



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kitale Shuttle Limited v Korir & 3 others (Miscellaneous Civil Case E101 of 2022) [2024] KEHC 4165 (KLR) (29 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4165 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS CIVIL CASE E101 OF 2022**

**PN GICHOHI, J**

**APRIL 29, 2024**

**BETWEEN**

**KITALE SHUTTLE LIMITED ..... APPLICANT**

**AND**

**CHARLES K. KORIR ..... 1<sup>ST</sup> RESPONDENT**

**RATSON MOTORS ..... 2<sup>ND</sup> RESPONDENT**

**KITALE SHUTTLE SERVICES ..... 3<sup>RD</sup> RESPONDENT**

**MATIN MASINDE ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. Through the firm of Muchiri Gathecha & Co. Advocates, the Applicant filed a Notice of Motion dated 25<sup>th</sup> July 2022 and brought under Order 51 of the [Civil Procedure Rules](#) and Section 79G of the [Civil Procedure Act](#) seeking orders that:-
  1. The Applicant /Objector be granted leave to file an appeal out of time
  2. Costs herein be provided for.
2. The main ground is that the Ruling in this matter was delivered in favour of the Respondent on 27<sup>th</sup> April 2022 without the knowledge of the parties herein. That aggrieved, the Applicant/Plaintiff intends to appeal against the said ruling but the Thirty days statutory period for doing so has already lapsed.
3. In support is an affidavit sworn by Samuel Chege Nyumu on 25<sup>th</sup> July 2022 in his capacity as the Director of the Applicant. He depones that he was not aware of the said ruling until the Applicant's Advocate wrote to the court to find out when the ruling will be delivered only to be informed by



- the registry orally that the ruling was delivered on 27<sup>th</sup> April 2022 and that the Application had been dismissed.
4. He depones that though his advocate applied for a copy of the ruling on 23<sup>rd</sup> June 2022, it was not until 20<sup>th</sup> July 2022 that he got a copy of the said ruling. That he immediately instructed his Counsel to appeal but his Advocate informed him that time to appeal had lapsed hence this application as he is still desirous of pursuing the Appeal.
  5. In reply, the 1<sup>st</sup> Respondent swore an Affidavit on 11<sup>th</sup> October 2022 and while highlighting the circumstances under which the Objector's application was dismissed, he deponed that he was aware that the firm of A.N. Geke & Co. Advocates had filed an application dated 27<sup>th</sup> January 2020 under a certificate of urgency for stay of execution pending hearing and determination of the Appeal and duly annexed a Memorandum of Appeal.
  6. That the orders lapsed and attachment proceeded and attached the Applicant's motor vehicle registration number KCK 489 Q.
  7. Consequently, the firm of Wachira Wanjiru & Co. Advocates filed an application on 27<sup>th</sup> February 2020 for stay of execution of the attached motor vehicle and sought release of the attached motor vehicle and setting aside of the judgment.
  8. That a consent was entered between the parties the judgment debtor liquidates the decretal sum buy monthly installments of Kshs. 200,000/= and that it was upon payment of the first instalment that the motor vehicle was released by the auctioneers on the strength of that undertaking. However, the Applicant defaulted and the court delivered its ruling on 3<sup>rd</sup> September 2021 dismissing the Applicant's application for setting aside the judgment.
  9. It was immediately after the said Ruling that the Applicant filed the objection proceedings through the firm of Gathecha & Co Advocates to stop execution of the decree on the basis that Kitale Shuttle Services and Kitale Shuttle Ltd were different entities. The court indeed granted stay pending determination of objection proceedings.
  10. While acknowledging that the ruling had been scheduled for delivery on 23<sup>rd</sup> February 2022 but was differed and delivered on 27<sup>th</sup> April 2022 dismissing the application with costs, the 1<sup>st</sup> Respondent maintained that the multiple applications were meant to frustrate him the decree issued to him.
  11. While also highlighting the unaccounted time between the time the Applicant came to know of the said ruling and filing of Memorandum of Appeal, he urged the Court to dismiss the application for not first seeking admission of the appeal before seeking leave to appeal out of time.
  12. This application was canvassed by way of written submissions. In his submissions dated 7<sup>th</sup> July 2023, the Applicant relied on several cases including the case of *Edith Gichugu Koine v Stephen Njagi Thoithi* [2014] eKLR on the principles governing application to file appeal out of time under Section 79 G of the *Civil Procure Act* as being "but not limited to the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted."
  13. He submitted the Applicant had explained the delay as neither party was present during the ruling and that there was no notice issued for the date of delivery of the ruling and further that though Applicant applied for a copy of the ruling on 23<sup>rd</sup> June 2022, it was not until 20<sup>th</sup> July 2022 that he got a copy of the said ruling.



