



**GR v DC (Suing on behalf of and as the mother of the minor SC) (Miscellaneous Application E020 of 2022) [2023] KEHC 24490 (KLR) (16 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24490 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
MISCELLANEOUS APPLICATION E020 OF 2022  
RL KORIR, J  
OCTOBER 16, 2023**

**BETWEEN**

**GR ..... APPLICANT**

**AND**

**DC ..... RESPONDENT**

**SUING ON BEHALF OF AND AS THE MOTHER OF THE MINOR SC**

**RULING**

1. The Applicant filed a Notice of Motion Application dated 10<sup>th</sup> May 2022 which sought the following Orders:
  - i. Spent.
  - ii. That the Applicant herein be granted leave to file his Appeal against the Judgment in Sotik PMCC Maintenance Cause No. 12 of 2020 out of time.
  - iii. That necessary directions be given.
  - iv. That the costs of this Application be provided for.
2. The Application was brought under Orders 50 Rule 6 and Order 51 Rule 1 and 4 of the *Civil Procedure Rules*, Section 3A and 79G of the *Civil Procedure Act* and it was based on the grounds on the face of the Application and further by the Supporting Affidavit sworn by Geoffrey Rono on 10th May 2022.

**The Applicant's Case.**

3. It was the Applicant's case that he could not file his Appeal within the prescribed period because the proceedings took a long time to be typed. It was his further case that his Appeal had an overwhelming chance of success and that the Respondent would not be prejudiced if the leave was granted.



4. On 19th September 2022, I directed that this Application proceeds by way of written submissions and that counsel for the Applicant was to serve the court directions upon the Respondent who was absent.
5. On the subsequent court dates being 12th October 2022, 15th November 2022, 15th March 2023 and 9th May 2023, the matter was mentioned in open court and there was no appearance by either party.

**The Applicant's submissions.**

6. The Applicant submitted that he could not file his Appeal within the stipulated 30 days because the trial court proceedings took too long to be typed. He further submitted that the Respondent would not suffer any prejudice as he had demonstrated to this court that he was ready and willing to have this matter heard on a priority basis.
7. It was the Applicant's submission that he stood to suffer irreparable loss if his Application was not granted because his appeal was arguable and had a high chance of success.
8. The Applicant submitted that the Respondent had already extracted the order and that was why the current Application was commenced. That it was just and fit that he be granted leave to file his Appeal out of time.
9. There was no response to the Application by the Respondent.
10. I have gone through and considered the Notice of Motion Application dated 10th May 2022, the Applicant's written submissions dated 1<sup>st</sup> March 2022, the Respondent's Written Submissions dated 29th September 2022 and the only issue for my determination was whether the Applicant should be granted leave to file his appeal out of time.
11. Section 79G of the [Civil Procedure Act](#) 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.

12. This court is clothed with the discretion to decide whether or not to grant leave to file an appeal out of time. Such discretion ought to be exercised judiciously and within the principles of the law. The principles were set out in the Court of Appeal case of [Omar Shurie vs Marian Rasbe Yafar](#) (Civil Application No. 107 of 2020) UR where it was held:-

“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.” (Emphasis mine)



13. The importance of giving a sufficient reason for the extension of time to appeal was discussed in the Court of Appeal case of *Susan Ogutu Oloo & 2 Others vs. Doris Odindo Omolo* (2019) eKLR where it was held that:-

“In an application for extension of time, the single Judge has discretion. I am aware that the discretion I have is to be exercised judiciously and not whimsically or capriciously. The guiding principles on the issue of extension of time was laid out by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v IEBC* (2014) eKLR Sup. CT. Application No. 16 of 2014.

The Supreme Court aptly stated extension of time is not a right of a party; a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court. Of paramount importance, the reason for delay must be explained to the satisfaction of the Court. Further, the application for extension must be brought without undue delay and it must be demonstrated if the respondent will not suffer prejudice if extension is granted”.

14. The Applicant stated that the reason he could not file his Appeal out of time was that the typing of the trial court proceedings took too long. I have gone through his Application in which the Applicant attached the trial court Judgment and I have noted that it was delivered on 14th January 2022.
15. The Applicant also attached a Letter that was marked as “GR1”. The Letter is addressed by the firm of Bii V.K & Co. Advocates to Sotik Law Courts requesting for certified copies of the typed proceedings and Judgment. The letter is dated 11th February 2022 but there is no evidence to indicate that it was received by Sotik Law Courts.
16. The practice is that Applications of such a nature are supported by a Certificate of delay issued by the trial court indicating and confirming the delay in getting typed proceedings for the purpose of filing an Appeal. The Applicant did not attach such certificate of delay. The Court of Appeal in *Mistry Premji Ganji (Investments) Limited vs Kenya National Highways Authority* [2019] eKLR held that:-
- “.....A certificate of delay is usually issued in such cases, specifying the time taken for the proceedings to be typed, for purposes of exclusion of the same during computation.....”
17. This Application smirks of indolence and an afterthought by the Applicant. The Applicant confirmed as much in his submissions that the present Application was prompted by the Respondent when she extracted what I presume to be a decree from the trial court. The fact that this Application was filed on 12th May 2022 gives credence to my finding.
18. The Applicant bore the burden of demonstrating to this court why he should be granted leave to file his Appeal out of time, a burden which he failed to discharge. The burden of such proof did not shift when the Respondent failed to respond to the Application.
19. It is my finding that the Applicant did not approach this court with clean hands and as pointed out earlier, this Application was filed once the Respondent extracted the decree from the trial court. It seems to me therefore that the Applicant wants to use the Appeal to frustrate the Respondent from enjoying the fruits of her Judgement. I shall however not deny him his constitutional right to be heard on appeal.
20. In the final analysis, and in the exercise of my discretion, I grant the Applicant leave to file his Appeal out of time on the following conditions:-
- i. The Applicant is to file his Record of Appeal strictly within 30 days of this Ruling.



ii. The leave granted shall terminate on the 31<sup>st</sup> day from today.

iii. I decline to grant costs.

21. Orders accordingly.

**RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 16<sup>TH</sup> DAY OF OCTOBER, 2023**

.....

**R. LAGAT-KORIR**

**\*\*JUDGE\***

