

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
MISCELLANEOUS APPLICATION NO E108 OF 2023

JAMES GICHUKI THUO
.....**APPLICANT**

VERSUS

LAMECK MUGOMBA LUNG'ANZI
GLORIA MNYAZI MBARU (suing as legal representatives of the estate
Of ANDREW SHOKA LUNG'ANZI..... RESPONDENTS

RULING

1. In an application dated 7.9.23, the Applicant seeks leave to appeal out of time against the judgment delivered on 31.7.23 in Kilifi SPMCC No. 273 of 2018. He also seeks an injunction restraining the Respondents from executing the said judgment, pending the hearing and determination of the intended appeal.
2. The Applicant averred that the delay in filing the appeal was occasioned by his failure to instruct his advocates on time. He further averred that the delay is not inordinate and that the same is excusable. He intends to appeal against the judgment and has applied for the certified typed proceedings. Further that the decretal amount is exorbitantly high as loss of dependency was not evidentially proven. He asserted that he stands to suffer substantial loss if execution is allowed to proceed. Additionally, that his appeal raises triable issues. Lastly, that he is willing to deposit half the decretal amount as security and to comply with the orders of the Court.
3. The Respondents opposed the Application *vide* a replying affidavit sworn on 17.10.23. They averred that the case was first determined in a judgment entered on 20.11.2020, which was set aside on 30.8.21 and fresh hearing ordered; that the Applicant failed to come up with defence with new evidence and witnesses in spite of being granted time to do so out of time; that the Application is a delaying tactic and an abuse of the court process; that no good reason has been given for the delay in filing the appeal; that the memorandum of appeal raises mere denials and that the Application should be dismissed.
4. The statutory period for filing an appeal in this Court from a subordinate Court is 30 days. This is stipulated in Section 79G of the Civil Procedure Act which 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.

5. The *proviso* to Section 79G of the Act allows a party who gets caught up and is unable to file an appeal within the stipulated period, to seek extension of time. Such party must however satisfy the Court that there is good and sufficient cause for not filing the appeal on time.
6. An order for extension of the time to file an appeal is discretionary. It is an equitable remedy and not a right of a party. (See **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR**).
7. On the principles that a court should consider in the exercise of its discretion in an application for extension of time, the Court of Appeal in **Omar Shurie v Marian Rashe Yafar [2020] eKLR**, stated:

[B]ut this Court has over the years devised appropriate principles to be applied in achieving a 'just' decision in the circumstances of each case. The case of Leo Sila Mutiso v Hellen Wangari Mwangi [1999] 2 EA 231 is the locus classicus which laid down the parameters as follows:

“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 impugned decision is dated 31.7.23. By dint of Section 79G of the Civil Procedure Act, the appeal ought to have been filed by 31.8.23. The Application was filed on 8.9.23 a delay of about 9 days. Applying the principles set out in **Leo Sila Mutiso**, the Court finds that while there was some delay in filing the Application and draft memorandum of appeal, the same is not inordinate.
9. As regards the reason for delay in filing the appeal, the Applicant states the same was occasioned by his failure to instruct his advocates on time. This in my view is not a good and

sufficient cause for not filing the appeal in time as he has not stated why he did not instruct his advocates on time.

10. The case belongs to the Applicant and he had a duty to follow up on his case and to assist the court in ensuring that justice is dispensed expeditiously (see **Tana Teachers' Cooperative and Credit Society Limited v Andriano Muchiri [2018] eKLR**).
11. The conduct of a party is key in any matter where the jurisdiction of the Court to exercise its discretionary powers is invoked. On this point I associate with Gikonyo, J. who in **Moses Mwangi Kimari v Shammi Kanjirapparambil Thomas & 2 others [2014] eKLR** stated:

We should not only look at the delay of six months since the direction of 8th November, 2012, we should look also at the entire conduct of the Plaintiff; it is negligent and tinctured a don't-care attitude towards court orders. This is not unfair indictment of the Plaintiff; it is simply an atonement of serious disobedience of court orders which no serious court of law should countenance.
12. I have considered the conduct of the Applicant herein. Directions to file submissions were given on 17.10.23 and parties were to attend court on 9.11.23 for compliance. On that date, parties were absent. The matter was stood over to 15.11.23, and again the parties were absent. The next mention date was fixed for 15.2.24 and parties were absent yet again. The record reveals an applicant who has repeatedly failed to attend court and to comply with directions of the Court. The Applicant's conduct should not be countenanced. By his conduct, the Applicant derogated from the overriding objective of the expeditious, fair, just, proportionate and economic disposal of the matter herein.
13. The delay in this matter has been occasioned by the Applicant. I accordingly find that granting the orders sought herein would greatly prejudice the Respondents who are yet to enjoy the fruits of their judgment. It would be a travesty of justice to exercise discretion in the Applicant's favour, given his conduct. I accordingly find and hold that the Application lacks merit and the same is dismissed with costs to the Respondents.

DATED, SIGNED and DELIVERED in MALINDI this 17th day of April 2026

M. THANDE

JUDGE

