



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mutiso & another v Njuguna (Civil Miscellaneous Application  
1 of 2023) [2023] KEHC 18752 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18752 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL MISCELLANEOUS APPLICATION 1 OF 2023**

**MW MUIGAI, J  
JUNE 15, 2023**

**BETWEEN**

**MBITHE MUTISO ..... 1<sup>ST</sup> APPELLANT**

**JACKSON MUYA KALLA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JULIUS NJUGUNA ..... RESPONDENT**

**RULING**

1. Vide a application dated January 12, 2023 brought under section 79 G and 95 of the *Civil Procedure Act* and order 50 Rule 5 of the *Civil Procedure Rules*, the Applicants seek the following orders that;
  - a. Leave be granted to the Applicant to file an appeal out of time with respect to Machakos Civil Case No E178 of 2021; Julius Njuguna vs Mbithe Mutiso and another
  - b. The annexed memorandum of Appeal be deemed as duly filed and served upon payment of the requisite fees
  - c. Costs of this application be provided for.
2. The Application is supported by the affidavit of Jackson Muya Kalla dated February 12, 2023 in which it was contended that the time for filing the appeal lapsed on December 30, 2022 and they had applied for a copy of certified proceedings and judgment on December 19, 2022. It was deposed that they have received a copy of the judgment on December 19, 2022 by which time the prescribed time for lodging the appeal had lapsed. That the delay was not inordinate and he has a string and arguable appeal with high chances of success.



## Responses

3. In opposition of the Application, the Respondent filed a Replying affidavit dated January 24, 2023 sworn by Julius Njuguna. It was stated that judgment in the lower court matter was delivered on November 16, 2022 in the presence of both parties' advocates and counsel for the applicant had been granted a right of appeal within 30 days from the date of delivery of the judgment. That it was upon the applicants to demonstrate good cause as to why the application ought to be allowed and having gone through the application, there was no sufficient reason to warrant this court to exercise its discretion.
4. It was stated that there was no bar to the applicants in filing a Memorandum of Appeal within 30 days from the delivery of judgment and they would have shown their desire and intent on making an appeal. The Respondent opined that the Applicants took over a month in requesting proceedings and their payment which compounds on the indolence on their part and no explanation has been advanced over the same. Further, it is upon the Applicants to demonstrate what prejudice they will suffer and the same must be demonstrated. On the memorandum of Appeal, it was contended that the same does not have any grounds from which the Appeal can succeed. The Respondent stated that he will suffer irreparably as he shall not be able to enjoy the fruits of judgment, a sum which having been agreed with the Applicants through a written agreement of November 12, 2020 have failed to honour. The Court was urged to dismiss the Application.
5. The Application was canvassed by way of written submissions.

## Submissions

6. The Applicant filed submissions on February 17, 2023 and submitted that as per order 50 Rule 2 and 4, time stopped running on December 21, 2022 and he had exercised 28 days of Appeal. The 30 days had not been concluded which according to him procedurally lapsed on January 16, 2023. While relying on section 79 G of the *Civil Procedure Act* and the case of *Mwangi vs Kenya Airways Limited [2003] KLR*, it was submitted that the delay in filing the appeal was occasioned by the fact that despite having requested for certified copies of the judgment and proceedings, the same had not been supplied and they paid for the same for abundance of caution. The court was urged to exercise its discretion and enlarge the time.
7. It was submitted that section 7 (1) of the Sixth schedule of the *Constitution* of Kenya makes it imperative to apply provisions of section 79 G of the *Civil Procedure Act*. The Applicant further relied on the cases of *Vincent Sunday Yier vs Foam Mattress Limited [2004] eKLR*, *Banco Arabe vs Bank of Uganda [1999] 1 EA 22*, *Raila Odinga vs Independent Electoral and Boundaries Commission & 4 other [2013] eKLR*, *Nicholas Kiptoo Korir arap Salat vs IEBC & 7 Others [2014] eKLR*, *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi, Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others [2013] eKLR* and *University of Nairobi vs Riccati Business of East Africa [2020] eKLR*.
8. The Respondent filed submissions on February 20, 2023 and while relying on the case of *MFI document solutions Ltd vs Paretto Printing Works Limited [2021] eKLR*, it was submitted that the trial court delivered judgment on November 16, 2022 as follows;
  - a. Judgment entered against the defendant for a refund of the purchase price being a sum of Kshs 350,000 plus interest from the date of filing the suit
  - b. Defendants to pay the costs of the suit
  - c. Defendant has a right of appeal within 30 days.



