



Darby v Akatsa (Civil Application E469 of 2022) [2023] KECA 885 (KLR) (24 July 2023) (Ruling)

Neutral citation: [2023] KECA 885 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E469 OF 2022
GWN MACHARIA, JA
JULY 24, 2023**

BETWEEN

ROBERT NICHOLAS DARBY APPLICANT

AND

ROSE SHIBERO AKATSA RESPONDENT

(Being an application for extension of time to file an appeal out of time against the Judgment of (M. Thande, J.) dated 29th July, 2022 in Civil Suit No. 40 of 2016 (OS))

RULING

1. The applicant filed a Notice of Motion dated December 7, 2022, brought under sections 1A, 1B, 3A, 66, 75(h) and 95 of the *Civil Procedure Act* and sections 3, 3A and 3B of the *Appellate Jurisdiction Act*, seeking leave to appeal out of time and that the Memorandum of appeal annexed thereto be deemed as properly filed.
2. The application is supported by the grounds on the face of it and the supporting affidavit sworn by the appellant who contends that the Judgment of the High Court was delivered on July 29, 2022, and being dissatisfied with apart of it, he wished to exercise his right to appeal. However, the time to appeal had lapsed. He states that the delay in lodging the appeal on time was not deliberate and/or inordinate, but was occasioned by the challenge in obtaining the Judgment and the Decree on time as at some point, the court file could not be traced; that he was only able to obtain the documents on September 28, 2022 upon which he gave instructions to his advocates to file an appeal on September 30, 2022; that he stands to suffer great prejudice if the application is not allowed; and that it is in the interest of justice that the application be allowed.
3. The application was unopposed.
4. I have considered the application and the grounds on which it is premised. Rule 77(1) of the *Court of Appeal Rules* mandates a person who desires to appeal to this Court to give a Notice of Appeal in



writing, which notice shall be lodged in two copies with the Registrar of the superior court within fourteen

(14) days from the date of the decision against which the appeal is preferred.

5. I have perused the documents annexed to the application, which are; a copy of the Judgment, a copy of the letter requesting for a copy of the Judgment dated August 25, 2018, a copy of judiciary invoice for the said letter and a copy of the Decree and the undated Memorandum of Appeal. There is nothing on record to demonstrate that the applicant filed the requisite Notice of Appeal with the superior court in compliance with rule 77(1) of this *Court's Rules*. The applicant, too, does not allude to having filed one, which leads to the inescapable conclusion that he did not file a notice of appeal as required by the law.
6. Be that as it may, the applicant has explained that the failure to file the notice of appeal was neither deliberate nor inordinate. This is buttressed by the fact that, although the trial court judgment was delivered on July 29, 2022, it was not until September 28, 2022 that he was able to obtain the typed certified proceedings. He then shortly thereafter, on September 30, 2022 instructed his counsel to appeal. This application was filed on December 30, 2022, which translates into a three- month delay. Although this delay is not explained, there is no evidence of systemic delay in doing what ought to have been done so as to regularize the appeal. Thus, in the interest of doing substantive justice, and further noting that the application is not opposed, I shall exercise the inherent discretion conferred on me in favour of the applicant. I hold this view bearing in mind that the failure to file a notice of appeal may have been inadvertent and not deliberate. See *Fakir Mohammed v Joseph Mugambi & 2 Others* [2005] eKLR in which this Court held thus:

“As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of this parties, whether the matter raises issues of public importance, are all relevant but not exhaustive factors.”

7. In the circumstances, I allow the application with orders that the applicant shall file and serve a Notice and Memorandum of Appeal within seven (7) days of this Ruling. Thereafter, the record of appeal shall be filed and served within 30 days. Costs of the application shall be in the appeal.
8. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JULY, 2023.

G.W NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

