



**Muriuki & another (Suing as the legal representatives of the Late Patrick Kibiru Muriithi) v Mungai & another (Miscellaneous Application 79 of 2022) [2023] KEHC 23966 (KLR) (24 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23966 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS APPLICATION 79 OF 2022  
SM MOHOCHI, J  
OCTOBER 24, 2023**

**BETWEEN**

**BEATRICE GATHONI MURIUKI ..... 1<sup>ST</sup> APPLICANT  
ALVIN WANJIKU KIBIRU ..... 2<sup>ND</sup> APPLICANT  
SUING AS THE LEGAL REPRESENTATIVES OF THE LATE PATRICK KIBIRU  
MURIITHI**

**AND**

**JANE WANGARI MUNGAI ..... 1<sup>ST</sup> RESPONDENT  
NATIONAL BANK OF KENYA LTD ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before me is a Notice of Motion dated 2<sup>nd</sup> March 2022, filed pursuant to Order 50 Rule 5 of the [Civil Procedure Rules](#), 2010, Sections 3A, Section 79(g) and 95 of the [Civil Procedure Act](#) CAP. 21 of the Laws of Kenya, Article 159 (2) of [the Constitution](#) of Kenya, 2010 where the Applicants, Beatrice Gathoni Muriuki and Alvine Wanjiku Kibiru, are the legal representatives of the late Patrick Kibiru Muriithi.
2. The Applicants are seeking orders, to extend the time to file an appeal against a judgment delivered on October 13, 2021, in Molo CMCCNo. 312 of 2017. They argue that the appeal is meritorious and has a high probability of success. They also state that the delay in filing the appeal was not due to laziness but rather the inability to obtain a copy of the judgment from the registry. They request the Court to grant them leave to appeal out of time and provide for the costs of the application.
3. The Application is supported by a sworn Affidavit of Beatrice Gathoni Muriuki dated 2<sup>nd</sup> March 2022, and is based on the following grounds:



- a. The Appeal raises triable issues and has high chances of success.
  - b. The delay in filing the appeal was not due to laziness but rather the inability to obtain a copy of the judgment from the registry
  - c. The Respondents will not be prejudiced in any way if the orders sought herein are granted as prayed.
  - d. That it is in the interest of Justice and equity that the prayers sought are granted.
4. The Application is opposed by way of filed Grounds of Opposition dated 20<sup>th</sup> December 2022 supported by a sworn Replying Affidavit by Millicent N. Wasonga, as follows:
- i. That the Application was filed in flagrant violation of the well-established legal doctrines and statutory provisions relevant to the subject application and the same is devoid of merit whatsoever or at all.
  - ii. That the Application is fatally defective for want of form and law.
  - iii. That the Application has been lodged in bad faith and is incompetent.
  - iv. That the Application as presently constituted is overtaken by events as the statutory time limit within which an appeal is allowed has since lapsed.
  - v. That the Application as presently constituted will occasion miscarriage of justice and great prejudice to the 1<sup>st</sup> Proposed Respondents if it is allowed.
  - vi. That this Application ought to be dismissed for the foregoing reasons with costs to the Defendant/1<sup>st</sup> proposed Respondent.
5. This Court had directed that the Application was to be heard and determined on the basis of written submissions and parties were to file their written submissions by the 19<sup>th</sup> May 2023.

### **Applicant's Case**

6. The Applicants filed their written submissions on the 9<sup>th</sup> April 2023 contending that, the factors to be considered are highlighted in the case of *Nicholas Kiptoo Arap Korir Salat vs IEBC* & 7 others Application No. 16 of 2014 [2014] eKLR where the honorable judges reiterated the considerations to be made in such a case to be as follows; -
- “ 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 Respondent's if the extension was allowed.
  6. Whether the application has been brought without undue delay



