



**Board of Governors Sun & Shield Primary School v Rotich & another (Civil Appeal E001 & E002 of 2022 (Consolidated)) [2024] KEHC 5276 (KLR) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 5276 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL E001 & E002 OF 2022 (CONSOLIDATED)**

**HM NYAGA, J**

**APRIL 30, 2024**

**BETWEEN**

**THE BOARD OF GOVERNORS SUN & SHIELD PRIMARY SCHOOL ..... APPELLANT**

**AND**

**SAMMY KIPCHUMBA ROTICH ..... 1<sup>ST</sup> RESPONDENT**

**DOMINIC KAMAU KARUITHA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Appeal no. E001 of 2022 arose from Nakuru CMCC No. 563 of 2013: Sammy Kipchumba Rotich Vs Mary, Waigi, The Board of Governors Sun & Shield Primary School, Kipyegon Chelimo, Cheptoo Julius and Jackson Kipkemoi Rotich (the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants respectively).
2. The Appeal No. E002 of 2022 arose from Nakuru CMCC No. 891 of 2012: Dominic Kamau Karuitha Vs. Mary, Waigi, The Board of Governors Sun & Shield Primary School, Kipyegon Chelimo, Cheptoo Julius and Jackson Kipkemoi Rotich (the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants respectively). Both Appeals were consolidated pursuant to this Court orders issued on 18<sup>th</sup> October, 2023.
3. In each appeal the Applicant/Appellant filed a Notice of Motion Application dated 5<sup>th</sup> January, 2022 on 7<sup>th</sup> January, 2022. The applications are brought under Sections 1A, 1B, 3A, 3B & 95 of the *Civil Procedure Act*, Order 42 Rule 6(3), 6, and Articles 22 and 159 of *the Constitution* of Kenya.
4. The Applications have 7 and 8 prayers respectively but save for prayers for leave to file an appeal out of time and for costs of the Application, all the other prayers are spent.
5. The Applications are supported by grounds set out on the face of it and the Supporting Affidavit of Gladys Jerobon Kiptiony who is the director and proprietor of the Applicant.



6. It is the Applicant's case that it was never served with any summons, judgment and notice of entry of judgment and or a valid decree /post judgment proceedings and that the firm of Getrude Matata Advocates which entered appearance on its behalf, did so without its instructions and it does not even know of the existence of such a firm.
7. It is Applicant's further assertion that the said law firm entered into consent on liability leading to the contested judgments herein without the Applicant's instruction and therefore it committed clear acts of fraud and gross misrepresentation.
8. The Respondents, Sammy Kipchumba Rotich and Dominic Kamau Karuitha opposed the Applications via their Replying Affidavits sworn on 21<sup>st</sup> January,2021 and 20<sup>th</sup> January, 2021 respectively.
9. The 1<sup>st</sup> Respondent avers that the Applicant's assertion that it was unrepresented in the proceedings in Nakuru CMCC No.563 of 2013 is completely misleading as it was represented all through by the firm of Kinyanjui Njuguna & Co. Advocates.
10. He asserts that the instant application is an abuse of the court process as the Applicant filed a similar application dated 9<sup>th</sup> December,2021 for review and setting aside of the judgment before the trial court and the same is pending determination.
11. He depones that the firm of Odhiambo & Odhiambo Advocates filed a consent dated 9<sup>th</sup> December 2021 signed by the firm of Kinyanjui Njuguna & Co Advocates allowing them to effect Notice of Change of Advocates to represent the Applicant but the said firm of Odhiambo & Odhiambo Advocates did not file a Notice of change of Advocates and as such they are improperly on record and all the documents filed by them are incompetent.
12. With respect to prayer for leave to file appeal out of time, the 1<sup>st</sup> respondent asserts that the same should be declined for reasons that no good or sufficient reasons has been advanced for failure to file the appeal in time.
13. It is his further deposition that the intended appeal is substantially defective since the Applicant has omitted other parties in Nakuru CMCC No. 563 of 2013.
14. The 2<sup>nd</sup> Respondent on his part avers that the Application is completely devoid of merit and actuated with malice to frustrate him from enjoying the fruits of his judgment.
15. He avers that the contention by the Applicant that it was not served with summons to enter appearance is untrue as the Applicant's head teacher duly received the summons on its behalf ,signed and affixed the school stamp on the backside of the same.
16. He depones that subsequent to the said service the Applicant duly entered appearance and filed statement of defence & compliance documents through the firm of Getrude Matata & Co. Advocates on 18<sup>th</sup> October, 2012.
17. He contends that the firm of Odhiambo & Odhiambo Advocates is improperly on record as it has never filed a notice of change of advocates taking over the conduct of the matter from the firm of Getrude Matata & Co. Advocates and as such the documents filed by it are incompetent and ought to be struck out.
18. It is his deposition that no competent appeal can be lodged against the judgment of the trial court where he is the only respondent yet there were other Defendants in the lower court who participated fully in the trial and the appeal will affect them directly as per the draft memorandum of Appeal.



