



Omwoyo & another (Suing as personal representatives of the Estate of Surnoffic Omwoyo Gichana - Deceased) v Directline Assurance Co Ltd (Civil Appeal E537 of 2023) [2023] KEHC 4061 (KLR) (Civ) (2 May 2023) (Ruling)

Neutral citation: [2023] KEHC 4061 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E537 OF 2023

AN ONGERI, J

MAY 2, 2023

BETWEEN

CYLVIAH MORAA OMWOYO 1ST APPELLANT

THOMAS NYACHIRO GICHANA 2ND APPELLANT

**SUING AS PERSONAL REPRESENTATIVES OF THE ESTATE OF Surnoffic
OMWOYO GICHANA - DECEASED**

AND

DIRECTLINE ASSURANCE CO LTD RESPONDENT

RULING

1. The application coming for consideration in this ruling is the one dated October 13, 2022 seeking leave to appeal out of time.
2. The application is based on the grounds that the time for preferring an appeal had run out by 16 days and further that the advocate was waiting for instructions from the client.
3. The application is supported by the affidavit of the applicant in which she has deponed that the court delivered judgement dated June 7, 2022. She later instructed her advocates to lodge an appeal but was informed that the time allowed to file an appeal had run out. She indicated that the delay herein is not so inordinate as to be inexcusable and that the respondent is unlikely to suffer any prejudice.
4. The respondent did not file a replying affidavit.
5. The sole issue for determination is whether the applicant is entitled to leave to appeal out of time.



6. The governing legal principle is contained in section 79B of the [Civil Procedure Act](#) and order 42 rule 11 and 13 of the [Civil Procedure Rules](#) which states as follows;

Section 79B of the [Civil Procedure Act](#) provides as follows;

“Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily”.

Directions under section 79B [order 42, rule 11]

A judge of the High Court shall, within thirty days of the filing of an appeal under section 79B of the Act, peruse the appeal and give directions in accordance with the provisions of section 79B of the Act.

Directions before hearing [order 42, rule 13.]

- (1) Upon notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the registrar shall cause the appeal to be listed for the giving of directions by a judge in chambers.
- (2) Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule.
- (3) The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.
- (4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—
 - (a) the memorandum of appeal;
 - (b) the pleadings;
 - (c) the notes of the trial magistrate made at the hearing;
 - (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
 - (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
 - (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:Provided that—
 - i. a translation into English shall be provided of any document not in that language;
 - (ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).

7. The conditions for grant of leave to appeal out of time are as were discussed by the Court of Appeal in [Thuita Mwangi v Kenya Airways Ltd](#) [2003] eKLR. They include the following:

- i) The period of delay;



- ii) The reason for the delay;
 - iii) The arguability of the appeal;
 - iv) The degree of prejudice which could be suffered by the respondent if the extension is granted;
 - v) The importance of compliance with time limits to the particular litigation or issue; and
 - vi) The effect if any on the administration of justice or public interest if any is involved.
8. I find that although this claim has been settled, the appellant can still exercise her right of appeal if she is aggrieved by the judgment or decree.
9. Article 48 of Constitution guarantees every person access to justice, in addition, under article 50(1) of the Constitution, every person has the right to have any dispute that can be resolved by the application of law decided in fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
10. I allow the application dated October 13, 2022 on the following conditions;
- i. That the appeal be filed within 30 days of this date.
 - ii. That the appeal be prosecuted within 90 days upon being filed.
 - iii. Failure to comply the appeal to stand automatically dismissed after 90 days of this date unless the time for compliance is extended.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 2ND DAY OF MAY, 2023.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

