



**Shake Distributors Company Limited v Menza & another (Both suing on behalf of the Estate of Samuel Ndegwa Puza Alias Samuel Ndegwa Kuza (Deceased)) (Miscellaneous Civil Application E010 of 2023) [2023] KEHC 17868 (KLR) (22 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17868 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
MISCELLANEOUS CIVIL APPLICATION E010 OF 2023**

**GMA DULU, J  
MAY 22, 2023**

**BETWEEN**

**SHAKE DISTRIBUTORS COMPANY LIMITED ..... APPLICANT**

**AND**

**MJENI TSIMBA MENZA ..... 1<sup>ST</sup> RESPONDENT**

**RIZIKI UMAZI NYAMAWI ..... 2<sup>ND</sup> RESPONDENT**

**BOTH SUING ON BEHALF OF THE ESTATE OF SAMUEL NDEGWA PUZA  
ALIAS SAMUEL NDEGWA KUZA (DECEASED)**

**RULING**

1. Before me is an application by way of Notice of Motion dated 10<sup>th</sup> February, 2023 filed under Section 3A, 63(a) and 79G of the [Civil Procedure Act](#) (Cap.21), seeking the following orders:-
  1. (Spent)
  2. (Spent).
  3. That this honourable court be pleased to grant leave to the applicant to lodge/or file an appeal out of time.
  4. That costs of this application be in the cause.
2. The application has grounds on the face of the Notice of Motion that judgment in Voi CMCC No. E151 of 2021 was pronounced on 21<sup>st</sup> September 2021, that the applicant is aggrieved and is intent on impugning the judgement on appeal, that the time prescribed for lodging or filing appeal has lapsed, and the applicant intends to appeal against the judgment, that the delay in filing of appeal within time



was occasioned by the fact that the applicant's insurer was MUA Insurance (K) Ltd formerly known as Salam Insurance Ltd was undergoing restructuring and failed to instruct an advocate.

3. The application was filed with a supporting affidavit sworn on 10<sup>th</sup> February, 2023 by Lilian Simiyu the Deputy Manager – Legal Services of MUA Insurance (K) Ltd which amplifies the grounds of the application.
4. The application is opposed through a replying affidavit sworn on 27<sup>th</sup> February, 2023 by Riziki Umazi Nyamawi, one of the respondents, in which it was deponed that after judgment was entered the applicant's counsel wrote a letter by email dated 26<sup>th</sup> January, 2023 intimating that they would pay the decretal amount. It is also deponed in the affidavit that the applicant has so far not served the Memorandum of Appeal on the respondent.
5. The application was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Murimi Ndumia, Mbago and Muchela Advocates for the applicant, as well as the submissions filed by Njoroge Mwangi & Company for the respondents.
6. This being an application for extension of time to appeal from the subordinate court in civil proceedings, it is governed by the provisions of Section 79G of the Civil Procedure Act (cap.21), which provides as follows:-

“79G 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 preparation and delivery to the appellant of a copy of the decree or orders. 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.”

7. I have considered the application, documents filed and the rival submissions of the parties counsel. A decision for extension or expansion of time to file appeal is in the form of the exercise of discretionary power by this court which has to be based on firm legal principles, and not on sympathy or whims. The parameters to be considered by the court in such an application have been restated in many cases including the case of Mwangi v Kenya Airways Ltd [2003] KLR cited by counsel for the applicant, wherein the Court of Appeal stated as follows:-

‘It is now well settled that the decision whether or not to extend the time for appeal it 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 the delay, secondly the reasons for the 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.’

8. In the present case, the judgment of the trial court was pronounced on 6<sup>th</sup> September, 2022. The application herein was filed on 13<sup>th</sup> February, 2023 a period of about 4 months. The reason given for the delay was the restructuring of the insurance company which provided insurance cover for the subject motor vehicle – not the litigant/applicant. In my view therefore, the applicant has given sufficient or satisfactory reasons for the delay, which in the circumstances of this case is not inordinate.
9. With regard to whether the applicant has an arguable appeal, I have perused the draft Memorandum of Appeal. It is primarily an intended appeal challenging the quantum of damages awarded. In my view, it is an arguable appeal, with possibility of success.



10. Will the respondent suffer prejudice if the leave to appeal out of time is granted? In my view with the facts and circumstances of this case, the respondent will not suffer prejudice if leave to appeal out of time is granted, as they will have a chance to put their position in court in the appeal for consideration.
11. Consequently, and for the above reasons, I allow the application and order as follows:-
  - i. The applicant is hereby granted leave to lodge an appeal out of time.
  - ii. The intended appeal will be filed within 30 days from today.
  - iii. The costs of the application will abide the decision in the appeal. If the appeal is not filed as ordered in (ii) above, the applicant will pay the respondent the costs of this application.

**DATED, SIGNED AND DELIVERED THIS 22<sup>ND</sup> DAY OF MAY, 2023.**

**GEORGE DULU**

**JUDGE**

In the presence of:-

Ms. Atieno for the applicant

Mr. Kazungu for respondent

Mr. Otolu court assistant

