

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**MISCELLANEOUS CIVIL APPLICATION NO. E231 OF 2024**

**HAMISI MWALUMU ESHITEMI.....1<sup>ST</sup> APPLICANT**  
**CAROLINE MUSUNGU TITAKO.....2<sup>ND</sup> APPLICANT**  
**-VERSUS-**  
**FOCUS CONTAINER COMPANY LTD.....1<sup>ST</sup> RESPONDENT**  
**MOHAMED ABDI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicants’ application is a motion dated 9 August 2024 in which the applicants seek extension of time to file an appeal against a ruling delivered on 25 March 2023 in Mombasa Chief Magistrate Court Civil Case No. 377 of 2017 (Hon. Nabibya, Senior Principal Magistrate). The application is expressed to be brought under Sections 1A, 1B and 3 and 3A and 95 of the Civil Procedure Act, cap. 21; and Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules. It is supported by the 1<sup>st</sup> applicants’ own affidavit.
2. According to the applicants, their previous advocates, M/s. Kadima & Company Advocates filed a suit on their behalf in March 2017. In December of the same year, the firm of M/s Munyithia, Mutugi, Umara & Muzna Company Advocates took over the matter from M/s. Kadima & Company Advocates.
3. On 24 February 2022, the applicants’ advocates filed an application to amend the plaint and sought to be given dates for the hearing of the

application. However, they later discovered that their suit had been dismissed for want of prosecution on 18 January 2023.

4. On 29 March 2023, the applicants' advocates filed an application seeking to have the suit reinstated but the application was dismissed on 26 July 2023. On 6 September 2023, the applicants made an application for review of the court's decision of 26 July 2023 but the application was dismissed on 25 March 2024. Thereafter, more particularly on 3 April 2024, the applicants' counsel wrote to the executive officer seeking a certified copy of the proceedings and the ruling; payment for these documents was made on 9 April 2024. A certified copy of the proceedings was availed on 18 June 2024 but to date the ruling has yet to be availed.
5. Jairus Odhiambo Ogada swore a replying affidavit opposing the application. He has stated that he is the operations supervisor of the 1<sup>st</sup> respondent. He has sworn that the applicants deliberately failed to prosecute their suit and, therefore, it was properly dismissed. They have also defended the magistrate's decision declining to review orders dismissing the applicant's application seeking to reinstate the applicants' suit.
6. It is sworn on behalf of the respondents that if the suit is reinstated, the respondents would be prejudiced since they have lost contact of their

witnesses considering that the events forming the foundation of the applicants' suit happened way back in 2017.

7. Section 79G of the Civil Procedure Act states that appeals to this Honourable Court from decrees or orders in the lower court must be filed within thirty days from the date of the decree or order appealed against. There is a proviso that the appeals may be filed out of time if there is “*good and sufficient cause*” for failure to file the appeal in time. The section reads as follows:

***79G. Time for filing appeals from subordinate courts***

***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.***

8. Thus, the court may exercise discretion and extend time to file an appeal out of time if it can be demonstrated that an applicant has a good and sufficient cause for the delay in filing an appeal. The question here is whether the applicants had such good and sufficient cause.

9. The order against which the applicants seek to appeal was given on 25 March 2024 and, therefore, going by the provisions of section 79G of the Act, the appeal ought to have been filed on or about 26 April 2024.
10. But by 13 August 2024 when the applicants filed this application, the appeal had not been filed ostensibly because the applicants' counsel had not been supplied with a certified copy of the ruling. The proceedings are said to have been supplied on 18 June 2024.
11. Considering the form an appeal from the magistrates' court to this court takes, none of these documents is necessary for the filing of an appeal contemplated under section 79G of the Civil Procedure Act. According to Order 42 Rule 1(1), a memorandum of appeal is adequate for this purpose. This rule reads as follows:

***Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.***

12. Sub-rule (2) goes further to state what should be contained in the memorandum of appeal. This sub-rule reads as follows:

***The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.***

13. A certified copy of the proceedings and the ruling, where one is appealing against an order, as in the instant case, are only necessary for the preparation of the record of appeal. Where the appellant is not in possession of these documents at the time of filing the appeal, the only other document necessary besides the memorandum of appeal is a certified copy of the decree or order. Depending on whether the appeal is against a decree or order, these documents ought to be filed with the memorandum of appeal.

14. But the law acknowledges that these documents may not be prepared and delivered within the thirty-day period when the appeal ought to be filed and for this reason, order 42 rule 2 provides a window for these documents to be filed outside the limitation period. This rule reads as follows:

***Filing of decree or order (Order 42, rule 2)***

***Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed.***

15. Against the background of these legal provisions, the applicants did not need a certified copy of the proceedings and ruling to file the

memorandum of appeal, or, to be precise, to file the appeal within the time stipulated by section 79G of the Act. As noted these documents would normally be filed later and, as a matter of fact, it is at the stage of issuing directions for the hearing of the appeal under section 79B and order 42 rules 11 and 13 of the Civil Procedure Rules that the court would be concerned about whether these documents have been included in the record of appeal. Rule 13 (4) reads as follows:

***(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—***

***(a) the memorandum of appeal;***

***(b) the pleadings;***

***(c) the notes of the trial magistrate made at the hearing;***

***(d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;***

***(e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;***

***(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:***

***Provided that—***

***(i) a translation into English shall be provided of any document not in that language;***

***(ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).*** (Emphasis added)

16. In the further affidavit filed in support of the application, the applicants have exhibited a draft memorandum of appeal, a fact that demonstrates that even without the ruling, the applicants could as well have filed the memorandum of appeal when they were required to. Lack of the certified copy of the ruling or proceedings is rather an excuse but not a “*good and sufficient cause*” for not filing the appeal in time. Thus, the applicants do not deserve the exercise of this court’s discretion to extend time in their favour.

