



Lighting and Interiors by Diamond Limited v Njoroge & 2 others (Miscellaneous Application E596 of 2022) [2024] KEHC 3055 (KLR) (Commercial and Tax) (15 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3055 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E596 OF 2022**

FG MUGAMBI, J

MARCH 15, 2024

BETWEEN

LIGHTING AND INTERIORS BY DIAMOND LIMITED APPLICANT

AND

BERNARD NGIGI NJOROGE 1ST RESPONDENT

SASAHOST LIMITED 2ND RESPONDENT

AIRTEL KENYA LIMITED 3RD RESPONDENT

RULING

Background

1. Before the Court is a Notice of Motion application dated 17th August 2022, brought under sections 3A, 75 (1), 79G, 95 and 63 (e) of the [Civil Procedure Act](#) and Order 50 rule 6 of the [Civil Procedure Rules](#), seeking leave to appeal against a ruling of the Chief Magistrate's Court striking out the suit for lack of jurisdiction, out of time.
2. The application is premised on the grounds on the face of it, the supporting affidavit sworn by the applicant's advocate, Joseph M. Rituga, on the same date and written submissions dated 21st June 2023.
3. The applicant confirms that time to file an appeal in this matter had lapsed, that the delay in lodging the appeal is excusable and that was in the interest of justice that the application be allowed.
4. The application is opposed by the 1st respondent through grounds of opposition dated 19th June 2023, on the grounds that the application was res judicata as the applicant had filed a similar application which was already determined by Honourable Justice Majanja in HCCOMM Misc App E099 of 2022 through a ruling dated 31st May 2022.



5. The respondent argued that the applicant had not shown a good and sufficient cause for failing to file an appeal within time. Finally, the respondent argues that the application is incompetent and misconceived since leave ought to be sought to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.

Analysis

6. I have considered the pleadings, the submissions and evidence presented by rival parties. The issues that arise for determination are:

- i. Whether this Court has jurisdiction to determine the application for leave where the applicant has not obtained leave from the lower court where the ruling emanated from as required under Order 43 Rule (1);
- ii. Whether the instant application is *res judicata*; and
- iii. Whether the applicant has made out a case for the grant of leave to appeal.

7. On the first issue Order 43 rule 1 (3) of the [Civil Procedure Rules](#) provides that:

“An application for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.”

8. Section 75 of the [Civil Procedure Act](#) in turn provides that:

“(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.”

9. I have read this Court’s ruling of 31st May 2022 in *Lighting and Interiors by [Diamond Limited V Njoroge & 2 Others](#)*, (Misc Appln E099 of 2022) [2022] KEHC 531 (KLR). It is clear that the applicant had filed an application seeking leave to appeal out of time against the ruling delivered by the subordinate court on 31st August 2021 in Milimani MCC No. E622 of 2021 striking out the suit for lack of jurisdiction.

10. One of the issues for determination was whether the court has jurisdiction to grant leave in view of the fact that order appealed from is not appealable as of right but with leave which leave must be sought and obtained. On that issue, the Court pronounced itself as follows:

“I have considered the arguments and I agree with the Respondents that the application before the subordinate court was struck out on the ground of want of jurisdiction hence it could not give rise to a decree since the rights of the parties were not settled. The Applicant therefore required leave as the order resulting therefrom was not appealable as of right under Order 43 rule 1(2) of [the Rules](#). Since an appeal in the High Court is filed by way of filing a Memorandum of Appeal, an appeal would be incompetent if leave is not sought as a pre-condition for the filing the appeal.

Despite the requirement of Order 43 rule 1(3) of [the Rules](#) requiring that leave be granted by the Subordinate Court in the first instance, this position is not supported by the provision of section 75(1) of the [Civil Procedure Act](#) which provides that leave may be granted by the court making the order or by the court to which the appeal lies if such leave were granted.



In this case, the time for filing the appeal has lapsed and the opportunity for applying for leave before the Subordinate Court lost. Since it is only the High Court that can grant leave for extension of time, it is the High Court that ought to grant leave to appeal which may be sought at the same time with the application for leave to appeal out of time.

