



Uniken Enterprises Ltd v Savali & 2 others (Miscellaneous Civil Application E011 of 2023) [2024] KEHC 16651 (KLR) (10 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16651 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
MISCELLANEOUS CIVIL APPLICATION E011 OF 2023
JL TAMAR, J
DECEMBER 10, 2024**

BETWEEN

UNIKEN ENTERPRISES LTD APPLICANT

AND

ALICE KAMANTHE SAVALI 1ST RESPONDENT

**JOSEPH SAVALIKAVAKA NZUKI (SUING AS LEGAL REPRESENTATIVE OF
THE ESTATE OF JOHN MUNYAO WAMBUA - DECEASED) 2ND RESPONDENT**

SPARATECH TRADING COMPANY LTD 3RD RESPONDENT

RULING

1. This ruling relates to the Notice of Motion application dated 17th January 2023 and filed in court on 16th March 2023 application. The application is filed pursuant to section 79G, 1A and 3A of the [Civil Procedure Act](#) and Order 50 Rules 6, Order 51 Rule 1, and all other enabling provisions of the Law, seeking for the following orders;
 1. That the court grant the applicant leave to file and serve an Appeal out of time in respect of the Judgement in the Chief Magistrate Court at Kajiado CMCC No 41 of 2020 delivered on 25th October 2022
 2. That the draft Memorandum of Appeal herewith attached be deemed as properly filed and / or be filed as per the directions of the court.
 3. That pending the inter-parties hearing and final determination of this application, the court do grant a stay of execution of the judgement and/ or decree of the lower court in Kajiado CMCC No 41 of 2020.
 4. That there be a stay of execution of the judgement and/or decree in Kajiado CMCC No. 41 of 2020 pending the determination of the intended appeal.



2. The application is based on the grounds on the face of the application and reiterated in the supporting affidavit of Jeniffer Catherine Ombonya. The applicants contend that the reason for delay in filing an appeal challenging the decision of the magistrate court was as a result of confusion and misunderstanding as to when the judgement would be delivered. For instance, the applicant stated that he had honestly believed that the matter would be mentioned on 3rd of November 2022 for purposes of taking a date for judgement whereas the judgement had been scheduled for 25th October 2022 and because of the confusion, the applicant filed its submissions on 25th October, 2022 unaware that it was the judgement date. It is contended that the mistake of counsel should not be visited on the applicant.
3. The application is opposed by the Respondent who filed a replying affidavit sworn by Alice Kamanthe Savali on 23rd June 2023 and filed in court on 24th July 2023 arguing that the application the subject of this ruling is unmerited, an abuse of the court process and otherwise frivolous. The Respondent contend that the matter came up for hearing on 16th June 2022 where parties were heard and a mention date of 21st July 2022 given to confirm filing of submissions. On the date the matter came for mention to confirm filing of submissions a further date was given as the parties had not complied. On 8th September the court reserved a ruling for 25th October 2022 and delivered the same as scheduled in the absence of both counsel for the parties. The Respondent contend that the applicant application is meant to frustrate the 1st and 2nd Respondents efforts to execute the decree and enjoy the fruits of the court's judgement.

Applicant Submissions

4. The applicant filed submissions reiterating the averments in the affidavit of Jenipher Catherine Ombonya and the grounds on the face of the application. It is submitted that the failure to file appeal within time was occasioned by the confusion relating to the proceedings before the magistrate court. It is argued that counsel for the applicant had no knowledge of the date set for delivery of judgement and that he had mistakenly taken the 25th October 2022 as the date for the parties to file their respective submissions. That explained the reason why the applicant counsel filed his submissions electronically on 24th October 2022 a day before the schedule date only to learn on 15th November 2022 and upon inquiry, that the judgment had been delivered on 25th October 2022 as aforesaid.
5. The applicant further contends that the intended appeal as demonstrated in the memorandum of appeal, raises weighty matters of law and has high chances of success particularly on the issue whether the magistrate had jurisdiction to deal with the matter which in its view falls under WIBA.

Respondents Submissions

6. The Respondent on the other hand filed their submissions and set out in details the chronology of the events as captured in the magistrate court proceedings to show that the applicants had slept on their rights and were all along aware of the delivery of the judgement. Further that the applicant has not explained away the inordinate delay of three months in filing an appeal from the time they became aware of the judgement of the court. The respondent argues that the memorandum of appeal was not file in accordance with the law and that the same should not be considered.
7. I have given due considerations to the party's respect case and their submissions which I have found useful in determination of this application. An application for leave to file appeal out of time, under the provisions of section 79G of the Civil Procedure Act, is discretionary and the court in the exercise of such discretion is guided by the principles enunciated in the Supreme Court case of Nicholas Kiptoo Korir Arp Salat vs IEBC & 7 Others [2014]. The Court in stated as follows;



8. The underlying principles a court should consider in exercise of such discretion include:
 1. Extension of time is not a right of any 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 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 if the extension is granted;
 6. Whether the application has been brought without undue delay.”