9. It was submitted that based on section 79 G of the *Civil Procedure Act*, the Appellant had time to file the Appeal by December 16, 2022 but chose to file the present application on January 13, 2023 demonstrating delay and further, that no good and sufficient cause for not filing the appeal within time had been demonstrated.
10. Whilst relying on the conditions for extension of time stipulated in the case of *Nicholas Kiptoo Korir arap Salat vs IEBC & 7 Others [2014] e KLR*, it was submitted that the reason and extent of delay had not been satisfactorily demonstrated. The applicant attached a letter dated December 19, 2022 addressed to the Chief Magistrate seeking for certified copied of the proceedings and judgment as well as a receipt for payment issued on the same date. The Respondent contends that the request is drawn and filed out of the 30days timeline illustrating the Applicant's indolence and the averment that they had not received typed judgment to enable them make a decision was an afterthought as they never followed up on the same within the timelines. He relied on the case of *Ibrahim Mweny Kotit vs Alemusis Kotit [2015] eKLR*.
11. Secondly, it was submitted that it is not enough to state that one will suffer prejudice but one must demonstrate to the court the prejudice that will be suffered. He cited the case of *Nzoia Sugar Company Limited Vs West Kenya Sugar Limited [2020] e KLR*. The Respondent contended that he will suffer prejudice as the agreement between the parties was drawn on November 12, 2020 and continued litigation means the respondent will have to wait long to enjoy the fruits of judgment. Further, that the draft memorandum of appeal did not raise any grounds of appeal which can succeed.

#### **Determination**

12. I have considered the Application, the affidavits on record and the submissions of the parties. The main issue for determination is whether this court should allow the Applicants to file the Appeal out of time.
13. The guiding provision on filing of Appeal is Section 79G of the *Civil Procedure Act* 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.'
14. The Supreme court in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR* stated as follows;
 

' Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it.'

Comparatively, in *United Arab Emirates v Abdelghafar & others 1995 IRLR 243* the Employment Appeal Tribunal laid down four principles to be observed in exercising the discretion to extend time. It stated at paragraph 7 thus:



'In the light of the guidance contained in these authorities it is possible to state, with reasonable precision, the principles which govern the exercise of the Appeal Tribunal's discretion to extend time and to identify those factors regarded as relevant.

1. The grant or refusal of an extension of time is a matter of judicial discretion to be exercised, not subjectively or at whim or by rigid rule of thumb, but in a principled manner in accordance with reason and justice. The exercise of the discretion is a matter of weighing and balancing all the relevant factors which appear from the material before the Appeal Tribunal. The result of an exercise of a discretion is not dictated by any set factor. Discretions are not packaged, programmed responses.
2. As Sir Thomas Bingham M R pointed in *Costellow v Somerset CC* (supra) at 959C, time problems arise at the intersection of two principles, both salutary, neither absolute.

' The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met.'

The second principle is that:

'A plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of a procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate.'

