



**Kaumbulu v Kenya Orient Insurance Co Ltd (Miscellaneous Application
E153 of 2023) [2023] KEHC 21505 (KLR) (20 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21505 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION E153 OF 2023
DKN MAGARE, J
JULY 20, 2023**

BETWEEN

NOAH NDOLO KAUMBULU APPLICANT

AND

KENYA ORIENT INSURANCE CO LTD RESPONDENT

RULING

1. This is Misc. Application seeking leave to appeal from the Judgment of the Honourable Chief Magistrate, E K Makori as then he was.
2. The decision sought to be challenged was given on September 30, 2021 in Mombasa CMCC 986 of 2018. The reason the Applicant gives is that he had ought for copies of proceedings and it is only on May 5, 2023 that he was supplied with proceedings.
3. During the hearing, I sought from the applicant, what is the use of proceedings in the context of filing appeal. I was not given a satisfactory explanation. I then asked him for a very simple document, if it is true that he was waiting for proceedings, when did he pay for the same. He stated that he paid in 2023 when he was collecting the proceedings.
4. The Applicant delayed for one year and 8 months. The Respondent indicated that the judgment was taken in presence of parties. IN a replying affidavit sworn by Amin said Amin the coastal region operating supervisor of the respondent.
5. He stated that there is no evidence that the proceedings were applied for. Further that a delay of over 600 days or 20 months is not excusable and it is inordinate.
6. They closed their file over 21 months ago. They urge that articles 47, 50 and 159 require that justice be done without undue delay I therefore find the reason plausible.
7. The factors to consider in dealing with such an application is;



- a. The length of delay.
 - b. The reason for delay.
 - c. The animus of the applicant.
 - d. The prejudice to the Respondent.
8. The Applicant has not explained the delay. It is my considered opinion that the 4 factors above are sequential. Therefore, you must fulfil each as you move to the next. If the delay is inordinate, it may not be necessary to go to the reason for delay. When the delay is reasonable, there must be a real and genuine reason for delay.
 9. In our court system, delay is usually documented. Without documentation, it never happened. For example, a lost file where there is no record of follow up, is not lost. When applying for proceedings, they must first be necessary but also must be paid for.
 10. Without payment, there are no proceedings being sought. Further, proceedings must be formally sought, even where the same were asked for in court, the registry must be moved and follow ups done.
 11. In this matter, the reasons for the delay are strange. Proceedings were not paid for, till 2023. There is therefore no explanation for delay up to May 2023. Further, I cannot understand the place of proceedings in filing of a memorandum of appeal. Under section 79G, the time for filing Appeals is provided as doth: -

“Time for filing appeals from subordinate courts 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.

12. Therefore, for certification to be done, there must be a request for decree or judgment. Under section 2 of the civil procedure Rules, a decree is defined as doth: -

“decree” means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include—

- a. any adjudication from which an appeal lies as an appeal from an order; or
- b. any order of dismissal for default:

Provided that, for the purposes of appeal, “decree” includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;

Explanation. — A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such



adjudication completely disposes of the suit. It may be partly preliminary and partly final.

13. An appeal can thus be made even if a formal decree had not been formally extracted. A decree includes a judgment. The only thing the Applicant could have done is to pay and collect the judgment, which was available from September 2021.
14. The Applicant delayed for over 20 months. The delay is inordinate. The reason given is not genuine and has not been explained. The applicant has not acted in good faith, waiting for many months and waking up and collecting proceedings then using them as an excuse. It is not necessary to address the prejudice to the Respondent given that the delay is inexcusable, inordinate and unexplained. This is a proper application to dismiss with costs.

Determination

15. In the circumstances I make the following orders: -
 - a. The Application dated May 22, 2023 lacks merit and is accordingly dismissed with costs of 20,000/=
 - b. The costs shall be paid within 30 days, in default execution to issue.
 - c. The file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 20TH DAY OF JULY 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:-

Kenzi for the Applicant

Jengo for the Respondent

