds. Some of the additional essential averments are:



- i. That the Court issued them with a certificate of delay on April 30, 2019 which they took to their advocate but he took no action whatsoever;
 - ii. That the Respondent is in the process of extracting a decree in execution of the judgement which involves a substantial amount of around one million shillings and in the absence of an appeal, they will be highly prejudiced and the intended appeal will be rendered nugatory.
 - iii. That due to insufficient advice from their Counsel, and his assurances, they did not realize that they should file a notice of intention to appeal within the lapse of thirty (30) days of judgement being delivered .
4. On their part, the Respondent filed a Replying Affidavit of which the following are the major averments.
1. That as stated by the applicant in paragraphs 2, 5 and 6 of her supporting affidavit the judgment intended to be appealed against was delivered on March 12, 2019 and the proceedings were supplied on April 30, 2019. There is therefore inordinate and unexplained delay of about 8 months between the date the proceedings were supplied and the date this application was filed which has not been explained away.
 2. That the judgment/decree intended to be appealed from is a money judgment/decree for the money borrowed from me and evidenced in a clear written agreement and the proposed appeal has no chance of success and is only meant to delay justice.
 3. That the applicants have conceded in paragraph 8 of their supporting affidavit that they have not filed and served notice of their intention to appeal within 30 days of delivery of judgment intended to be appealed against.
 4. That the applicants are not genuine when they blame their advocate in the court below for not filing their appeal within the prescribed time as they have not adduced any evidence to show that they gave the advocate such instructions.
 5. That failure by the applicants to annex a draft copy of the Memorandum of appeal of their intended appeal and their allegation that they will do so at an opportune time contained in paragraph 17 of their supporting affidavit confirms my assertion and belief that their belated proposed appeal has no grounds and is based on conjecture with other objectives other than the ends of justice.
5. The application was canvassed by way of written submissions.

Applicants submissions

6. The applicant's submissions are three pronged.
7. First, that there was no undue delay in filing the application as evidenced by their counsel's erroneous filing in the ELC Court on May 28, 2019. The said application was dismissed on October 11, 2019, and they filed the same application in the right court on the October 22, 2019;.
8. Second, that their appeal has high chances of success; and third, that the purported agreement dated the June 9, 2014, which formed the basis of the judgment is largely contested and for a number of reasons enumerated in the draft memorandum of appeal. That they do not know any of the witnesses mentioned in the lower court, and the signature thumbprints are not theirs. Further, the 1st Applicant was coerced into signing the agreement as he is illiterate



9. Third, that that the honourable court has the unfettered discretion to extend the timeline within which they can file and prosecute the appeal. They cited *Athuman Nusura Juma v Afwa Mohamed Ramadhan, CA No 227 of 2015*, where this Court stated on that issue:

' This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word possibly'.

Respondent's Submissions

10. The respondent submits that the delay of about 8 months between the date of delivery of the judgment in issue and the date of filing of this application is inordinate and has not been properly and candidly explained. The applicants have attempted to explain their inaction partially by blaming their unnamed previous advocates up to May 28, 2019 for inaction and/or negligence but this allegation cannot be verified as the said unidentified advocates have not confirmed the allegation through an affidavit.
11. They cite the case of *Job Muriithi Waweru v Mary Waruguru Munene, Kerugoya ELC Misc Application No 4 of 2020* in which leave was being sought for the filing of an appeal out of time. The main ground was that failure by the applicant to file his intended appeal out of time was occasioned by the inaction/negligence of the applicant's previous advocates. This is the same allegation as in this application before court.
12. In that case, Cheron, J, extensively quoting and applying decisions of previous superior courts, declined to accept the allegations of blame heaped on the applicant's former advocates. He reasoned first that the applicant's former advocates had not filed an affidavit to respond to the blame of inaction and negligence heaped on him and as to why he had failed to file defence within the prescribed period. He determined that pure and simple inaction by counsel or refusal to act is not a ground for extension of time.
13. The applicants also state that they filed a similar application for leave to appeal out of time in the wrong court, the Environment & Land Court and that the same was dismissed on October 11, 2019. What the applicants do not explain is the reason for their filing their application in the ELC, Kerugoya when the judgment of the lower court they intended to appeal against was a simple money judgment based on a simple friendly loan agreement/contract with a clear penalty clause and had nothing to do with land.
14. On the allegation that their intended appeal is arguable and has high chances of success the respondent disagrees. The Respondent's suit in the court below was for recovery of a sum of Kshs 950,000/= being a friendly loan advanced by agreement, with interest at an agreed rate, to the applicants who are man and wife. An attempt by the 2nd Applicant to deny her signature on the written agreement failed when the Respondent called a handwriting expert whose opinion was that the signature which she attempted to disown was hers. The lower court found for the Respondent on the basis of both verbal sworn evidence and documentary evidence.
15. Finally, the respondent argued that the court gave judgment for the principal debt and interest stipulated in the agreement. The court was under duty to do so as courts only enforce the contractual terms agreed upon by parties and has no business re-writing contracts for them as held in the case of *National Bank of Kenya Ltd Vs Pipeplastic Samkolit (K) Ltd A Prof Samson K Ongeri*, Court of Appeal at Nairobi, Civil Appeal No 95 of 1999.