For the reasons I have set out, I do not think it is necessary to express a view of the grounds for seeking leave to appeal out of time which is the second issue.”

11. On the second issue, section 7 of the *Civil Procedure Act*, provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

12. Flowing from the above, I find that the Court already pronounced itself on the issue of this Court’s jurisdiction to grant leave where it has not been obtained from the Court which the order sought to be appealed from emanated. No appeal or review has been filed against that decision. Therefore, that ground fails.
13. The second ground of whether the instant application is *res judicata* also fails because the Court did not finally decide the issue of whether the applicant had established the grounds for seeking leave to appeal out of time.
14. I now turn to the substantive issue of whether the applicant has made out a case for the grant of leave to appeal out of time. The Court’s power to grant leave to appeal out of time is discretionary. However, the discretion must be exercised judicially and with reason, not capriciously or on a whim.
15. The principles for consideration for the grant of leave to appeal were laid out by the Court of Appeal in *Leo Sila Mutiso V Hellen Wangari Mwangi*, [1999] 2 EA 231:

“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.” (Emphasis mine)

See also *Nicholas Kiptoo Arap Korir Salat V The Independent Electoral and Boundaries Commission & 7 Others*, (*Sup. Ct Application No. 16 of 2014*) [2014] eKLR.”

16. In this application, the applicant brought the present application on 17th August 2022, 78 days after the ruling of 31st May 2022 which struck out the motion of 4th February 2022. In *Andrew Kiplagat Chemaringo V Paul Kipkorir Kibet*, [2018] eKLR the Court of Appeal observed that:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”



17. The applicant's advocate explained that the reason for the delay is that the ruling of 31st August 2021 was delivered in the absence of both the applicant and his advocate. The ruling was scheduled to be delivered on 25th August 2021 but it was not ready and was then to be delivered on notice. However, neither the applicant nor his advocate were notified of the new ruling date of 31st August 2021.
18. The applicant learnt of the ruling on 24th January 2022 when its advocates moved to fix a pending application for hearing and was notified of the ruling by the 1st respondent's advocate. Thereafter, the applicant's advocates applied for a copy of the ruling and confirmed the position.
19. Afterwards, the applicant filed a motion dated 4th February Nairobi HCCC Misc. Application E099 of 2022 seeking leave to appeal out of time which was struck out on 31st May 2022 because the applicant had not sought leave to appeal. This led to the filing of the present application which is dated 17th August 2022.
20. The respondents have not contested the fact that the decision intended to be appealed was delivered without notice. Parties are entitled to a notice of the date of delivery of ruling and delivery of a ruling without notice may be a sufficient reason for expansion of time if a party moves the court expeditiously. See *Ngoso General Contractors Ltd V Jacob Gichunge*, Civil Appeal No. 248 of 2001 [2005] 1 KLR 737.
21. Accordingly, I find though the delay is inordinate the applicant has tendered a satisfactory explanation for the delay. As to whether the intended appeal is arguable, I have looked at the draft Memorandum of Appeal which raises the ground, among others, that the Learned Magistrate erred in failing to find that it was the counterclaim dated 14th June 2021 that raises issues that can only be heard and determined by the High Court in the first instance. To my mind, the intended appeal is arguable, not frivolous and it would be in the interests of justice to allow the applicant an opportunity to present its case.
22. Lastly, on the degree of prejudice to the respondents, the Court is required to balance the parties' competing interests. I note that on 8th November 2023, it was confirmed that the applicant has deposited costs as per the order of Hon. Majanja J. of 31st May 2022. This would ameliorate any prejudice to the respondents.

Determination

23. In view of the foregoing, I find that the application dated 17th August 2022 is merited. It is hereby allowed as prayed. The costs of the application shall await the outcome of the appeal.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 15TH DAY OF MARCH 2024.

F. MUGAMBI

JUDGE

