



REPUBLIC OF KENYA



KENYA LAW

THE NATIONAL COUNCIL FOR LAW REPORTING

Where Legal Information is Public Knowledge

DSM v MWG (Civil Application E075 of 2021) [2024] KECA 229 (KLR) (8 March 2024) (Ruling)

Neutral citation: [2024] KECA 229 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E075 OF 2021
AK MURGOR, JA
MARCH 8, 2024

BETWEEN

DSM APPLICANT

AND

MWG RESPONDENT

(An application for extension of time for giving Notice/ Filing and serving Notice of Appeal out of time against the judgement and decree of the High Court of Kenya at Mombasa (J. Onyiego, J.) delivered on 31st August, 2021 in Mombasa High Court Matrimonial Cause No 8 of 2017)

RULING

1. By a notice of motion dated August 31, 2023, brought pursuant to rules 4, 42 and 75 of the [Court of Appeal Rules, 2010](#), sections 3A and 3B of the [Appellate Jurisdiction Act](#), article 159(2)(d) of the [Constitution of Kenya](#), 2010, the applicant, DSM seeks that this court extends time for lodging the Notice of appeal against the judgment delivered on August 31, 2021 in Originating Summons No. 8 of 2017.
2. The notice is brought pursuant to the grounds on its face and on affidavits in support sworn by the applicant and that of his counsel Miss Mercy Wanjiru Ngugi sworn on October 22, 2021 where it was contended that the High Court Originating Summons No. 8 of 2017 was heard and concluded on February 2, 2021 when the applicant and the respondent were physically present in court and had testified. Upon close of the case, directions were taken that parties file and exchange written submissions and the matter be mentioned on March 11, 2021 to confirm filing of submissions; that on March 11, 2021 the applicant's counsel attended and though she had filed submissions on behalf of the applicant, the firm of Kipsang & Co. Advocates had not filed submissions on behalf of the respondent and as such the matter was adjourned to March 18, 2021 for a further mention which she informed the applicant; that on March 18, 2021 she attended court on behalf of the applicant when it was confirmed that the respondent had filed her submissions and that judgment would be delivered on May 21, 2021



- of which she informed the applicant; that she attended court for delivery of the judgment on May 21, 2021 but it was not ready, and they were informed that it would be delivered on notice.
3. Counsel contended that she did not hear anything about the matter until October 6, 2021 when she received a letter from the firm of Christine Kipsang & Co. Advocates forwarding a copy of a draft decree for their approval; that upon receipt of the letter, she forwarded the applicant a copy of the draft decree, and on the same day sought to obtain a copy of the judgment for their consideration but, unfortunately the court file could not be traced; that she requested the firm of Christine Kipsang to supply her with a copy which they did and on October 9, 2021 she received instructions from the applicant to lodge an appeal against the judgment of the trial Judge.
 4. Counsel further contended that the reason for the delay in filing the appeal was occasioned by the fact that she did not receive a notice of the delivery of the judgment on August 31, 2021; that had she received the notice, she would have attended court, advised the applicant in good time and filed the Notice of appeal within the time stipulated by the law; that on October 14, 2021, she wrote to court requesting for certified copies of the proceedings and judgment to enable her lodge an appeal, and on October 14, 2021, she forwarded the approved decree to the firm of Christine Kipsang & Co. Advocates and notified her of the applicant's intention to appeal; that the delay is not inordinate and the intended appeal is arguable because, the learned Judge was in error in law by holding that the respondent is entitled to half share of the property known as LR No 1xxx/xxKaren Warai South Road Nairobi County (the suit property) without developments without appreciating that it was a gift from the applicant's parents and there was no proof of contribution of the initial purchase price of Kes 500,000 by the respondent; that this is a weighty ground which the applicant intends to ventilate before this Court.
 5. When the matter came up for hearing on a virtual platform, learned counsel for the applicant Ms. Ngugi in highlighting the submissions largely reiterated the contents of the motion.
 6. Mr. Mung'oma, learned counsel for the respondent informed the Court that the respondent did not file a replying affidavit or grounds of opposition, but counsel sought to rely on their written submissions, where it was submitted that the applicant's argument that judgment was to be delivered on notice is unmerited because, the applicant was under an obligation to have regularly enquired from the court as to when the judgment would be delivered; that the applicant's indolence should not be visited on the respondent who has the right to benefit from her legally obtained judgement; that the applicant has not demonstrated sufficient reasons to warrant grant of extension of time to file a Notice of appeal.
 7. It was further submitted that in any event, the appeal is unlikely to succeed and that the respondent stands to suffer immense prejudice since the suit in the High Court was filed way back in 2017; that furthermore, the applicant is determined to further delay the matter in court so that he can continue collecting rent from the matrimonial property to the detriment of the respondent.
 8. The issue for determination is whether the applicant has satisfied the conditions for the exercise of this court's discretionary jurisdiction to extend time under rule 4 of the [Court of Appeal Rules, 2022](#).
 9. Under rule 4 of this [Court's Rules](#), it is settled that, the court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously, and not frivolously having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent will suffer prejudice if the extension was not granted. See the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* – Civil Application No Nai 251 of 1997.