14. On his part, the 1<sup>st</sup> Respondent filed submissions dated 18<sup>th</sup> September 2023 and relied on the contents of his Replying Affidavit. Acknowledging that grant of leave to file appeal out of time is discretionary, he maintained that the Applicant had not explained delay of 32 days.
15. Further, he submitted that having filed the application for leave to appeal out of time, the Applicant never sought to have the Appeal be admitted out of time, thus violating the provisions of Section 79 of the *Civil Procedure Act*.
16. He urged the Court to dismiss the application with costs to the 1<sup>st</sup> Respondent and allow the 1<sup>st</sup> Respondent enjoy the fruits of his judgment.
17. Having heard the parties through their affidavits and submissions, the issues that arise for consideration are :-
  1. Whether the application violates Section 79G of the *Civil Procedure Act*.
  2. Whether the Applicant has satisfied the principles governing leave to appeal out of time.
18. On the first issue, Section 79G of the *Civil Procedure Act* 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.”
19. There is a memorandum of appeal filed here but no record of appeal. The explanation is that the Applicant’s yet to receive the proceedings he applied for. That is understandable. There can be no record of appeal without all the components thereof. The issue of seeking that appeal be admitted out of time then should not arise.
20. On the second issue, it is settled law that the Court has discretion to grant application for extension of time under Sec. 79G of the *Civil Procedure Act* if the Applicant satisfies the court that he had good and sufficient cause for not filing the appeal on time. Regarding extension of time, the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others* [2014] eKLR. held:-

“...It is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

  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
  7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
21. It is not in dispute that the impugned ruling was delivered 27/04/2021 without notice to parties. Having requested proceedings on 23/06/2022, then the implication is that they were aware of the Ruling but filed the instant application on 18/08/2022 which application is dated 25<sup>th</sup> July 2022. That is a period of about 32 days.
22. In those circumstances, it is incumbent upon the Applicant to explain any further delays. His explanation is that he could not have filed the application without the copy of the ruling against which he was appealing of the order showing dismissal hence a delay of another 32 days. He was yet to receive the proceedings making the delay a total of 82 days.
23. The supply of proceedings applied for by a party is not within its control. Having duly applied for the same, the Applicant herein cannot be faulted for the delay and therefore this Court is satisfied that those are extenuating circumstances that tilt in favour of the Applicant.
24. From the annexures by the 1<sup>st</sup> Respondent herein, it is noted that vide Memorandum of Appeal filed on 27/01/2020 an appeal being Nakuru HCCA No. 14 OF 2020 was preferred by Ratson Motors, Kitale Shuttle Services and Matin Masinde (now the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents respectively) against the judgment and decree delivered on 10/09/2019 in Nakuru CMCC No. 820 of 2017 in favour of Charles Kiprop Korir (now the 1<sup>st</sup> Respondent herein).
25. In the process of execution of the Judgment by the 1<sup>st</sup> Respondent in Nakuru CMCC No. 820 of 2017, Kitale Shuttle Limited (the Applicant herein ) filed an objection vide application dated 27/09/2021 seeking setting aside the warrants attachment and proclamation of motor vehicles belonging to the Applicant and also a finding that Kitale Shuttle Services is a different entity from the Applicant (Kitale Shuttle Ltd ) and therefore the Applicant is not liable to satisfy the judgment in Nakuru CMCC No. 820 of 2017.
26. With that application having been dismissed in the circumstances herein , then more prejudice will be suffered by the Applicant than the 1<sup>st</sup> Respondent herein if the Applicant is denied leave to appeal.
27. Consequently, the Court to makes the following orders :-
1. The Applicant be and is hereby granted leave file and appeal out of time.
  2. The intended appeal be filed and served within 30 days from the date of this ruling.
  3. The costs of the application to abide the outcome of the intended appeal.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 29<sup>TH</sup> APRIL, 2024.**

**PATRICIA GICHOHI**



## **JUDGE**

In the presence of:

Ms Gathecha for Applicant

Ms Bosibori for M. Ndubi for 1<sup>st</sup> Respondent

Ruto- Court Assistant

