



**Kariuki v CIC General Insurance (Civil Application E161 of 2022)  
[2022] KECA 1166 (KLR) (28 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1166 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E161 OF 2022  
JM MATIVO, JA  
OCTOBER 28, 2022**

**BETWEEN**

**VICTOR NGUGI KARIUKI ..... APPLICANT**

**AND**

**CIC GENERAL INSURANCE ..... RESPONDENT**

*(Judgment of Sergon J delivered on September 24, 2020 in the civil division, Nairobi)*

**RULING**

1. This ruling determines the applicant's application dated May 16, 2022 in which he seeks the following orders: -
  - a. An order directing the deputy registrar of this court to conduct an inquiry into his pauperism and file a report over the inquiry.
  - b. Leave to appeal as a pauper.
  - c. Extension of the period within which he can file and serve his memorandum of appeal against the judgment of Sergon J delivered on September 24, 2020 in the civil division, Nairobi.
2. I note that there is an affidavit of service on record. However, the respondent has not filed any response.
3. Curiously, the applicant has not disclosed the High Court case number he desires to appeal against nor has he attached a copy of the decree and the judgment he desires to appeal against. In the supporting affidavit, the applicant refers to a decision rendered by the Employment and Labour Relations Court yet in application he talks of a civil suit. To my mind, Sergon J sits in the civil division of the High Court.
4. The applicant has not attached a copy of the notice of appeal nor has he disclosed whether he filed it. The decision is said to have been rendered on September 24, 2020, so the time for filing a notice of appeal has long lapsed. The applicant's prayers as framed pre-supposes the existence of a validly filed



notice of appeal. A notice of appeal is a jurisdictional pre-requisite. (See *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others {2014} eKLR*). This position was aptly explained by the California Supreme Court in *Silverbrand v County of Los Angeles {2009} 46 Cal. 4th 106, 113* as follows: -

“... the filing of a timely notice of appeal is a jurisdictional prerequisite. Unless the notice is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal. The purpose of this requirement is to promote the finality of judgements by forcing the losing party to take an appeal expeditiously or not at all.”

5. The applicant has not sought leave to file a notice of appeal out of time. He cannot jump the gun and seek leave to file a memorandum of appeal without first complying with the requirement to lodge a notice of appeal. Such leave if granted the ensuing memorandum of appeal will be legally frail and unsustainable. On this ground alone this application collapses.
6. The applicant prays that he be allowed to file his appeal as a pauper. The privilege of maintaining a pauper suit is a personal privilege granted to people who have no means of carrying on or continuing litigation. An applicant must show that he is not possessed of sufficient means to enable him pay court fees for institution of the suit. A person is a “pauper” when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit.
7. The right to sue in *forma pauperis* is restricted to indigent persons. A person may proceed as poor person only after a court is satisfied that he or she is unable to prosecute the suit and pay the costs and expenses. A person is indigent if the payment of fees would deprive one of basic living expenses, or if the person is in a state of impoverishment that substantially and effectively impairs or prevents the pursuit of a court remedy. However, a person need not be destitute. Factors considered when determining if a litigant is indigent include the party's employment status and income, the ownership of unencumbered assets, including real or personal property and money on deposit, the party's total indebtedness, and any financial assistance received from family or close friends. Not only personal liquid assets, but also alternative sources of money should be considered.
8. The applicant has not provided the court with details of his employment status and income, his unencumbered assets, personal property, cash, and his total indebtedness to determine whether he is indigent or whether there is a need to grant an order to inquire his pauperism. This onus to provide the necessary information so as to lay the basis lies on the applicant. It is not enough to make generalized and unsupported claim. The applicant is represented by a firm of advocates in this application. It would have been prudent to disclose whether he is being represented on pro bono basis and whether he was represented in the High Court.
9. The decision is said to have been delivered on September 24, 2020. The delay has not been explained. The applicant prays for extension of time to file his appeal. As was held by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others {2014} eKLR* the applicable considerations in cases of this nature are: -
  - i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
  - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court



- iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
  - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
  - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
  - vi. Whether the application has been brought without undue delay; and
  - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."
10. An applicant for extension of time to file an appeal out of time must show good and substantial reasons for the delay, and, *prima facie* good cause why the intended appeal should be heard. Whilst the first leg requires a satisfactory justification, (which has not been done), the second leg only requires one to show that the grounds of appeal are arguable. This too has not been demonstrated. It is upon satisfaction of both limbs that the court will use its discretion to grant the application.
11. Filing an appeal within a period of limitation is the rule and condonation of delay is an exception. While condoning the delay, the courts must be cautious and only on genuine reasons, the courts are empowered to condone the delay. The power of discretion to condone the delay is to be exercised judiciously and by recording reasons. The reasons furnished for condonation of delay must be candid and convincing. Therefore, the condonation of delay cannot be claimed as a matter of right and only on genuine reasons, the delay is to be condoned and not otherwise.
12. Flowing from the above discussion, it is my finding that the applicant's application dated May 16, 2022 is unmerited. I dismiss it with no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF OCTOBER 2022.**

**J MATIVO**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

