



REPUBLIC OF KENYA



Kirigo (Suing as Administrator of the Estate of James Kigo Muita) v Wairagu (Miscellaneous Civil Application E015 of 2022) [2023] KEHC 18586 (KLR) (15 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18586 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
MISCELLANEOUS CIVIL APPLICATION E015 OF 2022**

AK NDUNG’U, J

JUNE 15, 2023

BETWEEN

JOSEPH MUTTA KIRIGO (SUING AS ADMINISTRATOR OF THE ESTATE OF JAMES KIGO MUTTA) APPLICANT

AND

MOSES MOKERE WAIRAGU RESPONDENT

(Appeal against the judgment delivered on 15/09/2022 in Nanyuki CMCC No 34 of 2019)

RULING

1. Vide a Notice of Motion dated 10/11/2022 and amended on 01/04/2023 the Applicant seeks an order that time be extended within which the Applicant may lodge appeal against the judgment delivered on 15/09/2022 in Nanyuki CMCC No 34 of 2019. By that judgement the Applicant’s (plaintiff’s) suit against the Respondent (defendant) succeeded and he was awarded damages and costs after full trial. The Applicant however intend to appeal the trial court decision on apportionment of liability.
2. The judgment having been delivered on 15/09/2022, appeal ought to have been lodged on or before 15/10/2022 according to section 79G of the *Civil Procedure Act*, cap 21) which 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.”
3. The memorandum of appeal was filed on 21/10/2022 and the present application for leave to appeal out of time was filed on 10/11/2022 and amended application was filed on 13/04/2023. This means



therefore, the memorandum of appeal was filed out of time, that is six (6) days after without the leave of this court. Therefore the delay that we are dealing with here is about one month and twenty-seven days since the application for leave was filed on 10.11.2022. The memorandum of appeal filed herewith was therefore irregular for the same was filed without the leave of this court.

4. Under the proviso to section 79G aforesaid, this court may admit an appeal out of time if the Appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.
5. The reason for the delay in lodging the appeal is set out on the face of the application and more particularly deponed to in paragraph 5 of the supporting affidavit annexed to the application. That reason is that;
 - i. That upon receiving a copy of the judgment on 21/09/2022, Advocates on record contacted the Applicant and informed him about the contents of the judgment but the Applicant took time getting back to his advocate and only visited the advocate's office on 14/10/2022 where he explained that he was taking care of his sick relatives hence the delay.
6. The Applicant's application is unopposed since the Respondent failed to file a response to the application despite been served.
7. The application was canvassed by way of written submissions. The only reason advanced by the Applicants is that the delay in filing their appeal was not deliberate and that the delay was only for three days.
8. It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. The Court of Appeal in *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR while relying on the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, (Civil Application No Nai 255 of 1997) (unreported); stated that;

“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 reason 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”. (Emphasis added)
9. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v. The Independence Election & Boundaries Commission & 7 others*, [2014] eKLR, the Apex court held that a court exercising its discretion to extend time has to consider the following factors;
 - a. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 - e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - f. Whether the application has been brought without undue delay; and



10. The delay for filing the appeal as seen earlier is about one month and twenty-seven days. To enable this court to exercise its discretion in favour of the Applicant, he had the duty to satisfy the court that he had a good and sufficient cause for not filling the appeal in time. I have not found such good and sufficient cause.
11. Nevertheless, since the delay is not a long time, and since the application is not opposed by the Respondent, I find merit in the application and allow it. Leave to appeal is granted as prayed.

DATED, SIGNED AND DELIVERED AT NANYUKI THIS 15TH DAY OF JUNE 2023

A. K. NDUNG’U

JUDGE

