



REPUBLIC OF KENYA



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**Ambayo v Maseno Mission Hospital & another (Miscellaneous Application
E068 of 2021) [2022] KEELRC 1189 (KLR) (7 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1189 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
MISCELLANEOUS APPLICATION E068 OF 2021**

CN BAARI, J

JULY 7, 2022

BETWEEN

ANNE AMBAYO APPLICANT

AND

MASENO MISSION HOSPITAL 1ST RESPONDENT

COMPREHENSIVE CARE CENTRE 2ND RESPONDENT

RULING

1. By a Notice of Motion application dated 13th October, 2021, the Applicant seeks orders that:
 - i. Spent
 - ii. The Honourable Court be pleased to grant the Applicant leave to file an appeal out of time from the Judgment of Hon. Yalwa PM at Maseno delivered on 18th December, 2019, in ELRC No. 1 of 2018.
 - iii. The Memorandum of Appeal Annexed hereto be deemed as dully filed.
 - iv. That costs of the application be in the intended appeal
2. The application is supported by grounds on the face of the motion and an affidavit sworn by Anne Ambayo, the Applicant herein. The basis of the application is that the judgment in this matter was delivered on 18th December 2019, where after, the Applicant being aggrieved, instructed her Advocates on record then, M/S Oburu Obwatinya and Company Advocates, to appeal against the judgment.
3. The Applicant avers that it is upon these instructions that the Advocates applied for, got proceedings and a copy of the judgment. The Applicant further avers that being desirous of pursuing her appeal, she visited the offices of her Advocates then on record, where she was given a copy of the memorandum



- of appeal, duly dated and signed making her believe that the appeal had been filed and served on the Respondents herein.
4. The Applicant avers that her Advocates failed to execute her instructions as regards the appeal despite several visits to their offices. She further avers that she is still desirous of pursuing the appeal, and has instructed the current Law Firm, hence this application.
 5. The application is opposed vide the Respondents' replying affidavit sworn by Brenda Akinyi Otieno on 8th March, 2022.
 6. The Respondents aver that the Applicant's time to file an appeal lapsed on 10th February, 2020, and that a period of one year and eight months is inordinately long for the Applicant to file her appeal in view of the time allowed under Section 79G of the Civil Procedure Act and Order 50 Rule 4 of the Civil Procedure Rules.
 7. The Respondents further aver that the Applicant has not disclosed the reason for the delay in filing the instant application. They aver that the reason that Counsel failed to file either this application or the appeal, is remote and unconvincing in view of the fact that cases belong to litigants and not Advocates.
 8. The Respondents aver that the draft memorandum of appeal does not raise arguable grounds of appeal.
 9. Parties canvassed the application by way of written submissions. Both parties filed their submissions.

The Applicant's Submissions.

10. It is submitted for the Applicant that the copies of memorandum of appeal produced before court is evidence enough that the Applicant was interested in filing an appeal against the judgment rendered by the lower court. The Applicant further avers that by giving her a copy of the Memorandum of Appeal that was never filed, the Advocate previously on record led the Applicant to believe that the Appeal had been filed.
11. The Applicant further submits that failure of the Advocate to file the appeal should not be visited on her. She sought to rely in the cases of Owino Ger vs. Marmanet Forest Co-operative Credit Society Ltd [1987] eKLR; CFC Stanbic Limited vs. John Maina Gitthaiga & Another [2013]eKLR; Lee G. Muthoga vs. Habib Zurick Finance [K] Ltd & Another Civil Application No. Nai 236 of 2009, where the Court variously declined to visit wrongs committed by Advocates and their staff on innocent clients where it had been sufficiently demonstrated that clients were not to blame for the default.
12. It is submitted for the Applicant that the Memorandum of Appeal raises tenable issues of fact and law. The Applicant further submits that while the entire appeal is meritorious, she specifically refer the court to grounds 1 and 2 of the Memorandum of Appeal, and more specifically that despite the Honourable Magistrate finding that the Respondents wrongfully terminated the applicant based on Section 46 of the Employment Act, he failed to properly quantify and award her dues.
13. It is further submitted for the Applicant that the Respondent does not stand to suffer any prejudice if this application is allowed.

The Respondents' Submissions

14. The Respondents submit that the decision on whether or not to grant leave to admit an appeal out of time, is an exercise of discretion, and this being an exercise of judicial discretion, must be on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Respondents had reliance on the holding in Mbukoni Services Limited & another v Mutinda Euben Nzili & 2 others [2021]eKLR at paragraph 20



15. It is submitted for the Respondents that the application before the court does not meet the criteria for a grant of leave to appeal out of time and should be dismissed.
16. It is the Respondents further submission that a lot of time has lapsed since the impugned judgment was rendered, and the Respondents shall suffer great prejudice should this application be allowed, arising from the effluxion of time.

