



Ogutu & another (t/a Golden Homes Property Consultants) v Board of Management Ahero Girls Secondary School (Miscellaneous Civil Application E026 of 2023) [2023] KEHC 20259 (KLR) (19 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20259 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION E026 OF 2023**

**MS SHARIFF, J
JULY 19, 2023**

BETWEEN

DICKENS OMONDI OGUTU 1ST APPLICANT

DICKENS OMONDI AOI 2ND APPLICANT

T/A GOLDEN HOMES PROPERTY CONSULTANTS

AND

**BOARD OF MANAGEMENT AHERO GIRLS SECONDARY
SCHOOL RESPONDENT**

(Application for leave to file the notice of appeal and appeal against the judgement delivered by the Hon Nyigei (SRM) on November 20, 2019..)

RULING

1. The applicants herein vide an application dated February 22, 2023 seek the following orders;
 - a. Spent.
 - b. The court be pleased to extend time within which to file the notice of appeal and appeal against the judgement delivered by the Hon Nyigei (SRM) on November 20, 2019.
 - c. Costs of and incidental to this application do abide the outcome of the intended appeal.
2. The 1st applicant swore an affidavit in support of the application where he depones that the trial court delivered it's judgement in PMCC No. 73 of 2018 whereat it dismissed their claim whereupon he instructed the firm of D.O.E Anyul & Co. Advocates to file an appeal against the decision on the same



- day. Pursuant to those instructions the said law firm wrote to the trial court's registry requesting for certified copies of the proceedings which were eventually obtained way beyond the limitation period for lodging an appeal. Moreover the Covid-19 outbreak adversely affected their business therefore they could not instruct counsel to proceed with their earlier instructions of lodging an appeal.
3. The 1st Applicant further depones that on 28/10/2022, the respondent's counsel wrote to their counsel seeking access to funds held in a joint account which demand if acceded to will render the success of the intended appeal a nullity. He deposes that the respondent will not suffer any prejudice by the extension of time to lodge their appeal as the judgment sum is already secured in the joint account of parties' advocates.
 4. The respondent opposed the application through a replying affidavit sworn by Joyce Omondi, the respondent's principal who depones that the applicants filed similar applications dated January 11, 2021 and July 11, 2021 which were withdrawn after extensive progress had been made towards disposal of the said applications.
 5. She depones that the applicants have already paid 90% of the respondent's costs and what is remaining held in the joint account is paltry and cannot be adequate security in the intended appeal.
 6. The parties filed their respective submissions in disposal of the appeal.
 7. The applicants submit on the issue of jurisdiction that they have already filed a draft Memorandum of Appeal hence this court is properly vested of jurisdiction. They rely on *Safaricom Ltd v Ocean View Beach Hotel Ltd & 2 others* Civil Application No. 327 of 2009 (UR) and *Africa Eco-Camps Limited v Exclusive African Treasures Limited* [2014] eKLR.
 8. On the length of delay and the reason given thereto, it is argued that the same was occasioned by delay in processing copies of typed proceedings and thereafter the certificate of delay. It is also submitted the mistake was caused by the applicants' former advocates and the same ought not to be visited upon them. On this issue, counsel cites; *Tana & Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others* [2015] eKLR and *Martha Wangari Karua v IEBC* Nyeri-Civil Appeal No. 1 of 2017.
 9. On whether the applicants have advanced sufficient cause, it is argued based on the decision in Isaac Mugweru Kiraba t/a Isamu Refri-Electricals v Net Plan East Africa Ltd [2018] eKLR. The applicants posit that the trial court's dismissal of their suit amounted to grave miscarriage of justice since the applicants had supplied building and construction materials to the Respondent and a refusal to review or set aside the said dismissal would be an affront to the applicants' rights as protected by Articles 10(2) (c) of the *Constitution*.
 10. On whether the intended appeal is arguable, the applicants contend that there are issues worth determination by the court to wit; the effect of the dismissal on concept of suppliers to educational institutions and whether the trial magistrate erred by failing to take into account the admission made by the respondent that the applicants had indeed supplied it with construction materials. The authority in *Kenya Tea Growers Association & another v Kenya Planters & Agricultural Workers Union*-Civil Application No. 72 of 2001-Nrb, *Kenya Railways Corporation v Edermann Properties Ltd* Civil Appeal No. 176 of 2012-Nrb and *Ahmed Musa Ismael v Kumba Ole Ntamorua & 4 others*- Civil Appeal No. 256 of 2012-Nrb.
 11. On the issue of whether the applicant has established grounds for grant of the orders sought, the respondent submits that the applicants have not explained the hinderance they faced from the year 2019 and or the delay of over 4 years.



12. It is submitted that the applicants filed 2 previous applications which they withdrew despite nearing conclusion and therefore had adequate time to pursue their earlier applications instead of withdrawing them only to later file a similar application.
13. The respondent's assertion is supported by the following authorities; *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR, *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR, *Nginyaga Kavole V Mailu Gideon*- Misc. Application No. 401 of 2013 and *Union Insurance Co. Of Kenya Ltd Ramzan Abdul Dhanji* Civil Application No. 179 of 1998.

