



REPUBLIC OF KENYA



**Ogola v Okoth & 2 others (Miscellaneous Application E003 of 2024)
[2024] KEHC 14864 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 14864 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
MISCELLANEOUS APPLICATION E003 OF 2024**

A. ONG'INJO, J

OCTOBER 17, 2024

BETWEEN

SUSAN AKINYI OGOLA APPELLANT

AND

NICHOLAS OKOTH & 2 OTHERS RESPONDENT

RULING

1. The Application is seeking that the court extends time to appeal out of time is dated 25th January, 2024.
2. The Application is brought pursuant to Sections 1A, 1B, 3, 3A and 79G of the *Civil Procedure Act* and Orders 50 Rule 688 and Order 51 Rule 1 of the *Civil Procedure Rules*.
3. The Applicants case is that she was dissatisfied with the judgment and/or decree of the trial court on Rongo PMCC No. E002 of 2020 on liability and intends to appeal against the same that delay in filing appeal was due to the fact that the Advocates didn't reach Applicant in time to advise and take further instructions. That by the time Applicant learnt of the judgment time within which to appeal had lapsed.
4. The Applicant argued that her appeal had overwhelming chances of success and that the Respondent would not suffer any prejudicial if orders sought are granted.
5. Judgment against which the Applicant intends to appeal was delivered on 20.9.2023. The Applicant says that her Advocate did not reach out as she had lost her phone and that failure to lodge appeal on time was occasioned by circumstances beyond her control. She said that her intended appeal raised salient and/or pertinent issues of facts and law and hence the same has overwhelming chances of success shown on draft Memorandum of Appeal.
6. The Respondents were granted leave to file response within 14 days and directions taken that the application would be canvassed by way of written submissions.



7. The Respondent did file Replying Affidavit sworn on 14th March, 2024 and confirmed he was beneficial owner of motor vehicle.
8. The Applicant filed submissions dated 8th May 2024 and argued that 3 months and 4 days delay cannot be said to be inordinate delay and the same was because of unfortunate situation on the part of the Applicant and she should not be punished for a situation which was beyond her control.
9. The Applicants urged that they should be granted an opportunity to be heard and appeal be determined on merit.
10. The Applicant cited and relied on the holding of *Agip (Kenya) Limited v. Highlands Tyres Ltd* [2001] eKLR where it was stated:-

“Delay is a matter of fact to be decided on the circumstances of each case. Where a reason for the delay is offered, the court should be lenient and allow the Plaintiff an opportunity to have his case determined on merit. The court must also consider whether the Defendant has been prejudiced by the delay.”

11. The Applicants also submitted that the grant of leave to appeal out of time was as discretionary order which the court can grant upon weighing the Applicants right to appeal and the prejudicial that might be occasioned to the Respondent.
12. That right to appeal is a right to access justice and a party should only be denied the said right if it is proved that it would cause irreparable loss to the Respondent and/or occasion injustice to the parties.
13. The Applicants asserted that the Respondent had not alluded to any prejudice likely to be suffered should the application be allowed. The court was urged to find that the scale tilts in their favour. In *Paul Muthini Kimongo v Flex Pac International limited* [2019]eKLR the court cited with approval the decision in *Ivita v Kyumbu* [1984] KLR 441 where (Chesoni J held;

“The test is whether delay is prolonged and inexcusable, and if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and the defendant, so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents and, or witnesses may be and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however, satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse or the delay, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time.”

14. The Applicants also submitted that they had arguable appeal and supported their positions with the holding in *Joseph Gitabi Gachau & Another v Pioneer Holdings (A) Limited & 2 others* (2009) eKLR.

“On 4th April, 2008, a learned single Judge of this Court in an application for extension of time to lodge the appeal, held that the applicants' intended appeal was arguable and not frivolous. On our part, after considering the rival submissions by the parties, the ruling of the learned Judge below together with pleadings we are satisfied that eth appeal is indeed



arguable. This, in essence, does not mean an appeal which must necessarily succeed, but of course, one which ought to be argued fully before the Court.”

15. The Respondent did not file submissions. This court has considered the application, the response to the application as well as the Applicants submissions and the cited authorities and find that the application was filed within reasonable period of time and the Applicant cannot be said to have delayed inordinately, The Applicant is therefore granted leave to file appeal out of time within 14 days from today’s date.

DELIVERED DATED AND SIGNED AT MIGORI THIS 17TH DAY OF OCTOBER 2024.

A. ONG’INJO

JUDGE

Ruling delivered in the presence of

Mr. Watama Advocate holding brief for Mr. Odingo for the Applicant

Mr. Sam Onyango & Co Advocate for Respondent

Victor/ Lola – Court Assistants