17. But even if it was to be assumed that these documents are necessary, the applicants did not apply for a certified copy of the order which, as noted, is the only other document that must be filed alongside the memorandum of appeal where one is appealing against an order. In their letter of 3 April 2024, a copy of which the applicants have exhibited to their affidavit, the applicants wrote to the executive officer as follows:

***“We refer to the above matter and kindly request you to supply us with certified copy of ruling issued on 25.3.2024 by Hon. M.***

***Nabibya (SPM) and proceedings for purposes compiling record of appeal. We undertake to pay your charges.”***

18. It is apparent from their letter that the applicants never sought to be given a certified copy of the order appealed against.

19. It has been noted that under section 79G of the Civil Procedure Act, a decree or order appealed from is an essential component of an appeal filed in the High Court against a decision from the subordinate court. It is clearly for this reason that **section 79G** provides a window for extension of time to file the appeal if the decree or order appealed against could not, for one reason or another, be secured within the period which an appeal ought to be filed. Order 42 rule 2, as earlier noted, reiterates this position that *“where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such a time the court may order, and the court need not consider whether to reject appeal summarily under section 79B of Act until copy is filed”*.

20. Order 42 Rule 13(4), on the other hand, lists a certified copy of the order or decree appealed from as one of the primary documents to be included in the record of appeal and which the court cannot dispense with before confirming the appeal for hearing.

21. It, therefore, follows that the preparation and delivery of the decree or order for the purpose stipulated in **section 79G** of the Act is a mandatory

condition precedent to the institution and hearing of any or any valid appeal in the High Court against a decision of the subordinate court.

22. The essence of a certified copy of the decree or order appealed from is a question that was discussed by the Court of Appeal in **Kyuma versus Kyema (1988) KLR 185**. In that case, the applicant was caught out by time such that he could not file his appeal against orders issued by the magistrate's court without extension of time. He had applied for a "*certified copy of the proceedings and judgment/orders*". He ultimately got the certified copies of the proceedings and judgment and was also issued with a certificate of delay that certified the period required to prepare the proceedings and the judgment; apparently, it is the delay in preparation and delivery of these documents that occasioned the delay in filing of the applicant's appeal.

23. When the appellant filed his appeal, the learned judge (Shields J., as he then was) held that the certificate of delay which was filed with the appeal was not the one contemplated under **section 79G** of the **Act 21**. He struck out the appeal and when the appellant appealed to the Court of Appeal, the latter upheld the High Court's judgment and said at **page 187** that:-

***"The appellant was entitled to appeal to the High Court against these orders if he felt aggrieved by them. Section 65(1) of the Civil Procedure Act confers a right of appeal on him. But in***

*order to set on foot a competent appeal, the appellant must have filed his appeal within thirty days from the date of the order... This period may be extended provided he obtained from the magistrates court a certificate of delay within the meaning of section 79G of Act 21. The section allows the thirty days to be extended by such period as was required to make a copy of the “decree or order of the court”. As the appeal was to be filed beyond the 30 days prescribed by the rules, the appellant ought to apply and file with the memorandum of appeal, not only the order of the court, but also a certificate of delay.”(Underlining mine).*

24. This means that whenever one intends to file an appeal under **section 79G** of the **Civil Procedure Act**, it is incumbent upon the intended appellant to apply for an order or a decree which he will file together with the memorandum of appeal; apart from the memorandum of appeal and the decree the applicant must obtain and file a certificate of delay certifying the time taken to prepare and deliver the order or the decree should it be found that his appeal can only be filed outside the thirty-day time limit. The court explained this better in its judgment. It said at page 189:-

*“The question is what documents must the appellant file within thirty days or within the time lawfully extended by the certificate*

*of delay? Since the question contemplates that the appeal is against a decree or order, the appellant is obliged to apply first, Memorandum of Appeal in the form set out in appendix F No. 1 of the Civil Procedure Rules and second, a copy of the formal order of the court, if available. Rule 1A of Order 41 permits this latter document to be filed as soon “as possible and in any event within such a time as the court may order”. Therefore a certificate of delay within the true intendment of section 79G must certify the time it took to prepare and deliver to the appellant “a copy of the order” of the magistrate. But the certificate of delay exhibited by the appellant, did not speak of a decree or order. No such order was sought or extracted. What the appellant, in error, sought and what the court dutifully supplied, were “the proceedings and judgment”.*

25. **Rule 1A of Order 41** which the court referred to in its judgment, is now **rule 2 of Order 42 of the Civil Procedure Rules, 2010**.

26. As it was in the case of **Kyuma versus Kyema (supra)** so it is in the applicants’ case; the applicants did not apply for a certified copy of the order. Without a certified copy of the order appealed from, the intended appeal would be of no consequence and, therefore, granting the applicants’ application would be in vain. The applicants’ application is, therefore, dismissed with costs to the respondents. Orders accordingly.

**Signed, dated and delivered on 24 April 2024**

Ngaah Jairus  
**JUDGE**