10. Based on the aforesaid principles, it is necessary to begin by ascertaining whether the applicant has satisfactorily explained the delay in filing the Notice of Appeal. Counsel for the applicant submitted that the judgment was delivered on August 31, 2021, but they only came to learn of its delivery on October 6, 2021, as, no notice of the date of delivery of judgment was issued; that counsel only became aware of its delivery when counsel for the respondent sought her concurrence in respect of a draft decree; that therefore, the delay in filing the appeal was as a result of the failure to notify her of the date of delivery of the judgment.
11. This Court in the case of *Kenya Airports Authority v Kabia & another* (Civil Application E079 of 2023) [2023] KECA 1549 (KLR) observed that:

“..... notification is required whether the decision to be made is a ruling or judgement is not in doubt. It therefore follows that parties are entitled to a notice of the date of delivery of judgement and where such notice is not given, that omission may well amount to a sufficient reason for the purposes of enlargement of time to appeal if the applicant moves the Court for regularisation of his position expeditiously.” (emphasis mine)
12. In this case, though the respondent has opposed the application on the grounds that parties were duly notified of the delivery date of May 21, 2021 via email, it is not in dispute that the judgement was delivered on a date other than that on which it was initially scheduled for delivery. The applicant’s counsel has demonstrated that she diligently attended court whenever notified of delivery of the judgment, but that no notification was issued prior to delivery of the judgment on August 31, 2021. I have considered the record and can find nothing that would point to the applicant having been notified that the judgment would be delivered on August 31, 2021. And without such notice, it cannot be expected that the applicant would have known that the judgment was to be delivered on that date. Given the circumstances under which the applicant came to learn of the delivery of the judgment, I am satisfied that the lack of notice of the date of delivery of the judgment is a sufficient explanation for the delay in filing the Notice of Appeal.
13. Turning to whether the appeal has a likely chance of success, the applicant has indicated that the main reason for the appeal is that the learned Judge found that the respondent contributed towards the purchase of the subject property without appreciating that it was a gift from the applicant’s parents. In my view, this is a matter for which the applicant is entitled to ventilate before the Court.
14. Concerning whether there will be any prejudice suffered by the respondent if the orders of extension are granted, whilst the respondent’s contention is that her enjoyment of the fruits of her judgment will be deferred, my view is that this being a matrimonial matter, the interest of justice would be better served if, the issues in contention were determined once and for all for the mutual benefit of both parties.
15. In sum, the applicant having satisfied the requirements of rule 4, I exercise my discretion to extend time to lodge the appeal. Accordingly, the notice of appeal lodged on August 31, 2023 be and is hereby deemed as properly filed and served on the respondent. Costs in the appeal.

It is so ordered.

Dated and delivered at Mombasa this 8th day of March, 2024

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original



Signed

DEPUTY REGISTRAR

