



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Onkware v Njoroge & another (Miscellaneous Civil Application
241 of 2022) [2023] KEHC 18997 (KLR) (22 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18997 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
MISCELLANEOUS CIVIL APPLICATION 241 OF 2022**

**PN GICHOHI, J
JUNE 22, 2023**

BETWEEN

DANIEL ARIGA ONKWARE APPLICANT

AND

STANLEY MARARO NJOROGE 1ST RESPONDENT

DENNIS NYAATA 2ND RESPONDENT

RULING

1. By Notice of Motion dated September 14, 2022 filed by the Applicant through the firm of Ochoki & Company Advocates, the Applicant seeking orders that:-
 1. The Applicant be allowed to appeal judgment in Kisii CMCC No 338 of 2019 on the 5th day of 2019 out of time.
 2. The draft Memorandum of Appeal annexed herein be deemed as duly filed upon payment of the requisite fees.
 3. The costs of this application be in the cause.
2. The grounds are on the face of the application are that Applicant instituted a suit in the lower court against the Respondents herein in Kisii CMCC No 338 of 2019 and that judgment was delivered therein on November 5, 2021 whereby the court apportioned liability in the ratio of 70% : 30% in favour of the Defendants. He states that he is dissatisfied and wishes to appeal the against the said judgment but time has since lapsed. He explains that the reason for delay was financial constraint.
3. He reiterates these grounds in the supporting affidavit sworn by Daniel Ariga Onkware on September 14, 2022 to which he has attached a copy of the judgment and a copy Memorandum of Appeal and where he seeks that the said judgment be reviewed and/or set aside and in its place this court awards



damages that are equal to the injuries sustained by the Plaintiff. In support , he raises three grounds of appeal;

1. That the Learned Trial Magistrate erred in law and in fact by awarding damages that are so low as to amount to an erroneous estimate of damage suffered by the Appellant.
2. That the Learned Trial Magistrate erred in law and fact in not considering the Appellant's submissions
3. That the Learned Trial Magistrate erred in law in in awarding the Appellant an inordinately low award in respect of general damages.
4. Through the firm of Kimondo Gachoka & Co. Advocates, the Respondents oppose the application and seek its dismissal on the grounds that it is fatally defective , unnecessary vexatious , misconceived and an abuse of the Court process. They term the delay as inordinate, intentional and inexcusable. Further, they state that there is a substantial risk that injustice and serious prejudice will be caused to the Respondents if the application is allowed.
5. Further, the 2nd Respondent filed a replying affidavit which he swore on February 25, 2023 and opposed the application on the grounds that the said judgment was delivered in the presence of the parties and that they had enough time to file their appeal. That the judgement having been delivered on November 5, 2021, it is now almost two years since then and it is too late in the day to file this application and no reasonable reasons for delay have been given by the applicant. That the matter having already been settled, the 2nd Respondent would be gravely prejudiced as the case will continue hanging over his head. He therefore urges the Court to disallow the application.

Determination

6. No submissions were filed in this matter. The causal way in which the Applicant has handled this application is noted. While it could have been a typographical error, he refers to the date of judgment as November 5, 2021 on the face of the application , he also refers to the date as November 15, 2021. Be that as it may, the copy the judgment annexed shows it was delivered on November 5, 2021 and this application was filed on September 19, 2022 which is a delay of almost ten (10) months.
7. The Court has discretion to grant application for extension of time under Sec. 79G of the *Civil Procedure Act* if the Applicant satisfies the court that he had good and sufficient cause for not filing the appeal. Regarding extension the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others* [2015] eKLR held;

“...it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.”
8. The reason given by the Applicant is that delay was due to financial constraint as the Applicant was not able to raise the requisite fees to prefer appeal within the prescribed timelines. He has not stated what amount was required as filing fees and therefore that cannot be considered as an extenuating circumstance.



9. In *Nyaigua Farmers Co- Operative Society Limited v Ibrahim Nyambane & 3 others* [2016] e KLR, Musinga JA had this to say regarding application to file appeal out of time;

“The principles that guide this Court in considering an application of this nature are well known. They are the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, and lastly, the degree of prejudice to the respondent if the application is allowed.”

10. I am satisfied that the delay is inordinate and reasons given for delay unjustifiable. Allowing the application at this stage where the Respondents are said to have settled the matter is highly prejudicial to the Respondents. Further there is nothing in the Memorandum of appeal to show that there are chances of the appeal succeeding if the application is allowed. The application is therefore devoid of merit and dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 22ND DAY OF JUNE 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. Arati for Applicant

N/A for Respondent

Isindu, Court Assistant

