



**Lewis v Mathenge (Miscellaneous Civil Application
E001 of 2022) [2023] KEHC 22166 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 22166 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION E001 OF 2022**

F WANGARI, J

JULY 7, 2023

BETWEEN

SAFARI KEVIN LEWIS APPELLANT

AND

CHRISTOPHER G. MATHENGE RESPONDENT

RULING

1. The Applicant vide an application dated 30th November, 2022 and filed on date 5th January 2023 sought for the following orders: -
 - a. Spent
 - b. That the Honourable Court be pleased to grant the Applicant leave to Appeal out of time against the judgement of the Chief Magistrate in Mombasa CMCC No. 311 of 2019;
 - c. That the costs of the application be provided for.
2. Though it is indicated both in the proceedings and the Respondent's submissions that there are Grounds of Opposition dated 20/1/2023 and filed on 23/1/2023, the same is not in the court record. I find that the pleadings on record and the submissions filed are sufficient to have this court make an informed decision on the application at hand.
3. Directions were taken that the application be disposed off by way of written submissions. The Respondent complied by filing his submissions dated 27/2/2023. There are no submissions on record for the Applicant and I shall deem that they were never filed.

Analysis and Determination

4. I have considered the application, the Applicant's submissions, authorities cited as well as the law and in my view, the following are the issues for determination;



- a. Whether the application is meritorious;
 - b. What is the order as to costs?
5. On the first issue, the application basically seeks for leave to file an appeal out of time. Section 79G of the Civil Procedure Act is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. It provides as follows: -
- “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.”
6. From the provision above, it is noteworthy that the phrase used is “an appeal may be admitted out of time”. This therefore means that an appeal may indeed be admitted out of time. However, the intended appeal ought to have already been filed before or together with an application seeking leave to extend time for filing an appeal. I have perused the file and the Applicant has not attached a Memorandum of Appeal, though he refers to being granted leave to file a ‘Notice of Appeal’ which is not applicable in this case, as this is an intended appeal to the High Court and not to the Court of Appeal.
7. 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 just like any other exercise of discretion by the court. Some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time were suggested by the Court of Appeal in Thuita Mwangi v Kenya Airways Ltd [2003] eKLR. They include the following: -
- i. The period of delay;
 - ii. The reason for the delay;
 - iii. The arguability of the appeal;
 - iv. The degree of prejudice that will be suffered by the Respondent if the extension is granted;
 - v. The importance of compliance with time limits to the particular litigation or issue;
 - vi. The effect if any on the administration of justice or public interest if any involved.
8. On the period of delay, the Applicant in his application and supporting affidavit did not mention the date when the judgment was delivered. It is through the Respondent’s submissions that I note that the judgment in the Magistrate’s court was delivered on 17/3/2022. The Applicant states that the date of the judgment was not communicated to him and his lawyer was under the impression that the judgment was still pending delivery. He came to know that the judgment had been delivered after he was served with the ‘Notice to Show Cause’ (sic), (why Warrant of Arrest should not issue) hence filing this application. He stated that the delay in lodging the appeal was not inordinate but is purely inadvertent and is excusable.
9. The Respondent in his submissions state that the judgment date was taken by consent when both parties were present on 23/11/21 when they confirmed filing of submissions. On the date of delivery of judgment, neither the Applicant or his advocate was present and the judgment was delivered in their absence. The Respondent submitted that the allegation by the Applicant that the advocate was under



the impression that the judgment was still pending, was untrue since the advocate was present when the date of delivery of judgment was given. From the above, the Applicant has failed to satisfy this court that the reason for the 10 months delay was due to the fact that they were not aware that judgment had been delivered.

10. On arguability of the appeal, I note that in law, an arguable appeal/intended appeal is one that need not succeed but one that warrants the court's interrogation on the one hand and the courts invitation to the opposite party to respond thereto. The Applicant has not attached the draft Memorandum of Appeal. There are no grounds of the intended appeal to determine if they are arguable. I cannot determine if the intended appeal is one that meets the test of arguability.
11. On the degree of prejudice, as earlier noted, I have not had the benefit of the Respondent's response and as such, I cannot discern the prejudice to be suffered by the Respondent at this juncture. Be that as it may, any prejudice to be suffered can be alleviated through award of costs.
12. The upshot of the foregoing is that I am inclined to disallow the application dated 30/11/ 2022. In the absence of a draft Memorandum of Appeal, it is evident that the Applicant is not keen on exercising his right of appeal. I thus exercise my discretion in favour of the Respondent.
13. On the issue of costs, the same follows the event. This is what section 27 of the Civil Procedure Act decrees. However, this court has discretion to either award or not award any costs. The Applicant being unsuccessful, he shall bear the costs of the application. Flowing from the foregoing, I proceed to make the following orders: -
 - a. The application dated 30/11/2022 lacks merit and is thereby disallowed.
 - b. The costs of the application awarded to be Respondent.

Orders accordingly

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 7TH DAY OF JULY, 2023.

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F. WANGARI

JUDGE

In the presence of:

Wambui Advocate h/b for Mungai Advocate for the Appellant

Mwanzia Advocate h/b for Ondego Advocate for the Respondent

Barile, Court Assistant