9. Further the same principles were stated in *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi*, the Court of Appeal held 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.”

10. An application under section 79G of the *Civil procedure Act* contemplates in its proviso the filing of a substantive Appeal and an application made in that appeal seeking the admission of the appeal out of time. See generally the case of *Gerald M'limbine vs. Joseph Kangangi* [2008] eKLR, where the court stated that;

My understanding of the proviso to section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal, and at the same time seek the court’s leave to have such an appeal admitted out of the statutory period of time. The proviso does not mean that an intending appellant first seeks the court’s permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the court’s process under section 79B which says:

“79B Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree part of a decree or order appealed against he may notwithstanding section 79C, reject the appeal summarily”

It seems to me therefore that it is not open to the court to exercise its discretion under the proviso to section 79G of the *Civil Procedure Act* except upon the existence and perusal of the appeal to be “admitted” not to be “filed out of time.” Admission presupposes that the appeal has been filed and will be “admitted” for hearing after a judge has established under Section 79B that there is “sufficient” ground for interfering with the decree part of a decree or order appealed against.”



To allow the Applicant's Motion would be to defeat entirely the requirements of Section 79B of the *Civil Procedure Act* and indeed Section 79G itself upon which the Applicant relies.

11. I have however come across authorities of this court where the strict application of section 79G of the *Civil Procedure Act* was applied in conformity to the requirement of Article 159 of the *Constitution*. In *Raila Odinga vs. Independent Electoral and Boundaries Commission & 4 Others* [2013] eKLR:

The essence of that provision is that a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast in stone and which suits all situations of dispute resolution. On the contrary, the court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and requirements of a particular case, and conscientiously determine the best outcome.”

12. Although the application dated 17th January 2023 offends the proviso to section 79G of the Act the *Constitution* requires that such infraction shall not be allowed to impede substantial justice.
13. Has the applicant satisfied the requirement for extension of time? I have perused the Magistrate court file and established that on 14th April 2022, the case was fixed for hearing on 16th June 2022 and on that date, in presence of both counsel for the parties the case commenced. Two witnesses testified and were extensively cross examined by Mr Mariaria for the defendant/applicant. At the close of the plaintiff/Respondent's case, Mr Mariaria informed the court that they shall not be calling any witness and closed the defendant case. The court adjourned the matter to 21st July 2022 to enable parties file their respective submissions. On the said date counsel for the applicant was present and informed the court that they had not filed their submission and sought more time to do so. The court acceded to the request and gave another date of 8th September 2022. On that date the respondent counsel was present but the applicant counsel was absent. The court gave a further mention date for 22nd September 2022 and on that date and in presence of both counsels, the court reserved judgement for 25th October 2022 which was duly delivered as scheduled. Contrary to the averment by the applicants, the suit according to the proceedings of the magistrate court was never listed for mention on 3rd November 2022 and had the applicant perused the court file he would have established this fact.
14. It is therefore not correct as argued by the applicant, that the matter was scheduled for filing and / or confirming the filing of submissions on 25th October 2022. The applicant counsel was present in person on the date the court reserved the judgment date after the advocates failed on three occasions to file their respective submissions.
15. There is therefore no good and reasonable explanations offered for the delay in filing the appeal.
16. As to whether the application was brought without undue delay, an examination of the record and the applicants averments shows that on 11th November 2022, counsel for the applicant wrote to the court inquiring about the listing of the case on 3rd November 2022 for purposes of filing submissions by the applicant and receipt of the judgement notice in the circumstances. On 15th November 2022, counsel was informed that judgement had been delivered and a pdf copy thereof attached as requested. Therefore, the applicant became aware of the existence of judgement and took no steps to challenge the decision until three months later when an application for leave to file an appeal out of time was made. I am in the circumstances of this case not convinced that there were good and reasonable explanations for the delay in filing the present application. I do not wish to delve into contention that the intended



appeal is arguable or not on account of it falling within WIBA Jurisdiction having found that there was no good and reasonable explanation for the delay.

17. In the circumstances, I find no merit in the application dated 17th January 2023 and the same is Hereby Dismissed with Cost.

DATED AND DELIVERED AT KAJIADO THIS 10th DAY OF DECEMBER 2024.

JOHN T LOLWATAN

JUDGE