7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time. "
7. The Applicants submit that, although extension of time is not a right of a party. The right being an equitable remedy is in line with the principles of natural justice enshrined in our constitution as well as the right to appeal contained in Article 50 (q) of the constitution.
8. In the case of Visbva Stone Suppliers Company Limited v RSR Stone [2006] Limited [2020] eKLR where the learned judge in discussing the request to allow Applicant to exercise their undoubted constitutionally, underpinned right of appeal out of time adopted the Tanzanian case of Abbas Sherally & Another vs. Abdul Fazaiboy, Civil Application No. 33 of 2003; for the holding inter alia that:
- (i) "the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;
  - (ii) the right to be heard is a valued right; and
  - (iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice."
9. The Applicants submit that, the right of appeal is definite and like other rights clearly enshrined in the constitution, the right to appeal supersedes the technicality of the manner and the time in which the appeal is made. Since the applicant has a meritorious appeal that has a very high chance of success and that it would be a great peril to dismiss the application and appeal without giving the same a proper hearing and determination.
10. That, in giving the reasons for the delay of appeal, the Applicant relies on ground number 4 of the Application and paragraph 7 of the accompanying supported affidavit which emphasizes that failure to appeal on time was not as a result of indolence but rather the inability to procure copy of the judgment from the registry in 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 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. The underlined part of the section applies in this case as it is evident that the failure to file the memorandum of appeal was never indolent or deliberate but rather an event that was out of the control of the Applicant. The Court therefore has the power to determine the same and admit the appeal.
13. That the Respondents via their replying affidavit claim that the memorandum of appeal was filed a year later from the date of judgment which is a blatant lie on their part and ought not to be entertained by the Court.
14. The Applicants submit that, the memorandum of appeal annexed was duly filed on 22<sup>nd</sup> December 2022 which is two months late according to Section 79G of the Civil Procedure Rules contrary to



the declaration of the Respondents. However, the reason for the delay is plausible by dint that it was occasioned by circumstances beyond the Applicant's control.

15. Having satisfied that the delay to appeal was never an afterthought, the same should not be rendered the memorandum of appeal nugatory as was envisioned in the case of *Almas Hauliers Ltd v Abdulnasir Abukar Hassan* (2017 eKLR a delay of four months was found not to be inordinate.
16. Reliance is placed on the case of *Stecol Corporation Limited v Susan Awuor Mudembe* [2021] eKLR the learned judge determined as follows:

“Courts have over time excused parties where such delay is not inordinate as is in this Case and even in cases where there is inordinate delay, depending on the circumstances of each case and reasons for the delay, Courts have accorded parties an opportunity to be heard on appeal”.

17. That this is a Court of justice that ought to consider the interest of both the Applicant and the Respondent and that, the delay is not inordinate in consideration of the fact that the memorandum of appeal though filed out of time was lodged for purposes of exploring the right of appeal and interests of justice.
18. Section 95 of the Civil Procedure Rules provides that:

“Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Act, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

This is in line as read together with Order 50 Rule 6 of the Civil Procedure Rules 2010 that provides:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the Court, the Court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.....”

19. That the Court has the discretionary powers to enlarge the time and admit the appeal out of time in pursuit of the ends of justice. Delay especially when it's not in the fault of a litigant should not be a ground for prejudice on their part.
20. Further that no prejudice will be suffered by the Respondent. On the contrary, the Respondent shall be granted an opportunity to defend the appeal with merit and that the Applicant's appeal out of time should be allowed as prayed.
21. That the delay to appeal the judgment dated 13<sup>th</sup> October 2021, was not inordinate but rather unfortunate as the delay to procure the judgment, which was instrumental in filing the appeal as well as the record of appeal was acquired after the statutory limit of time had lapsed despite the Applicant's efforts to procure the same.
22. It is in the Court's power, ability and discretion as conferred to it by *the constitution* to allow the appeal with undue regard for lateness or otherwise technicalities
23. In Conclusion the Applicants submit that, they deserve the exercise the Court's discretion to admit the appeal out of time which is in the interest of justice notwithstanding that plausible explanation has been rendered.



24. The Applicant's urge that the Court invokes its inherent discretion to set aside the proceedings and judgment as captured in Section 3A of the [Civil Procedure Act](#) states otherwise:

"Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

25. In finality of submission the Applicants rely on the locus classicus case of [Kamlesh Mansukhalal Damki Patni Va Director of Public Prosecution & 3 Others](#) (2015] eKLR, the Court of appeal held that:

"It must be realized that Courts exist for the purpose of dispensing justice. Judicial officers derive their judicial power from the people or as we won't to say in Kenya, from Wanjiku, by dint of Article 159 (1)

Constitution which succinctly states that "judicial authority is derived from people, and vests in, and shall be exercised by the Courts and tribunals established by or under this Constitution.

