



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**MISCELLANEOUS CIVIL CASE NO. E030 OF 2020**

**BETWEEN**

**1. SYMON GICHUKI**

**2. ESTHER MUMBI** (*suing as the legal administrators of the estate of*

**GEORGE KARURI GICHUKI (DECEASED)**.....**APPLICANTS**

**VERSUS**

**FLORENCE KASIVA MUTAVI**.....**RESPONDENT**

**RULING**

1. The two applicants have filed the Notice of Motion application dated 1<sup>st</sup> December, 2002. They seek that leave be granted by this Court to file their appeal out of time. The judgment they seek to appeal against was delivered on 29<sup>th</sup> April, 2020 by Ruiru SPM court in Civil Case No. 101 of 2019. The application was served on the respondent but the respondent failed to oppose it and failed to attend court at the hearing.

2. The applicants' application is supported by the affidavit of Michael Mwangi, their advocate. In that affidavit, the advocate deponed that, although the judgment was delivered on 29<sup>th</sup> April, 2020, the same was not emailed to the advocate. That the advocate lost contact with the applicants due to COVID-19 pandemic. That following relaxed "COVID-19 measures", he obtained instructions from the applicants to file proposed appeal. That is the totality of the information given to the court by the applicants.

3. Section 79G of the Civil Procedure Act requires an appeal to the High Court from the subordinate court to be filed within 30 days from the date of the decision. That section is in the following terms:-

***“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against excluding from such period anytime which the lower court may certify as having been requisite for 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.’”***

4. A close and careful consideration of that Section 79G will reveal that the High Court is afforded discretion to admit an appeal out of time. That discretion presupposes that an appeal is in the first instance filed and the appellant then seeks leave to have that appeal admitted out of time. This indeed was the holding which I find persuasive in the case **GERALD M. LIMBINE VS. JOSEPH KANGANGI (2008) eKLR** as follows:-

***“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:-***

***‘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."*

5. The applicants' application will fail because there is no appeal filed capable of being admitted out of time as stated in Section 79G.
6. The application will also fail because the applicants failed to provide any material upon which this Court could exercise its discretion in their favour.
7. Although the applicants, through their advocates stated that the judgment was not emailed to them, they failed to state how and when they became aware of that judgment. They also did not attach a copy of that judgment; its existence therefore remains unknown. The Court of Appeal in the case ANNAH MWIHAKI WAIRIMU VS. HANNAH WANJA WAIRURU (2017) eKLR discussed what ought to be considered when an application is made for leave to file an appeal out of time and stated:-

*"In LEO SILA MUTISO V ROSE HELLEN WANGARI MWANGI, (Civil Application No. Nai. 255 of 1997) (unreported); this Court stated thus regarding how such discretion is to be exercised.*

*"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".*

8. The Notice of Motion dated 1<sup>st</sup> December, 2020, for the reasons set out above, is without merit and is dismissed.

**RULING DATED and DELIVERED at KIAMBU this 11<sup>th</sup> day of NOVEMBER, 2021.**

**MARY KASANGO**

**JUDGE**

Coram:

Court Assistant: Maurice

For Applicants: Ms. Muthoni

For Respondent: N/A

**COURT**

Ruling delivered virtually.

**MARY KASANGO**

**JUDGE**