



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Aberee v Bundi & another (Miscellaneous Civil Case E051 of 2023)
[2023] KEHC 23319 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23319 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS CIVIL CASE E051 OF 2023
TW CHERERE, J
OCTOBER 5, 2023**

BETWEEN

ALI WARIO ABEREE APPELLANT

AND

SILAS BUNDI 1ST RESPONDENT

AYUB KIMATHI 2ND RESPONDENT

*(application for leave to appeal out of time the judgment in
Nkubu PMCC No 80 of 2007 delivered December 21, 2018.)*

RULING

Background

1. On December 21, 2018, the court trial in Nkubu PMCC No 80 of 2007 entered judgment for the 1st Respondent as against the Applicant.
2. By notice of motion dated June 12, 2023, Applicant seeks leave to appeal the judgment in Nkubu PMCC No 80 of 2007 out of time. The motion is supported by Applicant's affidavit sworn by on June 12, 2023 in which he avers that the appeal has overwhelming prospects of success.
3. By way of a replying affidavit sworn on September 28, 2023, 1st Respondent opposed the application on grounds that Applicant is guilty of indolence and that the application is meant to deny him the fruits of his judgment which have remained unsettled for over 5 years ago.

Analysis and Determination

4. I have considered the notice of motion in the light of affidavits on record and the issue for determination is whether Applicant has made out a case for leave to appeal out of time.



5. The impugned judgment was delivered on December 21, 2018 and the instant application was filed on June 16, 2023 about 5 years after delivery of the impugned judgment.
6. Under Section 79G of *Civil Procedure Act*, an appeal from a subordinate court to the high court should be filed within a period of 30 days from the date of the decree or order appealed against provided that an appeal shall 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.
7. Having approached about 5 years after the impugned judgment was delivered, the onus is on the Applicant to demonstrate that the delay was reasonable, justified and that the Respondent will not suffer any prejudice if the order is not granted.
8. The principles that govern the exercise of discretion in an application for extension of time were restated by the Court of Appeal stated in the case of *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi* Civil Application No Nai. 255 of 1997 [1999] 2 EA 231 that:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. 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”.
9. In *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR, the Court of Appeal stated that:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”
10. The Applicant in this matter has not made any effort to explain the delay of about 5 years between the date the impugned judgment was delivered and the time he filed the current application and has clearly failed to unlock the court’s flow of discretionary power in his favour.
11. Consequently, I find that the circumstances of this case call upon the court to guard the 1st Respondent against further prejudice caused by delay in realizing the fruits of his judgment that has been occasioned by Applicant’s failure to settle the same.
12. In the end, the notice of motion dated June 12, 2023 is considered and found to have no merit and it is dismissed with costs to the 1st Respondent.

DATED AT MERU THIS 05TH DAY OF OCTOBER 2023

WAMAE. T. W. CHERERE

JUDGE

