



Kamau (Suing as legal representatives of the Estate of Lucy Nyawira Kinyua - Deceased) v Kenya Pipeline Company Limited; China Petroleum Pipeline Bureau (Third party) (Miscellaneous Civil Application E858 of 2024) [2025] KEHC 1185 (KLR) (Civ) (27 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1185 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E858 OF 2024
LP KASSAN, J
FEBRUARY 27, 2025

BETWEEN

FRANCIS KAMAU (SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF LUCY NYAWIRA KINYUA - DECEASED) APPLICANT

AND

KENYA PIPELINE COMPANY LIMITED RESPONDENT

AND

CHINA PETROLEUM PIPELINE BUREAU THIRD PARTY

RULING

1. Before this court is a Notice of Motion dated 07.06.2024 brought under Order 50 Rules 6, Order 51 Rules 1 of the [Civil Procedure Rules](#), Rule 4 of the Court of Appeal Rules, Sections 3A and 79G of the [Civil Procedure Act](#) and all enabling provisions of the law wherein the Applicant seeks orders to wit:
 - a. Spent
 - b. That this Honourable Court be pleased to extend time and/or grant leave to the Applicant to lodge an appeal out of time against the entire Ruling delivered by hon. Z.K. Kiboss in Milimani CMCC No. 1360 of 2013 Daniel Munyi Kamau-vs-Kenya Pipeline Company Limited & Another.
 - c. That the Memorandum of Appeal annexed hereto be deemed as duly and properly filed
 - d. That the costs of this application be provided for.



2. The said application is premised on the grounds on its face and further supported by the affidavit sworn by the Counsel for the Applicant. The Applicant's case is that he has an arguable appeal with high chances of success and it would be in the interest of justice to allow the application to file an appeal against the ruling delivered in CMCC No. 1360 of 2013. After the ruling was delivered, the Applicant applied for copies of the certified ruling and proceedings. However, the process of obtaining the ruling at the registry to facilitate the appeal was not expeditious leading to lapsing of the time required to file an appeal. That the Applicant had a good and sufficient cause for not filing the appeal within time. The delay was inordinate, inadvertent and excusable. That it would be in the interest of justice if the application is allowed.
3. The Respondent filed its Grounds of Opposition dated 04.11.2024, the grounds are
 - a. The ruling sought to be appealed from was delivered on 15th July 2024 and the Applicants had thirty (30) days to lodge their appeal. However, the Applicants filed their request for a copy of the ruling on 19th August 2024 outside the thirty day period. This is evident from the Applicants' letter court receipt which bears the date of 19th August 2024 though the Applicants' letter bears a prior date. The Applicants have not provided any explanation for the delay in lodging and paying for their letter requesting the ruling.
 - b. The Applicants need not have waited to receive a typed copy of the ruling and could have promptly perused the handwritten copy in order to prepare and lodge their memorandum of appeal.
 - c. The Applicants did not seek and thus lack leave to appeal against the ruling and orders of the subordinate court in this matter. Therefore, the instant application is a non-starter.
4. The application was canvassed by way of written submissions.

Applicant's submissions

5. The Applicant submitted that the application herein was brought without delay to allow the Applicant to continue the suit in the subordinate court and prosecute it to its logical conclusion. That the Applicant has an arguable case and believe he should be given a chance in court to have the matter determined on its merits. Section 95 of the *Civil Procedure Act* allows the court to grant an enlargement of time. That there has been a satisfactory explanation for the delay in filing the appeal. That the Respondent will not suffer any prejudice. That the application is meritorious and deserves a favourable exercise of the Court's discretion.

Respondent's submissions

6. The Respondent submitted that the application is a non-starter as it presumes there is an appeal as of right against the subordinate court's ruling which is not the case. That leave to appeal is required. The failure to obtain leave to appeal against the subordinate court's ruling makes the application to court fatal to its application. This alone is sufficient to dismiss the application. That the Applicant has not provided a satisfactory explanation for the delay in filing their appeal within time. That in the case of *Salat-vs-IEBC & 7 Others* KESC 12 (KLR) the extension of time requires the party seeking it to demonstrate they were not at fault for the delay.
7. That the Applicant waited until the expiry of the 30-day period to request a copy of the ruling. The said request letter was dated 07.08.2024 but stamped in court on 19.02.2024. the Applicant did not provide an explanation for the delay in requesting a copy of the ruling. That a vigilant party would not have waited to obtain a typed ruling to lodge their appeal within time and no explanation has been given as



to what prevent the Applicant from perusing the handwritten copy of the subordinate court's ruling. That equity aids the vigilant and not the indolent. The Applicant's indolence in failing to promptly apply for a copy of the ruling, or failing to peruse the file in the subordinate court, should deprive him of the equitable discretion. That the Respondent would be prejudiced as it will incur additional costs to defend an appeal that lacks any legal foundation. As such, the Respondent submitted that the application should be dismissed with costs.

