



REPUBLIC OF KENYA



**KENYA LAW**  
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**Molok v Njoroge (Suing as the personal representative of the Estate of Charles Ndungu Kihuria)  
(Miscellaneous Application E032 of 2021) [2023] KEHC 19594 (KLR) (23 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19594 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
MISCELLANEOUS APPLICATION E032 OF 2021**

**A MSHILA, J**

**JUNE 23, 2023**

**BETWEEN**

**GILBERT MOLOK ..... APPLICANT**

**AND**

**JOSEPH KIHURIA NJOROGE (SUING AS THE PERSONAL  
REPRESENTATIVE OF THE ESTATE OF CHARLES NDUNGU  
KIHURIA) ..... RESPONDENT**

**RULING**

1. The application dated 4<sup>th</sup> February 2021 is brought under Order 22 rule 22, Order 42 rules 4,6 and 7, Order 51 rules 1 and 3 of the *Civil Procedure Rules*, Section 79G, 3 and 3A of the *Civil Procedure Act* and all other enabling provisions of the law. The applicant sought for leave to file an appeal out of time and for an order of stay of execution pending the hearing and determination of the intended appeal.
2. The application is premised on the grounds that time to file an appeal on the ruling entered on 25<sup>th</sup> November, 2020 has since lapsed and that the court failed to notify the parties on the ruling date and the applicant only became aware when he was served with a letter demanding payment of the decretal sum dated 12<sup>th</sup> January, 2021.
3. The application is supported by the affidavit of Gilbert Molok. He deposed that the court entered an *ex parte* Judgment against him on 6<sup>th</sup> September, 2019. That his application dated 3<sup>rd</sup> August, 2020 to set aside the *ex parte* judgment and to file defence was dismissed on 25<sup>th</sup> November, 2020 which ruling was delivered in his absence as the court failed to notify the parties of the ruling date. He contended that being aggrieved with the said ruling he wishes to file an appeal which has high chances of success but time within which to file has since lapsed as such he seeks leave as he stands to suffer irreparable loss and damage.



4. In opposing the application, Joseph Kihuria Njoroge filed the replying affidavit sworn on 13<sup>th</sup> April 2021, in which he depones that a ruling notice was sent to both advocates on 20/11/2020 via email as such the applicant's allegation that he was not aware of the ruling date is misleading to the court. He contended that the applicant has not demonstrated sufficient cause for failing to file the appeal within time as has always been the norm since the beginning of the suit and the same is what caused the court to dismiss his application to set aside the exparte judgment.
5. On 21/10/2021, Ms. Mwaura counsel for the Respondent stated that she was willing to stay execution until conclusion of this matter. The application was heard by way of written submissions.

### **Applicant's Submissions**

6. Counsel filed his submissions on 17<sup>th</sup> December, 2021 where he stated that the court should exercise its wide powers and admit the appeal for hearing. The applicant was said to have an arguable appeal as he was not given an opportunity to defend himself during trial. Reliance was placed in [\*Bake N Bite \(Nrb\) Limited vs Daniel Mutisya Mwalonzi\*](#). It was submitted that the applicant had sufficiently explained the delay in filing the appeal which delay was occasioned by the lack of service of the ruling notice hence he was not aware that a ruling had been delivered on 25/11/2020.

### **Respondent's Submissions**

7. Counsel filed submissions on 26<sup>th</sup> January, 2022 where he stated that the explanation given by the applicant for his failure to file the appeal within time which is that he was never served with a ruling notice by the trial court is not tenable. He contends that the trial court did indeed send ruling notices to the parties as evidenced in paragraph 3 of his replying affidavit. Reliance was placed in the case of [\*Dilpack Kenya Limited vs William Muthama Kitonyi\*](#) 92018) eKLR where it was held that pure simple inaction by counsel cannot amount to a mistake which ought not to be visited on the client.

### **Issues For Determination**

8. Having considered the Applicant's application, the Replying affidavit by the Respondent in opposition to the same and the submissions filed by the parties. The only issue for determination is whether the prayer for leave to file an appeal out of time is merited.

### **Analysis**

9. 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.”

10. The provision of Section 79 G of the [\*Civil Procedure Act\*](#) provides that an appeal may be admitted out of time if the court is satisfied that the appellant adduced good and sufficient cause for not filing the appeal within time.
11. The applicant's reason for failing to file the appeal within time was that the trial court failed to notify him of when the ruling for his application to set aside the exparte judgment was to be delivered. The



respondent on the other hand stated that the trial court issued a ruling notice which was served upon parties on 20/11/2020 indicating that the ruling was to be delivered on 25<sup>th</sup> November, 2020.

12. A closer look at the replying affidavit shows the defendant's submissions in the lower court where he has provided his email address as info@kghazina.co.ke which email the court used to send the ruling notice to both Kimondo Gachoka & Company Advocates and Mwaura Shairi and Company Advocates.
13. In the circumstances, this Court find that the explanation given by the applicant is not satisfactory. Proper notice was issued by the trial court but the applicant and/or his advocate failed and/or chose not to act.

### **Findings And Determination**

14. This Court is satisfied that the reasons adduced do not sufficiently explain the failure to file the appeal within the stipulated time as such the applicant's application for enlargement of time to file an appeal is found to be devoid of merit and it is hereby is dismissed with costs to the respondent.

Orders accordingly.

**DATED, SIGNED AND DLIEVERED ELECTRONICALLY AT KIAMBU THIS 23<sup>RD</sup> DAY OF JUNE, 2023.**

**A. MSHILA**

**JUDGE**