Issues for determination

16. The sole issue for determination is whether the applicant should be granted leave to file appeal out of time.

Analysis and Determination

17. Section 79G of the [Civil Procedure Act](#) is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. 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 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.'
18. The court is required to take into account certain factors in the quest to exercise its discretion whether to extend time to file an appeal out of time were suggested by the Court of Appeal in [Tbuita Mwangi V Kenya Airways Ltd \[2003\] eKLR](#). They include the following:
 - a. The period of delay;
 - b. The reason for the delay;
 - c. The arguability of the appeal;
 - d. The degree of prejudice which could be suffered by the if Respondent the extension is granted;
 - e. The importance of compliance with time limits to the particular litigation or issue; and
 - f. The effect if any on the administration of justice or public interest if any is involved.

The delay period and reasons

19. The respondent asserts that the judgment intended to be appealed against was delivered on March 12, 2019 and the proceedings were supplied on April 30, 2019. There is thus an inordinate and unexplained delay of about 8 months between the date the proceedings were supplied and the date this application was filed which has not been explained away.
20. The applicant argued that due to insufficient advice from their Counsel, they didn't realize that they should file a notice of intention to appeal within thirty (30) days of judgement being delivered as he assured them that there is still time to appeal.
21. The respondent submit that the applicants' attempt to explain their inaction partially by blaming their unnamed previous advocates up to May 28, 2019 for inaction and/or negligence but this allegation cannot be verified as the said unidentified advocates have not confirmed the allegation through an affidavit.
22. In addition, it is clear that the 2nd appellant was present at the delivery of the judgment and, immediately on the following day, requested a copy of the proceedings and judgment. Her knowledge and alacrity appear quite high.



23. In *Job Muriithi Waweru v Mary Waruguru Munene [2020] eKLR* the court stated the importance of explaining the delay by counsel as follows:

' The applicant's hitherto advocate M/S AN Chomba have not placed any material why they failed to file defence and appeal within the timelines stipulated in law. It will therefore be difficult for this Court to exercise its discretion in the absence of grounds explaining why the advocate on record failed to do what he was expected by his client.'

In the present case, this was not done

24. As far as the arguability of the appeal is concerned, this can only be dealt with during the hearing. Further, the appellants have not even filed a memoranda of appeal. Thus there can be no argument as to arguability of the appeal. The assertion in the Replying Affidavit that they will file an appeal at an opportune time suggests a presumption that the court will exercise one aspect of its discretion to extend time on grounds of arguability without good cause.

25. I note that the Respondent's suit in the court below was for recovery of Kshs 950,000/= lent to them as a friendly loan advanced to them as husband and wife. the loan had an agreed interest provision. The 2nd Applicant sought to deny her signature on the written agreement, but failed. However, according to the handwriting expert who testified, his opinion was that the signature which she attempted to disown was hers.

26. The lower court found for the Respondent on the basis of both verbal sworn evidence and documentary evidence.

27. Ultimately, I agree with Sewe, J in *Evans Kiptoo V Reinhard Omwonyo Omwoyo [2021]eKLR* where she agreed with the reasoning of Emukule, J in *Gerald M'limbine v Joseph Kangangi [2008] eKLR*, where he stated that:

' My understanding of the proviso to section 79G is that an applicant seeking 'an appeal to be admitted out of time' must in effect file such an appeal, and at the same time seek the court's leave to have such an appeal admitted out of the statutory period of time. The proviso does not mean that an intending appellant first seeks the court's permission to admit a non-existent appeal out of the statutory period.'

28. In conclusion, I am of the view that the applicant's failure to file a memorandum of appeal, their failure to adequately explain the delay, all stand against a predisposition to exercise this court's discretion in the applicants' favour.

29. Accordingly, the application fails and is dismissed with costs.

30. Orders accordingly.

DELIVERED AT KERUGOYA ON THIS 17TH DAY OF MAY, 2023

.....

R MWONGO

JUDGE

Delivered in the presence of:

No Representation by Njue Muriithi for Applicants.



Regina Muthoni 2nd Applicant present.

Munene holding brief for I.W. Muchiri for Respondent.

Murage Court Assistant.

