



Assah Trading Company Limited & 2 others v Bank of Africa Kenya Limited (Miscellaneous Application 244 of 2022) [2024] KEHC 3399 (KLR) (15 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3399 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
MISCELLANEOUS APPLICATION 244 OF 2022**

**JM CHIGITI, J
MARCH 15, 2024**

BETWEEN

**ASSAH TRADING COMPANY LIMITED 1ST APPLICANT
ANWAR AHMED HASSAN 2ND APPLICANT
FARUK MOHAMEED 3RD APPLICANT**

AND

BANK OF AFRICA KENYA LIMITED RESPONDENT

RULING

1. The application before this court for determination is the one dated 6th October, 2023 wherein applicants are seeking for orders;
 1. That the Honourable court be pleased to grant the applicant leave to Appeal out of time against the ruling given on 17th August, 2022 in Kisi CMCC No. 795 of 2021.
 2. Cost of this Application be provided for.
 3. Any other Order that meet the ends of justice.
2. The Application is premised on the grounds on the face of the motion and the Supporting Affidavit of Ogutu Kevin Omondi sworn on 6th October, 2022.
3. The Honourable trial court delivered its Ruling in respect to the Notice of motion dated 14th October, 2023 on 17th August, 2022 in Kisii Civil Case No. 795 of 2021 disallowing the Application.
4. Being aggrieved with the said Ruling the Appellant instructed his advocate to file an Appeal against the said decision.



5. The Appellant's Advocate drafted the said Appeal and gave it to his office clerk Mr. Omondi on 15th September, 2022 to file in court on 16th September, 2022 being the last day of filing.
6. The said office clerk feel sick and did not report to work on 16th September, 2022 and he did not inform anybody in the office about the memorandum of Appeal that was to be filed.
7. The office clerk reported back to work on 26th September, 2022 only to remember that he never filed the memorandum of Appeal.
8. Since time for filing the Appeal had already lapsed, the Applicant had to seek leave to file the Appeal out of time.
9. The Application is premised on the provisions of Section 79G of the Civil Procedure Act which provides; -

“Every Appeal from the subordinate court to the high court shall be filed within a period of 30 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 required for preparation and delivery to the Appellant of a copy of decree; -

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.

10. The Applicant filed this Application within a period of less than two months after the delivery of the Ruling and the reason for the delay in filing the Appeal as has been already explained above is that the Applicant's Advocate's Clerk inadvertently failed to file the Appeal upon being instructed to do so the Applicant's Advocate for reason that he feel sick and by the time he came back to work the period for filing of the Appeal had lapsed.
11. The delay in filing the Appeal was not deliberate rather an excusable misfortune that befell the Applicant. Had the Applicant's counsel known that the Appeal had not been filed as he had directed the clerk, measures would have taken to ensure that the Appeal was filed within the time since the same had already been prepared and was ready for filing.

The respondents case:

12. The Respondents opposed the Application through the Replying Affidavit of Janet Kimunyu. It is the Respondents case that The Application does not meet the threshold for enlargement of time in which to file an appeal for the reasons that:
 - a. The Applicants have not demonstrated any good or sufficient reason for the delay in filing their intended appeal.
 - b. The Applicants have alleged that the delay was occasioned by their Advocates court clerk falling ill but they have not adduced any evidence to corroborate this allegation nor have they demonstrated why the Memorandum of Appeal could not be filed by any other person at their Advocates firm.
 - c. The Applicants have deliberately delayed the prosecution of the instant application for over 7 months since the Ruling was delivered. Moreover, the Applicants have not provided a reason for the inordinate delay in the prosecution of the instant application.



- d. The Applicants have never served the Memorandum of Appeal or a copy of the letter seeking certified copies of the Ruling and proceedings and thus no steps have been taken by the Applicants to prosecute their intended appeal.
- e. That the Applicants have not demonstrated any steps that they took to ensure that the intended appeal had been filed, they instead delegated and left the matter to the Applicant's Advocates Clerk.
- f. The Applicants herein have blamed the Advocate on record, the Advocate on record has shifted the blame to the clerk and the said clerk who is the deponent has shifted the blame to the office secretary. According to the respondent, this is a clear demonstration that the Applicants have since abandoned the present suit and only woke up when execution was on top gear.
- g. The Present application lacks substance, reasonable grounds to facilitate this honourable Court to invoke its discretion and consequently, the same ought to be dismissed instantly.
- h. The Respondent will be greatly prejudiced if the orders sought are granted as the litigation between it and the Applicants is nearing its logical conclusion with the completion of execution owing to the inordinate delay in prosecution of the instant application and purported appeal by the Applicants.

Analysis and determination:

13. Equitable reliefs are underpinned on well settled principles which guide the Court to decline or grant the applications. In the case of *Salat v Independent Electoral & Boundaries Commission & 7 others* [2014] KLR-SCK, the Court held as follows on extension of time to file an appeal out 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 ought to exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 4. Whether there is reasonable reason for the delay, which ought to be explained to the satisfaction of the Court;
 5. Whether there would be any prejudices suffered by the respondents if the extension was granted;
 6. Whether the application had been brought without undue delay; and;
 7. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.
14. I have looked at the applicant's case and I am satisfied that although there was a delay in filing the memorandum of appeal the delay for two months is not inordinate.
15. The reason for the delay in filing has been satisfactorily explained. The respondent has not demonstrated how it will suffer prejudice.
16. Mistake of counsel must never be visited upon an innocent litigant.



Order:

17. It is the finding of this court that the appellant has met the criteria for the grant of leave to file an appeal out of time and the motion is merited. Consequently, this court makes the following disposal orders;
- a. The appellant is granted leave to appeal out of time.
 - b. The draft memorandum of appeal be deemed as duly filed.
 - c. Lower court file to be availed to this court within 30 days from today.
 - d. The Memorandum of appeal to be served upon the respondent within 30 days from today.
 - e. Case to be mentioned for directions on 3rd July, 2024.
 - f. Costs in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 15TH DAY OF MARCH, 2024

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J. CHIGITI (SC)

JUDGE