3. The approach indicated by these two principles is modified according to the stage which the relevant proceedings have reached. If, for example, the procedural default is in relation to an interlocutory step in proceedings, such as a failure to serve a pleading or give discovery within the prescribed time limits, the court will, in the ordinary way and in the absence of special circumstances, grant an extension of time. Unless the delay has caused irreparable prejudice to the other party, justice will usually favour the action proceeding to a full trial on the merits. The approach is different, however, if the procedural default as to time relates to an appeal against a decision on the merits by the court or tribunal of first instance. The party aggrieved by that decision has had a trial to hear and determine his case. If he is dissatisfied with the result he should act promptly. The grounds for extending his time are not as strong as where he has not yet had a trial. The interests of the parties and the public in certainty and finality of legal proceedings make the court more strict about time limits on appeals. An extension may be refused, even though the default in observing the time limit has not caused prejudice to the party successful in the original proceedings.
4. An extension of time is an indulgence requested from the court by a party in default. He is not entitled to an extension. He has no reasonable or legitimate expectation of receiving one. His only reasonable or legitimate expectation is that the discretion relevant to his application to extend time will be exercised judicially in accordance with established principles of what is fair



and reasonable. In those circumstances, it is incumbent on the applicant for an extension of time to provide the court with a full, honest and acceptable explanation of the reasons for the delay. He cannot reasonably expect the discretion to be exercised in his favour, as a defaulter, unless he provides an explanation for the default.

Lastly in the Supreme Court of Judicature Court of Appeal, Civil Division, in *Sayers v Clarke Walker (a firm)* [2002] EWCA Civ 645 at paragraph 22 observed:

' It follows that when considering whether to grant an extension of time for an appeal against a final decision in a case of any complexity, the courts should consider 'all the circumstances of the case' including:

- a. The interests of the administration of justice;
  - b. Whether the application for relief has been made promptly;
  - c. Whether the failure to comply was intentional;
  - d. Whether there is a good explanation for the failure;
  - e. The extent to which the party in default has complied with other rules, practice directions and court orders;
  - f. Whether the failure to comply was caused by the party or his legal representative;
  - g. The effect which the failure to comply had on each party; and
  - h. The effect which the granting of relief would have on each party. In the case of a procedural appeal the court would also have to consider item (g): 'whether the trial date or the likely trial date can still be met if relief is granted'
15. The Supreme Court in the same case then set out the conditions for extension of time to file an appeal as follows;
- i. 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;
  - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
  - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
  - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
  - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
  - vi. Whether the application has been brought without undue delay; and
  - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.



16. While taking into consideration the conditions above, the court will look into the conduct of the Applicant and whether he is coming to this court with clean hands. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court, the party must show good or sufficient cause why the orders sought should be extended. The issue of good cause was discussed in the case of *Daphne Parry vs Murray Alexander Carson [1963] EA 546* where it was observed that though the provision for extension of time requiring 'sufficient reason' should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.
17. In this case, it is not in contention that the judgment was entered on November 16, 2022. The Applicant has not denied that the same was delivered in the presence of both counsels for the parties.
18. In *Samwel Ayienda Mookua vs Tinga Trading Company Limited Civil Application No Nai 184 of 2007*, it was held that wherever there is a delay, even for one day, there must be some explanation for it otherwise extension may not be granted.
19. The Applicant has presented mainly two reasons for delay to this court;
  - a. Time stopped running from December 21, 2022
  - b. The copy of judgment and proceedings had not been availed
20. The 30 days reserved for Appeal would thus lapse on December 16, 2022. The Applicant however contends that as per order 50 Rule 2 and 4, time stopped running on December 21, 2022 and he had exercised only 28 days of Appeal out of the 30 days reserved. I find the Applicant to be dishonest in this regard. The 30 days had already lapsed.
21. This section was interpreted by Githua J in *Francis Likhabila v Barclays Bank of Kenya [2020] eKLR*, where it was held that there was no conflict between section 79G of the *Civil Procedure Act* as well as Order 50 Rule 4 of the Civil Procedure Rules, the court stated that:

