



**Progressive Credit Limited v Gatugo (Miscellaneous Civil Case
E017 of 2023) [2023] KEHC 20069 (KLR) (12 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20069 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
MISCELLANEOUS CIVIL CASE E017 OF 2023**

AK NDUNG’U, J

JULY 12, 2023

BETWEEN

PROGRESSIVE CREDIT LIMITED APPLICANT

AND

FRAN CIS NJUKI GATUGO RESPONDENT

RULING

1. The Applicant in this case, Progressive Credit Limited, seeks in the main and by notice of motion dated 17/04/2023 that time be extended within which the Applicant may lodge appeal against the judgment delivered on 08/03/2023 in Nanyuki CMELC No 18 of 2020. The application is brought under section 79G and section 95 of the [Civil Procedure Act](#) and Order 50 Rule 6 of the [Civil Procedure Rules](#). By that judgment the Applicant’s (defendant’s) counterclaim was dismissed with costs and the Respondent’s (plaintiff’s) claim was allowed with costs. The application is supported by an affidavit of Collins Muhia.
2. The judgment having been delivered on 08/03/2023, appeal ought to have been lodged on or before 08/04/2023 according to section 79G of the [Civil Procedure Act](#), Cap 21 which provides that;

“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.”
3. The present application for leave to appeal out of time was filed on 17/04/2023; therefore, the delay that we are dealing with here is about nine (9) days. Under the proviso to section 79G aforesaid, this



court may admit an appeal out of time if the applicant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

4. The reasons for the delay in lodging the appeal are set out on the face of the application and more particularly deponed to in paragraphs 4, 5, and 6 of the supporting affidavit annexed to the application. Those reasons are –
 - a. That when the judgment was delivered, it was handwritten and the same was typed and certified on 05/04/2023.
 - b. That the judgment was collected and shared on 06/04/2023 and before the Applicant and their counsel could deliberate on the substance of the judgment and instruct counsel, both their offices closed for Easter holiday.
 - c. That it was after the Easter holiday that is on 11/04/2023 that they went through the judgment and saw the need to lodge the intended appeal.
5. The Application was opposed by the Respondent who filed a replying affidavit dated 24/04/2023 opposing the application on the grounds that;
 - a. The Applicant did not attach a certificate of delay to demonstrate good cause or reason why it failed to file the appeal within stipulated time.
 - b. The Applicant failed to seek stay of execution to stop time for filing the appeal from running.
 - c. The certificate of delay is mandatory to show the delay is on part of the court and not the litigant.
 - d. Failure to file a certificate of delay shows that failing to file the appeal in time was deliberate and lack of good faith.
 - e. The Applicant has failed to satisfy the threshold set out in section 79G of *Civil Procedure Act*.
 - f. The cause of delay should be legitimately explained and the Applicant has failed to do so.
6. The application was canvassed by way of written submissions. The Applicant submitted that the intended appeal is highly meritorious; that the Applicant is willing to comply with the orders of this court; that the Respondent shall not suffer prejudice if the application is allowed and that the application has been made without delay and in good faith and that it is in the interest of justice that the same be allowed.
7. The Respondent also filed written submissions. He argued that the Applicant did not attach the handwritten judgment to substantiate his claim; that the Applicant failed to attach a certificate of delay to show that the judgment was being typed hence the delay. Therefore, the Applicant cannot blame the court; that failure to attach the certificate of delay shows that the Applicant deliberately failed to file the appeal within the stipulated time and lack of good faith; that the Applicant is undeserving of the leave since he has failed to demonstrate good and sufficient cause for not filing the appeal in time.
8. I have considered the rival submissions by the parties herein. It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. The Court of Appeal in *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR while relying on the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, (Civil Application No Nai 255 of 1997) (unreported); stated that;

“It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly,



the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted”. (Emphasis added)

9. See also the conditions that were set by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v. The Independence Election & Boundaries Commission & 7 Others*, [2014] eKLR where the Apex court held that a court exercising its discretion to extend time has to consider the following factors;
 - a. 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;
 - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 - e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - f. Whether the application has been brought without undue delay; and
10. To enable this court to exercise its discretion in favour of the Applicant, the Applicant had the duty to satisfy the court that he had good and sufficient cause for not filing the appeal in time. The reason advanced by the Applicant is that the trial magistrate delivered a handwritten judgment and the typed judgment was only available on 05/04/2023. The Applicant however did not attach a certificate of delay as the Respondent contended to support his allegations. The Applicant also claimed that delay was also occasioned by Easter holiday.
11. The reasons advanced by the Applicant in my considered view are sufficient if only the applicant had exhibited a certificate of delay. This is the necessary document that would confirm attribution of the delay to the court house. Nevertheless, the delay as seen earlier is nine (9) days which is not a long time. I have also perused the memorandum of appeal attached to the Applicant’s application and it raises triable issues. It is my considered view that it will be in the interest of justice if the Applicant is given a chance to ventilate its issues through this appeal.
12. From the foregoing, I will allow the Applicant’s application and grant leave to file appeal out of time. I direct that that the record of appeal be lodged within 30 days hereof.

DATED SIGNED AND DELIVERED AT NANYUKI THIS 12TH JULY 2023

A.K. NDUNG’U

JUDGE

