



**Hezekiel Victor Obudo Tago (suing as the Father and next of friend  
of Daniel Obudo Tago v Musyimi (Miscellaneous Application  
103 of 2021) [2021] KEHC 364 (KLR) (14 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 364 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
MISCELLANEOUS APPLICATION 103 OF 2021  
MW MUIGAI, J  
DECEMBER 14, 2021**

**BETWEEN**

**HEZEKIEL VICTOR OBUDO TAGO (SUING AS THE FATHER AND NEXT OF  
FRIEND OF DANIEL OBUDO TAGO ..... APPELLANT**

**AND**

**RICHARD WAMBUA MUSYIMI ..... RESPONDENT**

**RULING**

1. By Notice of Motion dated 24<sup>th</sup> June 2021, the Applicant sought the following orders:-
  1. THAT the Court grants the Applicant leave to file appeal out of time against the Judgment of Hon. B. Kasavuli (PM) delivered on 1<sup>st</sup> April, 2021 in Mavoko Chief Magistrate Court Civil case No. 442 of 2019.
  2. THAT the costs of this application be provided for.
2. The application is based on grounds inter alia that the delay to file the appeal was occasioned by the fact that the office file was misplaced and could not be traced in the office.
3. The application is supported by the Applicant's advocate Musili Mbiti sworn on the same as day. He deposed that he was given instructions by the Applicant to appeal against the Trial Court judgment but unfortunately during the process of preparing the appeal, the office file was misplaced at the office. According to the deponent the delay was not the Applicant's making but due to the time it took to trace the file. According to the deponent the intended appeal raises pertinent issues of both law and fact and the appeal is arguable with high chances of success. He deposed that the delay is not inordinate. The Respondent will not suffer any prejudice. According to deponent, the Applicant is willing to abide with any conditions as may be set by this court.



## REPLYING AFFIDAVIT

4. In opposition to the application, on 19<sup>th</sup> July, 2021, the Respondent filed a replying affidavit he swore on 16<sup>th</sup> July, 2021. He deposed that the Applicant failed to take steps to file the appeal despite having the judgment in hand well before the limitation of 30 days had lapsed. He believes that the draft Memorandum of Appeal does not raise any issues of fact or law that would need to be determined by an appellate court. The Respondent believes that the Applicant has been indolent. According to the Respondent, he is being prejudiced since he is incurring costs in this proceedings. In the alternative, should the application be determined in favour of the Applicant, the Respondent deposed that he is entitled to thrown away costs.

## APPLICANT'S SUBMISSIONS

5. In support of the application, it is submitted by Applicant's advocate that the delay to file the appeal was neither intentional nor the Applicant's indolence since he had been given instruction to file appeal but the file could not be traced in the office. According to the advocate, the explanation is plausible and satisfactory, Reliance is placed on the case of Civil Application No. NAI.98 of 2013, *Aviation Cargo Support Limited vs St. Mark Freight Services Limited*.
6. It is submitted that the intended appeal as per the draft Memorandum of Appeal raises pertinent issues for determination. The delay was not inordinate and a reasonable explanation for the delay has been offered by the Applicant's advocate. Reliance was placed on Joel Ngugi J. decision in Misc. Civil Application No. 108 of 2017, *Samule Mwaura Muthumbi vs. Josephine Wanjiru Ngugi & Another* [2018] eKLR.
7. The advocate urged the court to allow the Applicant file the intended appeal out of time.

## RESPONDENT'S SUBMISSIONS

8. It is submitted by the Respondent's advocate that an office file is not needed in preparing a Memorandum of Appeal but the advocate's knowledge of the reasons why the Trial Court held as it did. According to Respondent's advocate, the Applicant's advocate did disclose when the office file was traced. It is submitted that whether leave should be granted, justice ought to be done to all parties. Reliance was placed on the case on *Donald O. Raballa vs. Judicial Service Commission & Another* [2018] eKLR where the court held that it behoved (an advocate or his office) to move with alacrity to save the situation before a court of equity. Further reliance was placed on the decision of Wambuzi JA(as he then was) in *AO Menya vs. McCreas Ltd*[1978] eKLR where the Judge in dismissing a similar application observed that there was lack of due diligence on the part of an advocate did not amount to sufficient reason. Lack on the part of the advocate and their clerk in taking steps to see that the notice of appeal was filed in time does not amount to a reason for delay.
9. According to Respondent's advocate, there was no sufficient cause shown by the Applicant as stated by Madan JA (as he then was) in *Belinda Murai & 9 others vs. Amos Wainaina* [1979] eKLR. It is therefore urged that due to lack of cogent reasons offered by the Applicant or his advocate, the court should not exercise its discretion in favour of the Applicant. It is submitted the Respondent will suffer unnecessary costs hence against equity and justice to allow the application. The Respondent urged the court to dismiss the application.