19. The Application was canvassed through written submissions.

### **Applicant's/ Appellant's Submissions**

20. The Applicant's counsel argues that grant of leave to file an appeal out of time is not an automatic right but an equitable remedy granted only upon satisfying the court of certain facts. He refers this court to the case of *Nicholas Kiptoo Arap Korir Salat vs The Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR which discussed the principles that guide the courts when dealing with applications for extension of time.
21. The Counsel also relies on the provisions of Section 79 G of the *Civil Procedure Act*.
22. The appellant's counsel argues that the purported Nakuru CMCC No. 891 OF 2012 is non-existent and fictitious and the summons & all consequential orders are all invalid for want of process and procedure.
23. The Appellant's counsel reiterates that proceedings, hearings, proclamations, attachment and Decree in relation to the matter were not served upon him or the Applicant.
24. The Counsel submits that the Appeal has a high probability of success and if not allowed to proceed the Applicant stands to be greatly prejudiced as it will lose its business premises and ability to conduct its trade effectively.
25. The counsel urges the court to exercise its discretion and allow the Applicant to file an appeal out of time.

### **Respondent's Submissions**

26. The respondents' counsel submits that the Applicant was aware of the suits but it chose to sleep on its right until when execution process commenced that it decided to file the instant applications.
27. He posits that the applicant has not explained how it found out about the judgment and reasons for the delay in filing an appeal if at all it was aggrieved by the decision of the trial court, and failed to establish whether it did an inquiry from the firm of Getrude Matata on the issue of representation.
28. On factors to consider in an application for extension of time to file an appeal out of time, this court was referred to the cases of *Salome Njoki Njuguna vs Jacob Muriungi Murea* [2018] eKLR; *Nginyanga Kavole vs Mailu Gideon* [2019] eKLR ; & *Habo Agencies Limited vs Wilfred Odhiambo Musingo* [2015] eKLR.
29. On costs, the Respondents' counsel argues that pursuant to Section 27 of the *Civil Procedure Act* costs follow the event.
30. He further cites the *Halsbury's Laws of England, 4th Edition (Re-issue), [2010], Vol.10. para 16*, which notes that:

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice”
31. From the foregoing, the counsel prays for the dismissal of the Applications with costs.



## Analysis & Determination

32. The issues that fall for determination are: -

- a. Whether the firm of Odhiambo & Odhiambo Advocates is properly on record.
- b. Whether the Applicant should be granted leave to appeal out of time.

Whether the firm of Odhiambo & Odhiambo Advocates is properly on record

33. Order 9 Rule 9 of the Civil Procedure Rules provides: -

“When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—

- (a) upon an application with notice to all the parties; or
- (b) upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be.”

34. The purport of Order 9 Rule 9 of the Civil Procedure Rules was addressed in the case of *Kazungu Ngari Yaa Mistry vs Naran Mulji & Co.* [2014] eKLR, where the court held as below:

“The provision envisages two different scenarios and the only commonalities are that, there has been a judgment and there was advocate on record previously. In first scenario under (a), the new advocate or the party in person makes a formal application to the Court with notice to all parties who participated in the suit for grant of leave to come on record or act in person. Under this first scenario, the consent of the previous advocate is not necessary, but the party must give notice to the other parties and then satisfy the Court to grant leave. In the second scenario under (b), the new advocate or party in person needs to secure the written consent of the previous advocate on record, file the consent in Court and then seek leave to come on record. My understanding of the scenario under (b) is that a formal written application is not necessary and that once the written consent has been filed, an oral or informal application would be sufficient to move the Court.”

35. The reasoning behind the said provision was also well articulated in the case of *S. K. Tarwadi vs Veronica Muehlmann* [2019] eKLR where the judge observed as follows:

“...In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him....”

36. The 1<sup>st</sup> Respondent contends that the current firm of advocates on behalf of the Applicant in Appeal no. E001/2022 is improperly on record as it did not file a Notice of change of Advocates.

37. From the lower court’s record, the firm of Kinyanjui Njuguna & Co Advocates was on record for the Applicant herein.

38. Post judgment, the said firm of Kinyanjui and Njuguna & Co Advocates and the firm of Odhiambo & Odhiambo Advocates signed a consent dated 9<sup>th</sup> December, 2021 whereby the latter firm took over the matter on behalf of the Applicant herein. Therefore, pursuant to Order 9 Rule 9 (b) the present firm is properly on record for the Applicant.



