



REPUBLIC OF KENYA



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**Gituma v Njuka (Civil Appeal (Application) E105 of 2023)
[2024] KECA 135 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KECA 135 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL (APPLICATION) E105 OF 2023
JM NGUGI, JA
FEBRUARY 9, 2024**

BETWEEN

LAWRENCE MWIRIGI GITUMA APPELLANT

AND

NICODEMUS OWOTSI NJUKA RESPONDENT

(Being an Application for leave to file and serve the Notice and Record of Appeal out of time from the Judgment and Decree of the High Court of Kenya at Vihiga, (Musyoka, J.) dated 7th October, 2022 in HCCA No. 24 of 2021)

RULING

1. The application before the Court is dated 26th July, 2023. The singular substantive prayer is framed thus:

“That the Applicant be granted leave to file and serve the Notice of Appeal and Record of Appeal out of time against the Judgment of Hon. Justice W. M. Musyoka in Vihiga HCA No. 24 of 2021 delivered on 07/10/2022.”
2. The application is supported by the applicant’s affidavit deposed on 26th July, 2023. In short, the applicant seeks to invoke the Court’s discretion for extension of time on the following pleaded facts:
 - a. The case at the High Court was heard by Farah, J. who scheduled judgment for 22nd January, 2022. Subsequently, the learned Judge left the judiciary. It therefore fell to Musyoka J. to take over the file and write the judgment.
 - b. Musyoka J., who was based at the Kakamega High Court but had to travel on certain days to sit at the Vihiga High Court, delivered the judgment on 7th October, 2022.



- c. The applicant says that the judgment was delivered without notice and that, therefore, neither he nor his advocate was present for its delivery.
 - d. The applicant does not disclose exactly when he got to know about the judgment and its contents but says that his advocate diligently tried to get hold of the file without much success.
 - e. The applicant further says that his efforts to trace the file were complicated by the fact that while Musyoka J. was based at the Kakamega High Court at the time, the file was from the Vihiga High Court and there was confusion whether the file was in Kakamega or Vihiga. To compound the confusion, the applicant says, Musyoka J. was moved to Busia High Court during this time.
 - f. In any event, by his narrative, the applicant would seem to have known of the contents of the judgment because he instructed his advocate to appeal. The advocate responded by writing a letter dated 28th November, 2022 but which was not presented to the High Court registry until on the 14th December, 2022. The letter requested for proceedings for purposes of filing an appeal.
 - g. The applicant depones that his advocate kept looking for the file and “got word” in April, 2023 that the typed proceedings were complete and that the file had been taken to the Vihiga High Court registry. However, he states that it is not until July, 2023 that his advocate finally had sight of the file.
 - h. This series of events, the applicant insists, are responsible for the delay in filing a Notice of Appeal. This series of misadventures, the applicant says, are not of his authorship – but are, instead, conspired by factors beyond his control. In particular, the applicant seems to place the blame on the court: for failure to give him or his advocate notice of delivery of judgment; for the confusion on whether the file was in Kakamega or Vihiga; and, generally, for making the file unavailable.
3. The respondent has vehemently opposed the application primarily through the replying affidavit of Ms. Maureen Tesot, learned counsel for the respondent, whose date of deposition is not indicated. Ms. Tesot complains that the applicant delayed filing the Notice of Appeal or an early application seeking leave to file out of time “advertently.”
 4. What would be the motive for this curious behavior? The respondent theorizes that the applicant probably wanted to benefit from the release of the funds which had been held in a joint interest-bearing account in the names of the two advocates as a condition for stay; and only file an appeal thereafter. The respondent insists that the applicant and/or his advocate learnt that the judgment had been delivered in October, 2022 but did not bring the present application until July, 2023.
 5. Ms. Tesot depones that the applicant’s counsel was furnished with copies of the judgment by Honourable W. Musyoka at the Vihiga High Court registry sometime in the month of October, 2022. She insists that the file was always at the Vihiga High court registry. It was never missing, she says, and points out that the applicant has not annexed any letters written by his counsel to the registry calling for the file. She believes that there is simply no good reason for the more than eight months delay in bringing the application.
 6. The application was argued by way of written submissions. The applicant’s counsel filed his submissions dated 25th October, 2023; while the respondent’s counsel filed theirs dated 26th October, 2023. Both sets of submissions rehash the respective narratives and positions taken by the two parties in their rival affidavits – one in support and the other in opposition to the application.



