



REPUBLIC OF KENYA



KENYA LAW
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**Ndere v Warui (Miscellaneous Application 24 of 2017)
[2023] KEHC 20689 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20689 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION 24 OF 2017**

G MUTAI, J

JULY 7, 2023

BETWEEN

RUTH NJOKI NDERE PLAINTIFF

AND

STEPHEN NDERE WARUI DEFENDANT

RULING

1. Before the Court is the Notice of Motion application dated March 8, 2023. Vide the said application the Plaintiff/Applicant seeks 3 orders to wit:-
 1. Spent;
 2. That the Court be pleased to extent the time for filing Notice of Appeal and the Notice of Appeal dated March 8, 2023 be deemed as duly filed;
 3. That costs of this application be in the cause.
2. The Plaintiff/Applicant avers that she was not informed of the judgment date and as such wasn't present when it was delivered. She further avers that at the time she learnt of the delivery of the judgment the period within which she could file the Notice of Appeal had lapsed. Upon becoming aware she filed the Notice of Appeal the subject of this application within 14 days of thereafter.
3. The application is supported by the annexed affidavit of the Plaintiff/Applicant. The said affidavit had 2 annexures to wit the letter written by her counsel to Court on April 1, 2022 and the Notice of Appeal dated March 9, 2023. The contention of the Plaintiff/Applicant is that the matter was initially slated for judgment on November 5, 2021. On the said date it was deferred to December 3, 2021. On December 3, 2021 the Court directed that the judgment would be delivered on notice. Her advocates wrote a letter on April 1, 2022 seeking to be informed of the date the decisions would be rendered. No response was received by them to the said letter. She was therefore shocked to learn that the judgment



was delivered in July 2022. The Plaintiff/Applicant deposed that she has an arguable appeal which she should be allowed to ventilate

4. The Defendant/Respondent is opposed to the said application. His advocate swore an affidavit on March 30, 2023. It is urged that there is no evidence that the Plaintiff/Applicant took any other or further step after writing the letter dated April 1, 2022, to find out if the judgment had been delivered. The deponent deposed that had the Plaintiff/Applicant been diligent she would have become aware of the delivery of the judgment well before the Defendant/Respondent informed her. He argued that the application now before the Court is defective and that this Court lacks jurisdiction to grant the orders sought. He therefore prayed that the application be dismissed with costs.
5. I have considered the application, the Replying Affidavit and the rival submissions of the parties. I have also perused the Court file.
6. The Defendant/Respondent has submitted that this Court lacks jurisdiction to determine the application. I must consider the said issue first as without jurisdiction I must down my tools (see '[Owners of Motor versus Lilian 'S' versus Caltex Oil \(Kenya\) Ltd \[1989\]eKLR](#)').
7. Order 50 Rule 6 of the [Civil Procedure Rules](#) gives Courts power to enlarge time for 'doing any act or taking any proceeding under these Rules'. Under Rule 77(1) of the [Court of Appeal Rules, 2022](#) the Plaintiff/Applicant ought to have filed the Notice of Appeal in this Court within 14 days of the date of delivery of the judgment. The said Rule provides that:-
 1. A person who desires to appeal to the Court shall give Notice in writing, which notice shall be lodged in 2 copies, with the Registrar of the superior Court;
 2. Each notice under sub-rule (1) shall, subject to rules 84 and 97 be lodged within fourteen days after the date of the decision against the decision for which the appeal is lodged.'
8. My understanding of the above provision is that the Notice of Appeal, being a document that is lodged with the Registrar of this Court, within fourteen days of the making of an impugned decision, an application for extension of time within which is a notice appeal must be filed is done either in this Court or at the Court of Appeal. That being the case I find and hold that I have jurisdiction to hear and determine the instant application.
9. From the record it is evident that the judgment ought to have been delivered on November 5, 2021. The same was adjourned to December 3, 2021. There is no record in the Court file of what transpired in the latter date. The next proceedings are those of July 5, 2022 when the judgment was delivered in the absence of both parties. It would appear to me that the Plaintiff/Applicant was diligent. Her advocate wrote a letter dated April 1, 2022 seeking to be advised by the Court. I have not seen a response in the Court file to the said letter. While I would agree with the Defendant/Respondent that she ought to have been more diligent her explanation for lack of action on her part is reasonable.
10. The Supreme Court in the case of [County Executive of Kisumu versus County Government of Kisumu & 8 others \[2017\]eKLR](#) held that the test to be applied in matters of this kind is:-
 - ' The under-lying principles that a Court should consider in exercise of such discretion:
 1. 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;
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;



3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.'

11. The Plaintiff/Applicant was made aware of the decision of this Court on February 28, 2023. She filed the Notice of Appeal on March 9, 2023. In the circumstances of this case I am satisfied that the delay has been sufficiently explained and that this is a matter where I should exercise my discretion by allowing the same.

12. Each party will bear own costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED THIS AT MOMBASA THE 7TH DAY OF JULY 2023 VIA MICROSOFT TEAMS

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GREGORY MUTAI

JUDGE

In the presence of: -

Ms. Mango for the Defendant/Respondent

No appearance for the Plaintiff/Applicant

Mr. Arthur Ranyundo – Court Assistant

