



Batoka Pharmacy Limited v Interior Perspective Limited (Miscellaneous Civil Application E400 of 2023) [2024] KEHC 4442 (KLR) (Civ) (26 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4442 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E400 OF 2023**

CW MEOLI, J

APRIL 26, 2024

BETWEEN

BATOKA PHARMACY LIMITED APPLICANT

AND

INTERIOR PERSPECTIVE LIMITED RESPONDENT

RULING

1. This ruling is in respect of the Notice of Motion dated 15th June, 2023 (the Motion) filed by Batoka Pharmacy Limited (hereafter the Applicant) seeking an order for an extension of time to enable the Applicant file an appeal against the judgment delivered by the Small Claims Court on 19th January, 2023 in Nairobi SCCOMM No. E5431 of 2022. The Motion is expressed to be brought under Sections 1A, 1B, 3A, 79G & 95 of the *Civil Procedure Act* (CPA); and Order 50, Rule 6 and Order 51, Rules 1 of the *Civil Procedure Rules* (CPR).
2. The grounds on the face of the Motion are amplified in the supporting affidavit sworn by advocate A.P. Ochieng' Ogotu, who averred that the following delivery of the impugned ruling, the Applicant's advocates received instructions to lodge an appeal against it and which instructions the advocates acted on by requesting for typed certified copies of the proceedings, ruling and resultant order, at the earliest opportunity. The advocate averred that the delay in lodging the appeal in good time was therefore occasioned by the time taken in obtaining the aforementioned documents. That by the time the requisite documents were received; on 2nd March, 2023; the statutory timelines for filing an appeal had lapsed.
3. Interior Perspective Limited (hereafter the Respondent) opposed the Motion by putting in the Grounds of Opposition dated 4th September, 2023 containing a total of 10 grounds. Therein, the Respondent essentially argued that no certification has been provided for the delay in issuance of the



- lower court proceedings and that the reasons given by the Applicant to explain the delay are both insufficient and inexcusable. That no arguable appeal exists in the matter since no memorandum of appeal has been annexed to the Motion. That if the court is inclined to allow the Motion, then an order ought to be made to the effect that the appeal be filed without inordinate delay.
4. The Motion was to be canvassed by way of written submissions. The Applicant's counsel anchored his submissions on Section 79G of the CPA which sets out the timelines for filing an appeal with the High Court to challenge the decision of a subordinate court. Counsel further anchored his submissions on the decisions in *Del Mote Kenya Limited v Patrick Njuguna Kariuki* [2015] eKLR and *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR on the unfettered discretionary power of the court in granting a party the extension of time to file an appeal and the principles for consideration in that regard. Counsel submitted that the delay in the matter has been reasonably explained and that such delay cannot be deemed inordinate or inexcusable.
 5. Reference was made to the decisions in *Mwangi S. Kimenyi v Attorney General & another* [2014] eKLR and *Agip (Kenya) Limited v Highlands Tyres Ltd* [2001] eKLR on what constitutes inordinate delay. The Applicant's counsel further submitted that the intended appeal raises arguable grounds with reasonable chances of success since the default judgment entered by the lower court is irregular as the same was entered in the absence of proper service, thereby satisfying the requirement that the existence of an arguable appeal. Here citing the decision in *James Kanyita Nderitu v Marios Philotas Ghika & Another* [2016] eKLR regarding the definition of an irregular judgment. It was the contention by counsel that in any event, the Respondent does not stand to suffer any grave prejudice if the order sought is granted. For those reasons, the court was asked to take into consideration the Applicant's right to be heard on its appeal, as restated in the case of *Joseph Njoroge v Reuben Waweru Mberia* [2017] eKLR and upon doing so, to allow the Motion as prayed.
 6. Counsel for the Respondent anchored his submissions on the provisions of Section 79G of the CPA; Section 38 of the *Small Claims Court Act* No. 2 of 2016 as read with Rule 30 of the *Small Claims Court Rules 2019*; and Order 42 of the CPR, on the procedure relating to appeals from subordinate courts to the High Court. Counsel equally anchored his submissions on the decision rendered in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR also cited in the submissions made on behalf of the Applicant, concerning the principles for consideration by the courts in extending the timelines for filing an appeal.
 7. Counsel submitted that the delay in filing the appeal and/or bringing the Motion in the present instance is unreasonable and that no proper reasons have been given to adequately explain such delay. Counsel relied on the decisions rendered in *Nandi Tea Estates Ltd v George Ochieng Oduogo* [2015] eKLR and *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR on the subject of reasons for delay in lodging an appeal within the statutory timelines. He contended that the Applicant is guilty of laches and hence undeserving of the order sought before this court. Reference was made to the decision in *Joshua Ngatu v Jane Mpinda & 3 others* [2019] eKLR on the doctrine of laches. Ultimately, the court was urged to dismiss the Motion with costs.
 8. The Court has considered the affidavit material; Grounds of Opposition and submissions on record. It is clear that the sole order sought is for leave to appeal out of time, otherwise referred to as the extension of time for the filing of an appeal. The power of the court to enlarge time for filing an appeal out of time is expressly donated by Section 79G of the CPA, as well as Section 95 of the same *Act*, read together with Order 50, Rule 6 of the CPR with the two(2) latter provisions setting out the discretionary power of the courts to enlarge the time required for the performance of any action permitted under the CPA and CPR respectively.



