



Wincomp Services v Janet Kurgat t/a Roshina Enterprises (Miscellaneous Civil Application E302 of 2022) [2024] KEHC 428 (KLR) (Civ) (25 January 2024) (Ruling)

Neutral citation: [2024] KEHC 428 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E302 OF 2022**

JN NJAGI, J

JANUARY 25, 2024

BETWEEN

WINCOMP SERVICES APPLICANT

AND

JANET KURGAT T/A ROSHINA ENTERPRISES RESPONDENT

RULING

1. The Applicant herein has filed an application dated 6th April 2022 seeking for leave to file an appeal out of time against the judgment and decree in Milimani Commercial Court Chief Magistrate's Court Civil Case No. 7454 of 2014 dated 20th December 2021.
2. The application is premised on grounds on the face of the application and supported by the affidavit of a director of the plaintiff, Josephine Syovata Wambua, sworn on the 6th April 2022.
3. The application is based on the grounds that judgment was scheduled for delivery on 25th November 2021 but was not delivered. That the advocates for the Applicant came to learn of the delivery of the judgment on the 21/2/2022 when they received a letter from the advocates for the Respondent in which was enclosed a cheque of Ksh.15,000/= and indicated that judgment had been delivered. That on the 23/2/2022 they received a letter from the advocates for the Respondent asking to be supplied with a copy of judgment apparently delivered on 25/11/2021. That upon receipt of the said letter the advocates for the Applicant drew a letter dated 24/2/2022 to the court registry asking for a copy of the judgment. However, that they were not able to trace the court file at the registry until the 4/4/2022 when they were supplied with a copy of hand-written judgment.
4. It is the contention of the Applicant that judgment was delivered in the absence of the advocates for the Applicant. That the Applicant has been aggrieved by the judgment and wish to exercise its right of appeal. That the appeal has high chances of success. Further that the Respondent will not be prejudiced



if the application is allowed as she will have her day in court to oppose the intended appeal. That failure to file the appeal within time was caused by mistake of the trial court. That the applicant is yet to be supplied with the typed copy of the lower court's judgment.

5. The application was opposed by the Respondent vide a replying affidavit dated 2nd September 2022.
6. The application was canvassed by way of written submissions.

Applicant's submissions

7. The Applicant submitted that judgment in the matter was slated for 25/11/2021 but was not delivered on that date. That they were informed that it would be delivered by notice of which they were not informed. That by the time they learnt of the delivery of the same, they did not have a copy of the judgment so that they could file the appeal. That a copy of the same was not available to them until 4/4/2022 when they managed to get a copy of hand-written judgment by which time the period granted for filing the appeal had lapsed. That the application was filed on 27/5/2022.
8. The Applicant submitted that the delay of 3 months in filing the application is not inordinate and is excusable. That the Respondent will not suffer any inconvenience that cannot be compensated by an award of costs if the application is allowed.

Respondent's submissions

9. The Respondent on the other hand submitted that it is not in contention that judgment was delivered without notice on both parties. That in compliance with the judgment the Respondent forwarded a banker's cheque of Ksh.15,200/= to the Applicant on 25/1/2022 which they acknowledged receipt of on the same day. It was submitted that this is a clear indication that they were aware that judgment had already been delivered.
10. It was submitted that the Applicant obtained a copy of handwritten judgment on 21/2/2022 which was within the time provided for filing an appeal but still the Applicant neglected to file the appeal. That the instant application was filed on 27/5/2022 which was 7 months after the delivery of the judgment on 25/11/2021. It was submitted that the delay for failure to file the appeal has not been satisfactorily explained. That the length of delay of 7 months is not excusable. It was submitted that the filing of the application was an afterthought meant to frustrate the cause of justice and waste the court's time. That the application should be dismissed with costs.

Analysis and Determination

11. This being a first appeal, the duty of this court is to re-evaluate and re-analyze afresh the evidence adduced at the lower court and draw its own independent conclusions. The Court of Appeal in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, put this duty as follows;

An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.

12. I have considered the grounds in support of the application and the submissions by the respective advocates for the parties. The issue for determination is whether the application for leave to file an appeal out of time is merited.



13. The application is made pursuant to the provisions of section 79G of the *Civil Procedure Act*, 2010 which provides as follows:

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 good and sufficient cause for not filing the appeal in time.

14. This court has wide discretion to enlarge time under Section 95 of the *Civil Procedure Act* and Order 50 Rule 6 of the *Civil Procedure Rules*, 2010. The same provide as follows:

Section 95. Enlargement of time

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

Power to enlarge time [Order 50, rule 6.]

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

15. The factors that the court has to consider in deciding on whether or not to grant an application to file an appeal out of time are as was laid out in the case of *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi* cited with approval by the Court of Appeal in *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR where it was held: -

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly) the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted.”

16. The Supreme Court of Kenya in the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & Others* [2014]eKLR set the following guidelines for consideration in an application for enlargement of time:

- “(1) 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;
- (2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;



- (3) Whether the court should exercise discretion to extend, is a consideration to be made on a case to case basis;
- (4) Whether there is a reasonable reason for the delay, the delay should be explained to the satisfaction of the court;
- (5) Whether there will be any prejudice suffered by the Respondent if the extension is granted;
- (6) Whether the application has been brought without undue delay; and
- (7)

17. It is therefore incumbent in an application for enlargement of time for the court to consider whether the application has been made without undue delay, the explanation for the delay and whether there will be prejudice suffered by the Respondent if leave to file the appeal out of time is granted.
18. The explanation given by the applicant for not filing the appeal is that judgment was delivered in their absence and in the absence of their advocates. That they came to learn of the delivery of the judgment on 23/2/2022 when they received a letter from the advocates for the respondent indicating that judgment had been delivered.
19. The Respondent admitted that judgment was delivered in the absence of both sides. The question then is as to the time when the Applicant came to learn of the delivery of the judgment and whether there was delay in filing the instant application after learning of the delivery of the same.
20. From the pleadings placed before the court I am persuaded that the Applicant came to learn of the delivery of the judgment in February 2022 and did not get hold of a copy of the judgment until April 2022 when they obtained a hand-written copy of the same. It is apparent that the Applicant had difficulties in obtaining a copy of the judgment from the court. The advocate for the Respondent wrote a letter to the advocate for the Applicant requesting to be provided with a copy of the judgment. This confirms that there was difficulty in getting a copy of the judgment. It would have been difficult for the applicant to file the application before laying their hands on the judgment. The Applicant has thereby satisfactorily explained the reason for the delay in filing the appeal and the application. I am of the considered view that a period of 3 months is not inordinate delay in filing the application after learning of the delivery of the judgment. That delay in the circumstances of this case is excusable.
21. It was the duty of the Respondent to show that they will suffer prejudice if leave to file appeal out of time is granted. They did not show any prejudice. In my view, they can be compensated by way of costs for any delay occasioned to them.
22. In view of the foregoing, I allow the application and grant the Applicant time to file the appeal within 14 days from the date hereof.
23. The Respondent to have the costs of the application.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF JANUARY 2024

J. N. NJAGI

JUDGE

In the presence of:

Mr. B. M. Musyoki for Applicant



Mr. Moturi for Respondent

Court Assistant – Amina

30 days Right of Appeal.