Analysis and Determination.

14. The impugned judgement in this matter was delivered by the subordinate court on November 20, 2019 and the instant application filed on February 22, 2023. This clearly means the applicants were out of time, though the law under Section 79G of the *Civil Procedure Act* accords such an applicant a window to lodge his appeal out of time. The Section states;

“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.”

15. It is demonstrably clear that an appeal may be admitted out of time if the applicant advances satisfactory grounds for the delay. Case law has established a number of factors to be considered when determining whether or not to grant leave to appeal out of time.
16. In *Mombasa County Government v Kenya Ferry Services & anor* [2019] eKLR, the Supreme Court held that;

Concerning extension of time, this Court has already set the guiding principles in the Nick Salat Case as follows:

“... 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.

“... we derive the following as the underlying principles that a Court should consider in exercising 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 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;



5. whether there will be any prejudice suffered by the respondents, if 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”
17. Since the date of delivery of judgement in the subordinate court, the applicants should have filed their appeal within 30 days from November 20, 2019, however, as matters stand, the application was only filed on February 22, 2023, a period of over 3 years from the said period.
 18. The applicants have attributed their delay to the alleged laxity by the registry staff in the subordinate court in furnishing them with certified proceedings and judgment, their firm’s cash flow decline due to the global Covid-19 pandemic and lastly on negligence of their former advocates on record.
 19. These allegations have been disputed by the respondent who states that the delay is inordinate and that the security in terms of monies held in a joint interest earning account may not adequately liquidate it’s costs in the event the application herein is declined.
 20. On the issue of the delay in obtaining certified copies of the proceedings, I find the decision in *Hassan Nyanje Charo v Khatib Mwashetani and 3 Others* [2014] eKLR imperative. In that decision, the Supreme Court held;
 - “(27) Counsel for the applicant has stated that he has exercised all due diligence to get the proceedings from the Court of Appeal, but to no avail...
 - (28) Would it be in the interests of justice then to turn away an applicant who has, prima facie, exercised all due diligence in pursuit of his cause, but is impeded by the slow-turning wheels of the Court’s administrative machinery? We think not.”
 21. In the instant application, there is an allegation that the letter bespeaking proceedings was sent to the registry on 13/12/2019, which proceedings were allegedly supplied way after the window for appeal had lapsed. However, the applicants have not stated when the same were availed.
 22. In the circumstances, despite taking cognizance of the fact that a party may not be blamed for the laxity of judicial staff in preparation and supply to a party of the typed proceedings, I do find that the applicants have been economical with information on when the proceedings were supplied to them.
 23. The other reason advanced for the delay is mistake of counsel such that it is alleged that the former advocated did not act with speed to lodge the appeal. It is trite law that mistake of counsel shall not visited on an innocent litigant.
 24. The issue of mistake of counsel was discussed in *Edney Adaka Ismail v Equity Bank Limited* [2014] eKLR, where the court declined to exercise its discretion simply because the Applicant claimed a mistake of counsel. In that matter, the Court held:
 - “It is true that where the justice of the case mandates, mistake of advocate even if they are blunders, should not be visited on the clients when the situation can be remedied by costHowever, it is not in every case that a mistake committed by an advocate would be a ground for setting aside orders of the court”.



“I fully agree with the above holding. It is not enough for a party to simply blame the advocate but must show tangible steps taken by him in following up his matter”.

25. In the instant application, the applicants have alleged that they instructed counsel to pursue an appeal on their behalf. The letter stated above was drafted by counsel. There however is no evidence of the steps taken by the applicants to pursue the appeal until 16th January, 2023 when they were jolted into action by the respondent’s letter asking to be allowed access to the funds held in a joint account.
26. Having considered the applicants’ assertions on the same and the respondent’s, I do find that the applicants took no steps and or were indolent in having the matter proceed on appeal. The period from when the instructions for appeal were given up to the time of filing the instant application is inordinate and has not been explained well.
27. It is a matter of common public notoriety that Covid-19 pandemic was declared in Kenya in the month of March, 2020 while judgement was delivered approximately 4 months before that declaration. Even after the said declaration, it has been over 3 years since then with no tangible progress being shown to have been put in place by the applicants.
28. I therefore find this excuse to be a scapegoat for the applicants’ delay and is not sufficient ground to be considered for enlargement of time to lodge an appeal.
29. Premised upon the above reasons, I find that the application for leave to lodge an appeal out of time has not been sufficiently proved on the account of time alone and I thus decline to grant the orders sought.
30. The other ingredients to be considered when deciding such an application will serve no purpose if discussed herein.
31. Consequently, the application dated February 22, 2023 is without merit and is hereby dismissed with costs to the respondent which are assessed at Ksh 15,000.
32. This file is marked as closed

DELIVERED, DATED AND SIGNED AT KISUMU THIS 19TH DAY OF JULY 2023

MWANAISHA. S. SHARIFF

JUDGE

In the presence of:

Mr Ochieng Otieno holding brief for Mr Amondi for the applicants

Mr Sala for the Respondent

