



REPUBLIC OF KENYA



**Dumila v Bwanamkuu (Miscellaneous Application E058 of 2023)  
[2024] KEHC 3149 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3149 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
MISCELLANEOUS APPLICATION E058 OF 2023  
SM GITHINJI, J  
MARCH 20, 2024**

**BETWEEN**

**ABUBAKAR MOHAMED OMAR DUMILA ..... APPLICANT**

**AND**

**MARYAM MOHAMED BWANAMKUU ..... RESPONDENT**

**RULING**

1. On 27<sup>th</sup> June 2023, the Applicant moved this court vide a Notice of Motion dated 9<sup>th</sup> June, 2023, under sections 1A, 1B, 65 (1) (C) and 79G of the Civil Procedure Act; Order 51 Rules 1 and 3 of the Civil Procedure Rules, 2010; and Article 48, 50 and 159 (2) (d) of the Constitution of Kenya. The Applicant sought the following orders: -
  1. Spent.
  2. That this honourable court deem the appeal filed herein as having been filed within time or in the alternative do grant the applicant leave to file the appeal out of time.
  3. The costs of this application be in the cause.
2. The grounds in support of the application were outlined on the face of the application and in the supporting affidavit sworn by the Applicant on the even date. The Applicant averred that he filed an application dated 19<sup>th</sup> December 2022 before the Kadhi's Court which was dismissed vide a ruling delivered on 21<sup>st</sup> March 2023. He stated that neither he nor his advocate was notified of the said ruling date and that they only became aware of the ruling on 6<sup>th</sup> June 2023, when his advocate attended the registry for other matters. The Appellant averred that he intends to appeal the Kadhi's decision and that it has a high chance of success.
3. The Respondent opposed the application. She swore a Replying Affidavit on 24<sup>th</sup> July 2023 stating that directions were given by the honourable Kadhi on 23<sup>rd</sup> February 2023 that the Applicant's application



would be canvassed by way of written submissions. On 28<sup>th</sup> February 2023, the Respondent's advocate then served via email, a mention notice to the Applicant's advocate. When the matter was mentioned on 16<sup>th</sup> March 2023, neither the Applicant nor his advocate availed themselves. The Respondent deposed that the Applicant was all along aware of the impugned ruling. She stated that the Applicant is guilty of laxity as he was never serious in attending proceedings in the Kadhi's court.

4. The Respondent added that the intended appeal is devoid of merit since the issues raised in the memorandum of appeal were never raised in his application which was dismissed. To her, the present application is a waste of judicial time and the intended appeal is aimed at denying her the fruits of judgment.
5. The application was canvassed by way of written submissions which I have carefully read and understood. Having considered the application, affidavits, annexures thereto, submissions filed and authorities presented to me, I find that the sole issue for determination is whether the Applicant is entitled to leave to file the appeal out of time.

### **Analysis and Determination**

6. For appeals to this court, section 79G of the *Civil Procedure Act* is the operative law in determining whether leave to appeal out of time should be granted. It provides that:

“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.”

7. The Supreme Court in the case of *County Executive of Kisumu v County Government of Kisumu & others* [2017] eKLR while quoting their decision in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others* Application No. 16 of 2014 [2014] eKLR reiterated the considerations to be made in such a case to be as follows:

“(23) It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The Court delineated the following as:

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 the discretion to extend time, 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 respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and...”

8. The Applicant in this case therefore had a duty to demonstrate that he had sufficient or good reasons for the delay to warrant this court to exercise discretion in his favour. The present application was filed 3 months after delivery of the impugned ruling. I must point out that the Applicant did not produce any annexures or documents to his supporting affidavit, not even the ruling or orders he wishes to challenge in the intended appeal. I equally do not see a copy of the memorandum of appeal. He however asserted that the delay was occasioned by failure to be notified of the ruling date before the same was delivered.

8. I am not convinced with the given reason. I say so because the Applicant has failed to demonstrate whether the impugned ruling was to be given on notice or that the date was taken in court or otherwise. It must also not be lost that cases belong to litigants and it is their duty to follow up on their matters. Having said so, I find no merit in the Applicant’s application. I dismiss the same forthwith with no orders as to costs given that the matter is a family dispute.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 20TH DAY OF MARCH, 2024.**

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**S.M. GITHINJI**

**JUDGE**

**In the Presence of: -**

**1. Miss Mwangi for the Respondent**

**2. Mr Aboubakar for the Appellant**