39. Regarding Civil Appeal No. 2 of 2022, the 2<sup>nd</sup> Respondent's case is that the firm of Odhiambo & Odhiambo Advocates never filed a notice of change of advocates to take up the conduct of the matter from the firm of Getrude Matata & Co. Advocates, and the alleged consent between the firms herein dated 9<sup>th</sup> December, 2021 is a forgery since the firm of Getrude Matata disowned the same. He annexed an email extract between his advocate and the said Getrude Matata Advocate to buttress this position.
40. I note that the said firm of Getrude Matata and Company, although said to have denied ever signing the consent to come on record, did not file any affidavit. The firm has neither complained that the current advocates have irregularly taken their brief, despite having purportedly written to say that they did not sign the consent.
41. Looking at the matter, I do not think that there is cogent evidence that the consent dated 30<sup>th</sup> November 2021 by the firm of Getrude Matata was fraudulently obtained. No report has been filed with the relevant authorities in respect of the said consent.
42. It is to be noted that the issue had been dealt with by the lower court and on 21<sup>st</sup> September 2021, it found that the firm of Odhiambo & Odhiambo were not properly on record. The said consent appears to have been filed to address that issue.
43. The lower court record also shows that although Gertrude Matata & Co Advocates were on record for the applicant, they did not participate in the hearing of the case at all. The said record also shows that substantive orders were subsequently issued by the lower court with the firm of Odhiambo and Odhiambo & Co. Advocates on record.
44. In the premises, I do not think that at this stage any prejudice is caused to the parties by the participation of the current firm of advocates. The applicant is entitled to an advocate of their choice and if the previous advocate has any issues, which have not been raised, that is a matter of taxation of costs against the applicant and it ought not to really affect the case as against the respondent herein.
45. There being no complaint from the firm of Gertrude Matata & Co. in Appeal no. E002 of 2022 arising from CMCC No. 891 of 2012, it is my view that it is really difficult to hold that the application was filed by a stranger, and ought to be struck out at this stage.
46. Having considered the question of representation, I will proceed to look at the other issues raised.  
Whether the application seeking leave to appeal out of time is merited
47. I have duly considered the submissions by the parties on the issue.
48. Section 79G of the *Civil Procedure Act*. The section 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.”



49. Section 95 of the *Civil Procedure Act* provides thus: -

“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.”

50. The applicant approaching the Court under this section must demonstrate “good and sufficient cause” for not filing the appeal in time. In *Thuita Mwangi vs Kenya Airways* (2003) eKLR, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in pari materia with Section 79G of the *Civil Procedure Act*, reiterated its decision in *Mutiso v Mwangi* [1997] KLR 630 as follows:

“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 general the matters which this court takes into account in deciding whether to grant an extension of time are first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

51. While the discretion of the court is unfettered, the applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court’s discretion in his favor.

52. The Court of Appeal in *Aviation Cargo Support Limited v St. Mark Freight Services Limited* [2014] eKLR held as follows:

“For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the court why it occurred and what steps the applicant took to ensure that it came to court as soon as was practicable.”

53. It is thus clear that even though there is no maximum or minimum period of delay set by the law, anyone seeking this relief must satisfactorily explain the cause of the delay. (See also *Andrew Kiplagat Chemaringo vs Paul Kipkorir Kibet* [2018] eKLR.

54. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others* [2014] eKLR set out the principles applicable in an application for leave to appeal out of time. The Court state inter alia that:

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

1. 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;
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 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.
55. These principles were also considered in the earlier case of *Leo Sila Mutiso vs Rose Hellen Wangeri Mwangi Civil Appeal 255/ 1997*, where the court held as follows: -
- “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.”
56. These principles were also reiterated in *First American Bank of Kenya Ltd vs Gulab P. Shah & Others HCC 2255/2000 [2002] IEA 65* and listed them as follows: -The explanation if any, for the delay;The merits of the contemplated action, whether the appeal is arguable;Whether or not the respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the applicant.
57. I will therefore proceed to determine whether the Applicant has advanced plausible grounds for delay in filing the appeals.
58. The lower court’s judgment in *CMCC No. 891/2012* was delivered on 17<sup>th</sup> December 2019 and subsequently the Applicant filed an application dated 28<sup>th</sup> May, 2021 seeking to set aside the judgment and decree and all consequential orders and the defence case to be reopened but the same was, indisputably, dismissed on 24<sup>th</sup> September, 2021.
59. Thereafter, the Applicant filed an application dated 9<sup>th</sup> December,2021 seeking unconditional release of the subject motor vehicle, temporary injunction restraining the respondent and the interested party and their agents from executing the decree issued on 4<sup>th</sup> March,2021 and from attaching or interfering with assets illegally proclaimed.
60. Before the ruling was delivered the Applicant filed the instant application on 7<sup>th</sup> January, 2022. That is about 2 years after the judgment.
61. In *Nairobi HCC No. 32 of 2010, Utalii Transport Company Limited & 3 Others vs NIC Bank Limited & another [2014] eKLR*, the Court in considering what amounted to inordinate delay had this to say;
- “Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable”
62. I associate myself entirely with the above findings. The Applicant herein averred that the delay was occasioned by its erstwhile advocate who entered appearance on its behalf without instructions and failed to notify it of the Judgment and post judgment proceedings in time.
63. The Applicant raised a serious allegation against the aforesaid firm but did not exhibit any complaint letter sent to the firm concerning the issue or inquiry letter to find out why it did so.



64. I agree with the Respondent that this amounted to mere allegations which are inexcusable and not plausible enough to warrant this court to exercise its discretion and grant the orders sought. Nothing prevented the Applicant from lodging an appeal within the requisite time even as it pursued the other applications it filed post judgment.
65. In regards to Nakuru CMCC No. 563 of 2013, the lower court Judgment was delivered on 20<sup>th</sup> April,2021. Subsequently, the Applicant filed an application dated 9<sup>th</sup> December,2021 seeking to restrain the respondent and Sadabri Auctioneers and their agents from attaching or interfering with their assets and for unconditional release of its subject Motor Vehicle for school transport services. Prior the determination of the Application, the Applicant equally filed the instant application on 7<sup>th</sup> January,2022. That is 8 months after the judgment.
66. The Applicant has advanced the same reasons above for failure to file its intended appeal in good time. The reasons are misleading as the Applicant was not represented by the firm of Getrude Matata but by the firm of Kinyanjui Njuguna before the lower court.
67. It is thus crystal clear that there has been unexplained inordinate delay on the part of the applicant in bringing these applications and filing of the Memorandum of Appeals.
68. With regard to whether the intended appeal is arguable, I am alive to the fact that in deciding an application of this nature, the court must be careful not to delve into the merits of the case as that is under the purview of the appellate court after hearing the merits of the same. The court should therefore only be concerned with the question of whether or not the appeal will be rendered nugatory.
69. A cursory look at the Memorandum of Appeals show that the grounds raised therein are against liability as against the applicant.
70. The history of the matter is that there was a test suit, namely NAKURU CMCC NO. 963 OF 2012 that was used to determine the question of liability. The two suits herein were only heard on the issue of quantum.
71. The essence of considering whether the appeal raises triable issues is to avoid the same being rendered nugatory should the decision of the appellate court overturn that of the trial court.
72. Once the question of liability in a test suit is determined the other suits need not be heard by the same court. The assessment of damages can be heard by any other court and this is what happened herein.
73. I am therefore at a loss as to how the court will set aside the finding on liability when there is no proof that there is an appeal in the test suit itself.
74. As regards the assessment of damages that proceeded in the two files herein, the question of service on the applicant was raised. I believe that given the fact that the matter proceeded in the absence of the applicant, that ground is sufficient to find that the intended Appeals are arguable.
75. The other limb is whether the Respondents can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the Applicant. The answer is in the affirmative. I find that no prejudice will be caused to the Respondents that cannot be compensated by an award of costs if the Applications are allowed.
76. Considering that extension of time is an equitable remedy, I hold that the Applicant should not be denied a seat in the altar of justice.
77. Having considered the applications, I am inclined to allow them on the following terms;



- a. The applicant's applications to appeal out of time are allowed. The Memorandum of Appeals, if duly filed and paid for to be deemed as duly filed. If not filed the same are to be filed and served within the next 14 days from the date of this Ruling.
- b. To safeguard the respondents' interests, the applicant shall deposit the decretal sum in each suit in a joint interest earning account in the name of the advocates for the parties within the next 30 days.
- c. The applicant to file and serve the record of appeal within the next 45 days.
- d. In default of compliance with order (b) above, the stay orders in force shall lapse automatically and the respondents are at liberty to commence execution.
- e. The applicants shall bear the costs of this application in any event.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 30<sup>TH</sup> DAY OF APRIL, 2024.**

**H. M. NYAGA,**

**JUDGE.**

In the presence of;

Court Assistant Kipsugut

Ms Bosibori for Respondent

No appearance for Applicant