7. I have considered the application, the affidavit in support thereto and its annexures – including the High Court’s judgment dated 7th October, 2022, the replying affidavit filed on behalf of the respondent; and the written submissions by both parties. The only question for determination is whether the applicant has met the threshold for the exercise of the Court’s discretion to grant leave for him to file a Notice of Appeal out of time.
8. This Court is empowered to grant extension of time under Rule 4 of the [Court of Appeal Rules](#) which provides that:

“The Court may, on such terms as it thinks just, by order extend the time limited by these [Rules](#), or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these [Rules](#), whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”
9. The principles on which this Court may exercise the discretion to extend time under Rule 4 were set out in *Leo Sila Mutiso v Hellen Wangari Mwangi* 2 EA 231 in which it was held as follows:

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes in to account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons 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.”
10. In the present case, the impugned judgment was delivered on 7th October, 2022. The present application was not filed until 26th July, 2023. That was 292 days from the date of delivery of the judgment or 9 months and 19 days. The Notice of Appeal is statutorily required to be filed within 30 days of delivery of the judgment. Therefore, the first action taken by the applicant to perfect his appeal came at least 262 days late.
11. The question for resolution is whether the delay is excusable, and if not, whether it is inordinate. The ostensible reason given by the applicant for the delay is twofold: first, that both he and his advocate did not know the date of delivery of the judgment; and second, that the High Court file was missing at the Vihiga High Court registry. That narrative is contested by the respondent who asserts that the applicant’s advocate was given a copy of the judgment in October, 2022; and further that the file was always available at the Vihiga High Court registry.
12. One of the contested issues in this case is when the applicant learnt about the judgment. Establishing the point of that knowledge is crucial for determining the length of delay. This has not been made easy by the oblique way the applicant has framed his narrative. He does not exactly say when he learnt that judgment had been delivered; only stating that his advocate was able to get the High Court file in July, 2023 shortly before he filed the present application.
13. There are several indications that the applicant’s narrative is not entirely candid. Four eminently come to the fore:
 - a. First, the certified copy of the judgment as delivered by Musyoka, J. which is attached to the applicant’s own application categorically states on its face that Mr. Mukisu was present for the applicant when the judgment was delivered. Neither the applicant nor his advocate have contested this inscription on the last, signed page of the certified copy of the judgment.



- b. Second, the fact that the applicant’s advocate was present during the delivery of the judgment and was given a copy thereof is corroborated by Ms. Tesot: in her replying affidavit, she categorically deposes that Musyoka J. gave a copy of the judgment to the applicant’s advocate upon delivery. This deposition by Ms. Tesot is not denied in any subsequent affidavit by the applicant and must be taken as the truth.
 - c. Third, applicant asserts that he instructed his advocates to file an appeal and the advocates responded by writing a letter dated 28th November, 2022 asking for copies of the proceedings. This would put the date which the applicant, by his own admission, had knowledge of the judgment, and the fact that it was adverse to him – to a date before 28th November, 2022.
 - d. Fourth, the certified copy of the judgment attached to the applicant’s supporting affidavit indicates that the judgment was certified on 8th March, 2023.
14. What emerges from the above is that the applicant must be deemed to have had knowledge of the judgment on the date it was delivered. At the very least, he knew about it sufficiently to request his advocate to appeal against it by 28th November, 2022. The question that arises is why the applicant did not file his application for extension of time right away. That application was filed nearly eight months later. The explanation that the applicant gives – that the original file was missing from Vihiga High Court – rings insincere for at least two reasons:
 - a First, it would appear that the file was available by 14th December, 2022 when the applicant’s advocates’ letter asking for proceedings was received at the High Court registry.
 - b Second, the respondent’s advocate has deposed in her affidavit that the file was actually available at Vihiga High Court registry – and that deposition has not been challenged by the applicant.
15. Ultimately, the applicant’s narrative raises concerns about the good faith and candour of the applicant in making the application. Both of these are factors in exercising discretion on his behalf.
16. The applicant’s impugned candour complicates the question of determining how long the delay is and whether it is excusable. However, as aforesaid, it is clear that, by his own admission, the applicant was aware about the judgment by 28th November, 2022. That is the date his advocate wrote a letter requesting for proceedings for purposes of filing an appeal. What is not clear, and is not explained is why the applicant did not lodge his application for extension of time at that time. By that time, the applicant was only 6 days late to lodge his appeal. Instead, he took another 240 days (8 months) for him to file the present application. There is simply no explanation at all for that delay. That the file was allegedly missing from Vihiga High Court registry, even while contested, cannot offer an excuse for the delay. The physical file is not needed in order to process an application for extension of time in this Court. The applicant clearly knew enough about the judgment to know that he would be preferring an appeal by 28th November, 2022. That should have been enough information for him to process an application for extension of time.
17. The concern that the present application is either an afterthought or that the delay was “calculated” and is, therefore, in bad faith as claimed by the respondent is not idle either. The respondent’s advocate has deposed that the monies held in a joint interest-bearing account by both advocates has been released to the applicant in accordance with the High Court judgment’s determination of liability. The applicant has already received the amounts and did so without intimating that he would be preferring an appeal. The respondent has alleged, and the applicant has not resisted the allegation, that the applicant waited to receive the amounts before bringing the present application. Needless to say, the applicant’s move, if true, would have been calculated to defeat any application for stay of execution by the respondent



while the appeal is pending. To my mind, this fortifies the view that the delay in bringing the present application is not excusable.

18. In these circumstances, the Court is not inclined to exercise its discretion on behalf of the applicant. The applicant's delay in perfecting his right of appeal is both inexcusable and inordinate in the circumstances. Consequently, the Court is unable to exercise its discretion on his behalf.
19. The result is that the Application dated 26th July, 2023 is for dismissing, and I hereby do so. Costs are awarded to the respondent.
20. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF FEBRUARY, 2024.

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

Deputy Registrar

