



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL DIVISION**

**MISC. CASE NO. E010 OF 2021**

**CHARLES MUGANE GACHIGUA.....APPLICANT**

**VERSUS**

**DOUGLAS MAINA MIHU.....1<sup>ST</sup> RESPONDENT**

**CHARLES KARANJA.....2<sup>ND</sup> RESPONDENT**

**MARY WANJARU MWANGI.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The applicant filed the notice of motion dated 12<sup>th</sup> January 2021, seeking an order granting her leave to file an appeal out of time against the ruling and/or orders issued on 30<sup>th</sup> April 2020 by Mr. D.O Mbeja Senior Resident Magistrate Milimani Commercial Courts Civil Suit No. 4152 of 2017. It is premised on the grounds on its face and the supporting affidavit of Daniel Wokali Mathenge her advocate.
2. A summary of the grounds of affidavit is to the effect that the intended appeal is arguable and steps have been initiated in getting certified copies of the proceedings, ruling and Judgement.
3. Further that an application dated 18<sup>th</sup> November 2019 (DWMI) was filed seeking to have the Judgement reviewed. A ruling was only delivered on 30<sup>th</sup> April 2020 after being deferred from 23<sup>rd</sup> January 2020 without the parties being notified. The deponent only learnt of the ruling upon being served by the respondent's counsel on 16<sup>th</sup> June 2020 (DWM III A and B). The said ruling dismissed the application dated 18<sup>th</sup> November 2019.
4. He therefore avers that the delay in filing the appeal was not deliberate.
5. In a replying affidavit sworn on 23<sup>rd</sup> February 2021 the 1<sup>st</sup> respondent opposed the application saying it was an abuse of the court process, baseless and a non – starter and bent on denying him the enjoyment of the fruits of the Judgement. Further he has deponed that the applicant has not conclusively explained the cause for the ten (10) months delay in filing the appeal.
6. He depones that the applicant had been granted leave to file an appeal by a ruling dated 8<sup>th</sup> January 2021. He suggests that the applicant be ordered to pay him 2/3 of the decretal sum and the balance be deposited in a fixed deposit joint account of both advocates or execution to proceed.
7. Both counsel filed written submissions in respect of the application. Mr. Mathenge for the applicant in his submissions dated 5<sup>th</sup> March 2021, contends that the reason for the delay has been fully explained in the applicant's supporting affidavit. The main reason is the delivery of the ruling on 30<sup>th</sup> April 2020 without the knowledge of the parties.
8. He has submitted that there are clear guidelines on what should be considered in an application for extension of time for filing an appeal. He relied on the case of **Samwel Mwaura Muthumbi Vs Josephine Wanjiru Ngugi and another {2018} eKLR**, Sections 79G and 95 of the Civil Procedure Act. Counsel argues that the explanation by the applicant fits well in the above guidelines. That there was no ten (10) months delay as alluded to by the respondent.
9. On the arguability of the appeal its his submission that all that the applicant is supposed to show is that the appeal is arguable and not that

it has a high probability of success. He referred to the case of **Samuel Maura Muithimbi (Supra)** where it was held that:

“At this point, the Applicant is not required to persuade the Appellate court that the intended or filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal: a demonstration that the Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict. The Applicants have easily met that standard. I believe that the Applicant has discharged this burden.”

10. Counsel has also submitted that the respondent has not explained what prejudice he will suffer if the application is allowed. He adds that the respondent having been aware of the delivery of the ruling on 30<sup>th</sup> April 2020 should not have waited for two (2) months to notify him.

11. Relying on Articles 50, and 159 (2) (d) of the Constitution he contends that parties should be given a chance to fairly prosecute their cases which are then determined by the court on merit. To support this argument, he cited the case of **Philip Keipto Chemwolo and another vs Augustine Kubende {1986} eKLR** where it was held:

“It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits. I think the broad equity approach to this matter is that unless there is a fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court is often said, exists for the purpose of deciding the rights of the parties and not for the purposes of imposing discipline.”

12. On the issue of the ruling of the 8<sup>th</sup> January 2021 he submitted that the same was in respect of leave to file an appeal while the present application is for leave to file appeal out of time, in accordance with section 75 of the of the Civil Procedure Act and Order 43 of the Civil Procedure Rules.

13. M/s Mudaye for the 1<sup>st</sup> Respondent in her submissions dated 17<sup>th</sup> March 2021 opposed the application dated 12<sup>th</sup> January 2021. She relies on the replying affidavit by Douglas Maina Muhiu the 1<sup>st</sup> Respondent. The first issue she raises is that a similar application had been filed by the applicant and he was granted leave to file appeal out of time on 8<sup>th</sup> January 2021. He has not filed the said appeal.

14. Citing the case of **Mwangi Vs Kenya Airways Ltd {2003} KLR** she set out the factors to be considered in an application of this nature. On the issue of delay, she has submitted that the appellant has not explained why it took him six (6) months after being notified of the ruling to file the instant application. That he has also not explained why there was a delay in filing an appeal even after their application dated 26<sup>th</sup> June 2020 was allowed.