8. I have considered the Application, responses and the submissions filed herein. The main facts relating to the Application herein are not in dispute. These include the existence of the judgment in Nairobi CMCC No. 4070 of 2024 delivered on 09.02.2024 in favour of the Respondent and the subsequent filing of an Appeal No. E379 of 2024 which was withdrawn.
9. The issues for determination herein are
 - i. Whether the Applicant herein should be granted leave to appeal out of time against the ruling in Nairobi CMCC No. 1360 of 2013.?
 - ii. Who should bear the costs?
10. Section 79G of the *Civil Procedure Act* provides that the appeals from the subordinate court to the High Court must be filed within a period of 30 days from the date of the decree or order from which the appeal lies. It provides:

“Every appeal from a subordinate court to high court should be filed within a period of thirty days from the date of the decree or order appealed against, From such period any time the lower court may certify as having been requisite of a copy of the or order. Provided that an appeal may be admitted out of time if the appellant satisfied the court that he had good and sufficient cause for the filing of the appeal in time.”
11. It allows for the extension of time within which an appeal ought to be filed is a matter of judicial discretion. An applicant seeking enlargement of time to file an appeal must show that he has a good cause for doing so.
12. Before I go into the discussion of principles applicable when seeking extension for leave to file an appeal out of time, the Respondent opposes this application stating that the Applicant failed to seek leave from the trial court to appeal. That an appeal as of right was not applicable to the Applicant as provided under Section 75 of the *Civil Procedure Act* and Order 43 of the Civil Procedure Rules.
13. Section 75 of the *Civil Procedure Act* provides:
 - “(1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted—
 - (a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;
 - (b) an order on an award stated in the form of a special case;
 - (c) an order modifying or correcting an award;
 - (d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;



- (e) an order filing or refusing to file an award in an arbitration without the intervention of the court;
- (f) an order under section 64;
- (g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
- (h) any order made under rules from which an appeal is expressly allowed by rules.

(2) No appeal shall lie from any order passed in appeal under this section.”

14. Whereas Order 43 of the Civil Procedure Rules provides the orders and rules wherein an appeal shall lie as of right under the provisions of section 75 (1) (h).

15. The trial court had dismissed the suit on 21.02.2021 for want of prosecution under Order 17 Rule (2) of the Civil Procedure Rules. The Applicant sought to reinstate the suit by filing an application dated 13.04.2022 under Order 17 Rule (2) and Order 51 Rule (15) of the Civil Procedure Rules. The trial court dismissed the said application vide its ruling delivered on 15.07.2024. A look at Order 43 Rule (1) of the Civil Procedure Rules, an appeal as of right under Order 17 does not lie. There is no indication that the Applicant sought leave to appeal the said ruling.

16. In the case of *Nippon Imports Limited-vs-Muthoni & Ano. (Suing as the administratrix and legal representatives of the Estate of Martin Njeru Katburi (Deceased) & Ano.* (Civil Appeal E016 of 2024) [2024] KEHC 5884 (KLR) (23 May 2024) (Ruling) the court noted as follows:

“ 14....., the respondents also took issue with the fact that the applicant did not seek leave to appeal since the appeal did not lie as of right under Section 75 (1) of the *Civil Procedure Act*. From a perusal of the trial court proceedings, the applicant did not seek leave to appeal against the ruling dated 22nd February 2024. Regardless, it filed a memorandum of appeal promptly alongside the application herein. Order 43 (1) of the Civil Procedure Rules provided for orders against which an appeal may lie as of right. The appeal herein is not one of them and the applicant should have sought leave before lodging the appeal. The applicant’s failure to do so elicits a point of law that has been raised through the preliminary objection. Unfortunately for the applicant, such leave cannot be sought after the appeal has already been lodged. (See the case of *Directline Insurance Co. Ltd-vs-Onyango* (Civil Appeal E345 of 2022)(2022) eKLR).”

17. The Applicant did not address the issue of not seeking leave to appeal in its written submissions. I concur with the Respondent.

18. The Respondent cited the case of *Serephen Nyasari Menge-vs-Rispah Onsase* (2018) eKLR, wherein Mutungi J. held:

“Thus the applicant did not have an automatic right of appeal against the order made on 18th December 2015 and therefore required to obtain the leave of the court as envisaged under section 75 (1) of the *Civil Procedure Act* and Order 43 subrule (3) of the Civil Procedure Rules. Under Order 43 subrule (3) such leave has to be sought from the court



that made the order either at the time the order is made by way of an oral application or within 14 days from the date the order was made.”

19. In light of the foregoing, the application herein is a non-starter as leave to appeal was not sought from the trial court as provided under the *Civil Procedure Act*. The application dated 13.09.2024 is dismissed with costs to the Respondent.

20. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF FEBRUARY 2025.

L. KASSAN

JUDGE

Amimo holding brief Bwire for Applicant

Cheruyot for 3rd Party

Carol – Court Assistant