' It is apposite to note that the *Civil Procedure Act* is silent on the formula courts should use in computing time limited under the Act. The respondent has urged me to be persuaded by the holding of my sister Kasango J in *Cook 'N' Lite Limited v Silvester Mutia Honatha*, [supra] and hold that the freezing of time from 21st December of any year to the 13th January of the following year does not apply to computation of time limited under Section 79G of the Act but only applies to time limited in the Civil Procedure Rules or in a court order with the exception of applications for injunctions. With much respect, though I agree with the Hon. Judge that Order 50 Rule 4 is indeed subsidiary legislation formulated under the *Civil Procedure Act*, I must say that I am not persuaded by the above holding because upon close scrutiny of the provision, I am not convinced that it contains anything that contradicts the provisions of Section 79G of the *Civil Procedure Act*. In my view, Section 79G of the Act prescribes the time within which appeals from decisions of the lower court should be filed in the High Court while Order 50 Rule 4 provides the formulae for computation of that time.

'I am fortified in the above finding by the Court of Appeal's decision in *Keziah Stella Pyman & 2 Others v Paul Mwololo Mutevu & 8 others*, [2013] eKLR and its recent decision in April this year in the case of *Gabriel Osimbo v Chrispinus Mandare*, [Supra] where the



court allowed an appeal which challenged the High Court's decision to strike out an appeal for being filed out of time after finding that Order 50 Rule 4 was not applicable in the computation of time limited under the Civil Procedure Act. In agreeing with the decision of J Mohammed, JA, Okwengu JA held as follows:

'I have read the draft judgment prepared by J Mohammed JA. I am in agreement that this appeal should be allowed. With due respect, the learned Judge misconstrued the purport of Order 50 Rule 4 of the Civil Procedure Rules. The rule simply provides the manner of computing time. It does not provide for any specific time for doing or taking any action. Thus, Order 50 Rule 4 does not contradict section 75G of the Civil Procedure Act, which provides a time limit of 30 days for filing an appeal. Order 50 Rule 4 simply provides how these days are to be computed if the period falls within the High Court vacation.'

Taking into account Rule 4 in computing the 30 days, it is evident that the appellant's appeal which was filed on February 7, 2011 was filed within time as it was affected by the High Court vacation and the period, December 21, 2010 to January 13, 2011 had to be excluded in computing the time. The Learned Judge was therefore wrong in dismissing the appeal.'

22. That excuse can therefore not hold water in this case.
23. On the second reason for the delay, the Applicant contends that the reason for the delay is in receiving the certified copy of judgment and proceedings. From the annexures particularly JMK2 which is a receipt dated December 19, 2022, the request was lodged 3 days after the time for filing the Appeal had lapsed. The letter to the Chief Magistrate requesting for proceedings is also dated and received on December 19, 2022.
24. The attached letter and receipt cannot be deemed to be sufficient cause for not filing the appeal within the stipulated time. In any case the filing of the Memorandum of Appeal is not dependent on the presence of the typed court proceedings since the reasoning of the Trial Magistrate is in the copy of the judgment which was delivered in the presence of counsel.
25. All in all, there is completely no reason advanced by the Applicant why the appeal was not lodged within time. In the absence of that explanation, this Court has no material on the basis of which it can exercise its discretion in favour of the Applicant.
26. As stated in the case of Boleyn Magic Wall Panel Ltd v Nesco Services Limited [2022] e KLR, that;

'From the foregoing, it comes out that the decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion and just like any other exercise of discretion. Being an exercise of judicial discretion, like any other judicial discretion, it must be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. Such discretion must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders.'

27. In conclusion, the Application lacks merit and is dismissed with costs to the Respondent.
28. It is so ordered.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 15TH JUNE, 2023 (VIRTUAL/PHYSICAL CON-FERENCE).**

**M.W.MUIGAI**



**JUDGE**

**In The Presence Of:**

**Mr. Makundi - For The Applicants**

**Mr. Munyao - For The Respondent**

**Geoffrey/patrick - Court Assistant(s)**