Judicial officers are also state officers, and consequently, are enjoined by Article 10 of *the Constitution* to adhere to national values and Principles of governance which require them whenever applying or interpreting *the Constitution* or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity, are upheld.

For these reasons, decisions of the Courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve. Such decisions may involve only parties inter se (and hence only parties' interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the Court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice." (Emphasis added)..

## **Respondents Case**

26. The Respondent opposed the Application by way of filed Grounds of Opposition dated 20<sup>th</sup> December 2022 supported by a sworn Replying Affidavit by Millicent N. Wasonga together with the 1<sup>st</sup> Respondent's written submissions dated 2<sup>nd</sup> May 2023 urging that, the Applicant's Application lacks merit, is frivolous, an abuse of Court's process and should be dismissed at the first instance, that the instant suit was dismissed vide a judgment that was delivered on 13<sup>th</sup> October 2021 and it's been more than a year since the judgment was delivered.

26. That the Applicants neglected to file an appeal within the statutory time limit and their indolence should not be entertained at the expense of justice. That the Applicants slept on their right of appeal and the decision to appeal out of time is merely an afterthought as no evidence has been tendered in support of the allegations of having been unable to secure a copy of the judgment on time.



26. As to whether there is good and sufficient cause for not filing the appeal in time, the Applicants submit that, the main provision of the law governing the application for leave to appeal is set out by Order 43 Rule 3 of the [Civil Procedure Rules](#) which states thus:

“An application for leave to appeal under Section 75 of the [Act](#) shall be in first instance be made to the Court making the order sought to be appealed from, either orally at the time the order is made or within fourteen days from the date of such order.”

27. That, the judgment sought to be appealed from was delivered on 13<sup>th</sup> October 2021 while the instant application seeking leave to appeal out of time was filed more than a year later.

28. That, the only ground cited by the Applicant for not filing the appeal within the statutory time limit is the inability to procure a copy of the judgment in time.

29. That, the Applicants have not tendered any evidence to confirm the said allegation since the letter dated 1<sup>st</sup> February 2022 requesting for a copy of judgment relied on by the Applicants is in reference to a letter that is dated 31<sup>st</sup> January 2021 way before the judgment herein was delivered on 13<sup>th</sup> October 2021.

30. That it's therefore clearly evident your lordship that the Applicants have been indolent and the decision to file the instant application was an afterthought. The Applicants have not demonstrated any reasons for failing to file the intended appeal within the stipulated time limits and should therefore not be allowed to forestall the cause of justice by filing unnecessary applications which are a misconception and a waste of the Court's time.

31. As to whether there are any prospects of success of the intended appeal? The Respondents rely on the case of [Bandali T/A Shimon Enterprises Vs. Wills Civil Application](#) No. 12 of 1991 cited with approval the ruling in *Sango Bay Estates Ltd. vs. Dreder Bank AG* (1971) EA in which S. Pry J. stated the principle upon which an application for leave to appeal may be granted as follows;

“As I understand it, leave to appeal from an order in civil proceedings will normally be granted where prima facie it appears that there are grounds of appeal which merit serious judicial considerations...”

32. That the prospects of success of the Appeal is minimal. The Court in the iconic case of *Swain vs. Hillman* (2001)1 AII ER 91 cited:

“That a real prospect of success, means that the prospect for the success must be realistic rather than fanciful. The Court considering a prospect for permission is not required to analyze whether the grounds of the Proposed appeal will succeed, but merely whether there is real prospect of success.”

33. That the intended appeal does not have any real prospects of success and in the circumstance, the instant application ought to be dismissed with costs to the 2<sup>nd</sup> Respondent.

### **Analysis & Determination**

34. I have evaluated the reason offered for the delay. I find and hold that the delay in obtaining certified proceedings and judgment cannot be faulted on the Applicants. I find and hold that the delay is excusable and that it has been satisfactorily explained. I also find that the Application meets the tests for the Court to exercise its discretion in the Applicants' favor. Accordingly, I allow the Notice of Motion



dated 2<sup>nd</sup> March 2022 and order that the intended appeal be filed and served within 30 days from the date of this ruling.

It is so ordered.

**SIGNED, DELIVERED VIRTUALLY ON TEAMS PLATFORM ON THIS 24<sup>TH</sup> DAY OF  
OCTOBER 2023**

.....

**MOHOCHI S.M**

**JUDGE**