15. Counsel argues that being granted the orders sought in such an application is not a matter of cause as was stated in the case of **Monica Malel and another Vs Republic Eldoret Civil Application No. 246 of 2008** where the late Aganyanya J.A stated as follows:

“When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show.”

16. It is counsel’s contention that allowing this application will highly prejudice the 1<sup>st</sup> respondent who has been walking on the corridors of Justice over this matter since 2017 without any compensation despite the Judgement. He asks the court to balance the rights of the two parties as was held in the case of **M/s Portreitz Maternity Vs James Karanga Civil Appeal No 63 of 1997** where the court said:

“That right of appeal must be balanced against an equally weighty right that of the plaintiff to enjoy the fruits of the Judgement delivered in his favour. There must be a just cause for depriving the plaintiff of that right.”

17. He has also submitted that the application is resjudicata as a similar application dated 26<sup>th</sup> June 2020 was decided on 8<sup>th</sup> January 2021. On this he referred to the case of **E.T. Versus Attorney General and another {2012} eKLR** and asked the court to dismiss the application.

18. In the alternative and without prejudice and in the event that the court found merit in the application he asked the court to be persuaded by the reasoning by Justice R.E. Aburili in the case of **Edward Kamau and another Vs Hannah Mukui Gichuki Misc. Application No 78 of {2015} eKLR**. He therefore asked the court to have the applicant pay part of the decretal sum of Ksh. 1,120,812/06, to the 1<sup>st</sup> respondent and deposit the other amount of Ksh. 560,306/33 in a fixed joint interest account.

19. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not file any responses to this application and so did not participate in the arguments.

### **Analysis and determination**

20. Upon considering the application, grounds, affidavits, annexures, submissions and cited authorities I find the main issue for determination to be whether the applicant has met the threshold for grant, of the orders sought.

Section 95 of the Civil Procedure Act provides:

“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.”

Section 79G of the Civil Procedure Act provides:

“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.”

21. The factors to be considered in an application for leave to file an appeal out of time have been set out in numerous decisions which have been listed by both counsel appearing herein. The clear factors are stated in **Samuel Mwaure Muthimbi (Supra)** and reinstated in the Supreme Court case of **Nicholas Kiptoo Arap Korir Salat Vs IEBC and 7 others, {2014} eKLR.**

22. In **Mwangi Vs Kenya Airways Ltd {2003} KLR** the court of Appeal suggested the following as some of the factors to be considered in an application seeking leave to file appeal out of time.

- a) The period of delay,
- b) The reason for the delay,
- c) The arguability of the appeal,
- d) The degree of prejudice which could be suffered by the respondent if the extension is granted;
- e) The importance of compliance with time limits to the particular litigation or issue,
- f) The effect if any on the administration of Justice or public interest if any is involved.

23. I will now consider the applicants’ application for extension of time against these factors. It is the Respondent’s submission that this application is resjudicata by virtue of the application that was decided on 8<sup>th</sup> January 2021. None of the parties availed a copy of that ruling before this court. The court does not therefore know the contents of the said ruling and the conditions issued to the applicant. The respondent in his replying affidavit at paragraph 12 deponed to having annexed the said ruling of 8<sup>th</sup> January, 2021. A perusal of the annexures only identifies with the ruling of 30<sup>th</sup> April 2020 the subject of the intended appeal. Even the alleged application seeking leave before the trial court has not been annexed to the notice of motion.

24. The application before this court has been brought under sections 79 G and 95 G of the Civil Procedure Act seeking leave to file appeal out of time. The applicant explained the failure by the trial court to notify him of the date of delivery of the ruling and/or even the fact of the delivery of the said ruling, which is not disputed by, the respondents. It’s the 1<sup>st</sup> respondent’s counsel who notified the applicant on 16<sup>th</sup> June 2020 of the delivery of the ruling two months after the act. The application dated 26<sup>th</sup> June 2020 was promptly filed and the ruling delivered on 8<sup>th</sup> January 2021.

25. Considering all these happenings I don’t think that the delay was deliberate, despite the period taken. I have further looked at the memorandum of appeal filed. It raises issues for determination by this court. I find the said issues to be arguable and I can’t dismiss them for being idle. The applicant should be given an opportunity to articulate them before the appeal court.

26. Both the 1<sup>st</sup> respondent and his counsel have raised the issue of payment of the decretal sum, as a condition for grant of leave to appeal in case the application is found to be meritorious. The notice of motion dated 12<sup>th</sup> January 2021 makes no mention of a prayer for stay of execution. This court cannot therefore grant orders that have not been sought.

27. The upshot is that the application dated 12<sup>th</sup> January 2021 is allowed in terms of prayer no.2

- i) The Appeal to be filed within 10 days.
- ii) The applicant to pay the costs of this application.

**DELIVERED ONLINE, SIGNED AND DATED THIS 8<sup>TH</sup> DAY OF JULY, 2021 AT NAIROBI**

**H. I. ONG’UDI**

**JUDGE**