Determination

17. I have considered the application by the Applicant, the grounds, supporting affidavit, and the parties' written submissions as supported by cited authorities. The issue for determination is whether the application has merit and therefore whether the orders sought should be granted.
18. The Applicant's case is that the judgment in this matter was delivered on 18th December 2019, where after, the Applicant, being aggrieved, instructed her Advocates on record then, M/S Oburu Obwatinya and Company Advocates, to appeal against the judgment. The Applicant's further case is that her Advocates failed to execute her instructions as regards the appeal despite several visits to their offices. She further avers that she is still desirous of pursuing the appeal, and has instructed the current Law Firm, hence this application.
19. The Respondents' termed the delay inordinate and that they stand to be prejudiced if the application is allowed in view of the time between the delivery of the judgment and this application.
20. Under Section 79G of the *Civil Procedure Act*, time for filing an appeal from judgment of the subordinate court is 30 days. The Application herein, was filed about a year and eight months after the judgment subject of the intended appeal.
21. Section 79G of the *Civil Procedure Act*, empowers the court to admit an appeal out of time, where the Appellant satisfies sufficient cause for late filing. The Section states:

“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 a good and sufficient cause for not filing the appeal in time (emphasis mine).”
22. In *Edith Gichungu Koine V Stephen Njagi Thoitithi* [2014] eKLR Odek JJA opined thus:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”
23. The main dispute in respect to the admission of the Applicant's memorandum of appeal, is the time it has taken the Applicant to file both the appeal and the instant application. A year and eight months, is to say the least, a long time. In Cecilia Wanja Wamwira Kerugoya Civil Appeal No.211 of 2013 [2018]eKLR the court stated thus;

“There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case..”



24. The Applicant claims that her previous counsel on record, had informed her that he had lodged the appeal, and even proceeded to give her a copy of the ‘memorandum of appeal’, just for her to discover much later that the appeal was never filed. It has variously been held that mistake of counsel should not be visited on a litigant. In *Belinda Mural & 9 Others v Amos Wainaina* [1978] eKLR, the Court of Appeal citing the case of *Shah H. Bharmal & Brothers Vs Kumar*[1961]EA 679 opined: “Mistakes of a legal adviser may however amount to ‘sufficient cause’ under the East African Rule.”
25. The party’s right to justice enshrined in Article 50 of *the Constitution*, is an important consideration in determining an issue of enlargement of time. In *Edward Kamau & Another vs Hannah Mukui Gichuki & Another* [2015]eKLR, cited by the Applicant, Justice Aburili in allowing a similar application held as follows:
- “The right to appeal, it has been held time and again, is a constitutional right which is the cornerstone of the rule of law. To deny a party that right, would in essence be denying them access to justice which is guaranteed under Article 50(1) of *the Constitution* which latter right cannot be limited under Article 25 of the said Constitution. In my view, it has not been shown that the intended appeal is frivolous or a sham and therefore it is only fair and just that the Applicants be accorded an opportunity to ventilate their grievances where they are aggrieved by a decision of the lower court, to challenge before a superior court.”
26. Although the merits of the draft appeal attached herewith is a matter to be determined by the appellate court, a glimpse of the memorandum of appeal, in my view raises arguable issues. It is only fair and in the interest of justice that the Applicant is allowed an opportunity to lodge her appeal for determination on the merits.
27. Consequently, for reason that I consider the draft memorandum of appeal as arguable and deserving a day in court (See *First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others* Nairobi (Milimani) HCCC No.2255 of 2000 [2002] 1 EA 65), I find the Applicant’s application to have merit.
28. In the upshot, I find the Applicant’s application dated 13th October, 2021, meritorious. I grant the prayers sought as follows:
- a) That the Applicant is granted leave to file an appeal out of time from the Judgment of Hon. Yalwa PM at Maseno delivered on 18th December, 2019, in ELRC No. 1 of 2018.
 - b) The draft Memorandum of Appeal Annexed hereto be and is hereby deemed as dully filed.
 - c) That the costs of the application shall abide the intended appeal
29. It is so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 7TH DAY OF JULY, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Idi present for the Applicant

Ms. Osewe present for the Respondent

Ms. Christine Omollo – C/A