## DETERMINATION

10. I have considered the application, affidavits in support and in opposition to and the written submissions.



11. According to the Applicant’s advocate, the file had been misplaced in the office and by the time it was found the stipulated period of 30 days required for an aggrieved party to file an appeal had already lapsed.

12. 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 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.”

13. What is good and sufficient cause? In *Wachira Karani vs. Bildad Wachira* [2016] eKLR Mativo J. held that:

“Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause...” See *Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others* [1964] EA 633 and *Daphne Parry vs. Murray Alexander Carson* [1963] EA 546.

14. The principles to be considered in exercising the discretion whether or not to enlarge time are well set out in *First American Bank of Kenya Ltd vs. Gulab P Shab & 2 Others* Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65 where the court stated the principles to be:-

“(i) the explanation if any for the delay;

(ii) the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;

(iii) Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.”

15. In the same vein, the Supreme Court of Kenya in the case of *County Executive of Kisumu vs County Government of Kisumu and 8 Others* [2017] eKLR held:-

“[23] It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat’s case to which all the parties herein have relied upon. The Court delineated the following as:

“the under-lying principles that a Court should consider in exercise of such discretion:

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 respondents if the extension is granted
  6. Whether the application has been brought without undue delay; and
  7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
16. The court’s view is that the delay of close to two months since the judgment was delivered on 1<sup>st</sup> April, 2021 has been explained in a casual manner. The Appellant’s advocate has not indicated the dates when the file was misplaced and when it was traced in the office despite stating that the file was traced after 30 days had lapsed. Based on the facts it may be difficult if not impossible to discern whether the Applicant’s advocates acted diligently and whether they were prevented by any sufficient cause from filing appeal in time. The explanation puts the Court in limbo.
17. Indeed, the Court of Appeal in *Kenya Ports Authority vs. Silas Obengele* Civil Application No. Nai. 297 of 2004 [2006] 2 KLR 112 stated that:
- “Whereas it is now settled that whenever there is a delay, even for one day, there must be some explanation for it otherwise an extension may not be granted where there was material before the single judge from which he could and did conclude that the delay or the periods of delay...the full bench will not interfere”
18. However the court notes that although no dates were indicated by the Appellant’s advocates, the advocate averred that he was given instructions by the Appellant to lodge an appeal against the judgment. This to court is an indication that the Applicant was dissatisfied by the outcome of the judgment.
19. I am fortified by the statement of Maureen Odero J. in the case of *Bank of Africa Kenya Limited vs. Put Sarajevo General Engineering Co.Ltd & 2 others* [2018] eKLR, where the Learned Judge stated that:-
- “This plea that the mistakes of Counsel ought not be visited upon the client is a common one and any advocate who fails to perform a duty due to his client will invariably seek relief on the basis that the mistakes or errors of the Advocate ought not to be visited upon the client.”
20. The court’s view is that the misplacement of the file was not a mistake of the Appellant hence the omission should not be visited upon the Appellant.
21. The court notes that the appeal is against both liability and quantum hence arguable issues that warrant to have a day in court for determination on merit. See *Kenya Commercial Bank Limited vs. Nicholas Ombija* [2009] eKLR on what is an arguable appeal.



22. The court notes that Respondent has in the alternative pleaded for thrown away costs in the event court grants leave to the appeal out of time. The Appellant’s advocate has averred that the Appellant is ready and willing to abide by any conditions as may be set by the court.

23. Indeed, Apaloo JA as he then was in *Phillip Chemwolo & Another vs. Augustine Kubede* [1982-88] KLR 103 at 1040 stated thus:-

“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 heard on merit”.

24. In *Mbukoni Services Limited & another vs. Mutinda Reuben Nzili & 2 others* [2021] eKLR, Odunga J. stated that:-

27. The broad approach under the current constitutional dispensation is that unless there is fraud or intention to overreach, an error or default that can be put right by payment of costs ought not to be a ground for nullifying legal proceedings unless the conduct of the party in default can be said to be high handed, oppressive, insulting or contumelious. The court, as is often said, exists for the purpose of deciding the rights of the parties and not imposing discipline.”

#### **DISPOSITION**

- a. The Applicant is granted leave to file and serve the appeal within 14 days from the date hereof. In default the application shall stand dismissed.
- b. Costs shall abide in the appeal.

It so ordered.

**RULING DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 14<sup>TH</sup> DAY OF DECEMBER 2021.**

**M.W MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

Onguka holding brief for Musili - For Applicant

Ms Muli for Respondent

Geoffrey - Court Assistant

