



**Nkanata v Inspector General of Police & 2 others (Civil Appeal
E029 of 2023) [2024] KEHC 323 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 323 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E029 OF 2023
FN MUCHEMI, J
JANUARY 25, 2024**

BETWEEN

MOSES MURIUNGI NKANATA APPELLANT

AND

THE INSPECTOR GENERAL OF POLICE 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

RULING

Brief Facts

1. The application dated December 14, 2022 is seeking for orders of leave to file an appeal out of time against ruling in Thika CM Civil Case No. 94A of 2020 delivered on June 22, 2022.
2. The respondents filed a Replying Affidavit dated February 3, 2022 in opposition to the application.

Applicant's Case

3. The applicant states that he instituted a suit being Thika CM Civil Suit No. 94A of 2020 against the respondents for malicious prosecution. On 28/2/2022, the respondents raised a preliminary objection on grounds that the suit was time barred. The trial court thus delivered its ruling on June 22, 2022 finding that the suit was time barred and struck out the suit.
4. Being aggrieved with the decision of the trial court, the applicant states that he instructed his advocates to file an appeal at the time the applicant instructed his counsel. As such, the applicant seeks to enlarge the time to file the appeal. The applicant argues that the delay was not intentional but was caused by the court registry in supplying certified proceedings which were necessary in filing the appeal.



5. The applicant states that his appeal is arguable as it is solely on the issue of jurisdiction having filed the matter one month after the statutory period. Moreover, the applicant argues that the respondents were actively involved in the prosecution of the case until the hearing of the main suit when they raised the preliminary objection. The applicant contends that he will suffer substantial loss for he will lose fruits of judgment for general and exemplary damages suffered out of malicious prosecution if the orders are not granted.

The Respondents' Case

6. The respondents oppose the application and state that the applicant has brought the instant application over five (5) months since the ruling of the trial court delivered on June 22, 2022. Furthermore, the respondents state that the suit in the lower court was dismissed in the preliminary stages and thus the proceedings consist of only eight (8) pages. Consequently, the same could not have taken over five months to be typed and furthermore, the applicant has not adduced any evidence to prove that indeed the delay was brought about by factors out of his control.
7. The respondents contend that the lower court suit was filed over two months out of the statutory period contrary to the law. The respondents further argue that a preliminary objection can be raised at any point of the proceedings before judgment and thus the preliminary objection was properly raised by the 3rd respondent. As such, the respondents contend that the application is a waste of time and ought to be dismissed. Furthermore, the intended appeal is bad in faith, misconceived and an utter abuse of the court process and is made in an attempt to defeat justice.

The Applicant's Submissions

8. The applicant submits that the delay in lodging the appeal was occasioned by the length of time it took to procure the certified proceedings and ruling required to prosecute the appeal. Thus, the applicant argues that the delay was not of his doing as the matter was completely out of his control.
9. The applicant relies on Sections 79G and 95 of the *Civil Procedure Act* and the cases of *Wanjiru Mwangi & Another* [2015] eKLR and *APA Insurance Co. Ltd vs Michael Kinyanjui Muturi* [2016] eKLR and urges the court to exercise its discretion in his favour and enlarge time within which to file the appeal as the delay was not inordinate and the respondents will not suffer any prejudice if the application is granted.
10. The applicant further argues he should not be locked out and yet he has approached the court seeking an opportunity to ventilate his grievances. To support his contentions, he relies on the case of *Kamlesh Mansukhalal Damki Patni vs Director of Public Prosecution & 3 Others* [2015] eKLR.

The Law

Whether The Court should exercise its discretion to grant the applicant leave to file his appeal out of time;

11. Section 79G of the *Civil Procedure Act* 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 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 good and sufficient cause for not filing the appeal in time.

12. It is clear from the wording of section 79G of the *Civil Procedure Act*, that before the court considers extension of time, the applicants must satisfy the court that they have good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of *Diplack Kenya Limited vs William Muthama Kitonyi* [2018]eKLR an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.
13. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that:-

“The underlying principles a court should consider in exercise of such discretion should include:-

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
- d. Whether there is a reasonable reason for the delay, the delay should be explained to the satisfaction of the court;
- e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
- f. Whether the application has been brought without undue delay.

14. Similarly in the case of *Paul Musili Wambua vs Attorney General & 2 Others* [2015]eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-

“.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

15. The applicants have faulted the trial court for the delay in filing his appeal as the registry took a long time in availing to the applicant a copy of the typed proceedings. The issue of delay of typed proceedings is a well known issue in our legal system and courts have extended time and held that such delay is not on the part of the party but the court and this issue consist of facts beyond a party's reach. This was



stipulated by the Supreme Court in the case of *Hassan Nyanje Charo vs Khatib Mwashetani & 3 others* [2014] eKLR where the court stated:-

Counsel for the applicant has stated that he has exercised all due diligence to get the proceedings from the Court of Appeal, but to no avail.....

Would it be in the interests of justice then to turn away an applicant who has prima facie, exercised all due diligence in pursuit of his cause, but is impeded by the slow turning wheels of the court's administrative machinery? We think not.

16. The Supreme Court further expounded in the case of *County Executive of Kisumu vs County Government of Kisumu & 8 Others* [2017] eKLR and held:-

However, we hasten to add that a ground of delay of getting typed proceedings is not a prima facie panacea for a case of delay whenever it is pleaded. Each case has to be determined on its own merit and all relevant circumstances considered. It is worth reiterating that in considering whether or not to extend time, the whole period of delay should be stated and explained to the satisfaction of the court.

17. In the present case, the trial court delivered its ruling on 22nd June 2022 striking out the applicant's suit for being time barred. The applicant filed the instant application on December 14, 2022 which is about five months after the date of the impugned ruling. Although the applicant faults the registry for the delay in obtaining the proceedings, he has not annexed any correspondence requesting for the typed proceedings or a reminder to the court. Neither has he annexed a certificate of delay to confirm that indeed the proceedings took a long time to be typed. The applicant has annexed a copy of the typed proceedings which were certified on 24/8/2022. Thus, it is not clear why, after obtaining the proceedings on 24/8/2022, the applicant did not proceed to file the appeal but waited for another four months. The applicant has not explained satisfactorily to the court the whole period of delay. In this regard, I find that the delay of five months is inordinate and the reasons given for the delay are not plausible.
18. On the chances of the appeal succeeding, the applicant has annexed a draft Memorandum of Appeal raising 5 grounds which challenge the constitutionality of Section 13A of the *Government Proceedings Act*. The applicant argues that Section 13A of the said *Act* which provides for limitation in which to institute a suit against the government contravenes Article 48 of the *Constitution*. Its imperative to note that Section 13A has not been declared unconstitutional by any court and as such, the section is still law in that regard.
19. I have carefully considered the grounds of appeal and I am of the view that the appeal cannot be said to be arguable.
20. As such, it is my considered view that the applicant has not satisfied the conditions to warrant enlargement of time to file the appeal.
21. Accordingly, the application dated December 14, 2022 lacks merit and is hereby dismissed with costs to the respondent.
22. It is hereby ordered.

DATED AND SIGNED AT THIKA THIS 25TH DAY OF JANUARY, 2024.

F. MUCHEMI

JUDGE