9. Section 79G 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.”

10. The principles governing leave to appeal out of time are settled. A successful applicant must demonstrate “good and sufficient cause” for not filing the appeal in time. In *Tbuita Mwangi v 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.”

11. While the discretion of the court is unfettered, a successful 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. On the question of the exercise of judicial discretion, the Supreme Court observed in the case of *Telkom Kenya Limited v John Ochanda and 996 Others* [2015] eKLR that:

“In instances where there is delay in filing the notice of appeal, this Court has inherent jurisdiction to admit such appeal, provided sufficient explanation is proffered for the cause of delay. The design and objective of the Supreme Court Rules is to ensure accessibility, fairness and efficiency in relation to this Court. Parties should comply with the procedure, rather than look to the Court’s discretion in curing the pleadings before it. This Court’s position is that the circumstances of each case are to be evaluated, as a basis for arriving at a decision to intervene, in instances where full compliance with procedure has not taken place....”

See also *Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 Others* [2019] eKLR.

12. The Supreme Court in the case of *Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The Court stated inter alia that:

“(T)he 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.
7.”

See also County *Executive of Kisumu v County Government of Kisumu & 8 Others* [2017] eKLR.

13. On the period of delay, the court upon perusing a copy of the impugned ruling as annexed to the Motion, noted that it was delivered on 19th January, 2023 whereas the instant Motion was brought some five (5) months later on or about the 15th of June, 2023. In the court’s view, while the delay is slightly prolonged, it cannot be deemed inordinate in the circumstances.
14. Concerning the reasons for the delay, the court considered the explanation given by the Applicant regarding the time taken in obtaining the requisite certified documentation from the lower court to enable it lodge an appeal in good time. A copy of the letter dated 19th January, 2023 and marked as Annexure 00-2 to the supporting affidavit, supports the averment made on behalf of the Applicant that a request was made for certified copies of the typed proceedings and ruling, soon after delivery of the impugned ruling. The court equally considered the opposing averments by the Respondent which in effect stated that no reasonable explanation has been given by the Applicant for the delay.
15. Upon considering the rival positions taken above and upon studying the material on record, the court is persuaded that it is more plausible than not that the delay was largely occasioned by the time taken in obtaining the certified copies of the proceedings and ruling. The court therefore finds the reasons stated to be fairly reasonable in the circumstances.
16. Regarding the viability of the intended appeal, the court noted the averments and arguments by the Applicant that the intended appeal seeks to challenge the decision by the trial court, declining to set aside default judgment. Which according to the Applicant, was entered in the absence of proper service of summons coupled with the pleadings in the suit. Upon further perusing the impugned ruling which was marked as Annexure 00-1, the court was able to ascertain that the issue of service at the core of the application which was the subject of the impugned ruling. In the court’s mind, this argument would constitute a pertinent issue for consideration on appeal. In any event, all that is required here is a demonstration that the appeal is worthy of consideration by the court, and not necessarily that it will succeed. Moreover, based on the language employed in *Mutiso v Mwangi* (supra) the requirement touching on the viability of the intended appeal, is neither mandatory nor stringently applied in an application of this nature.
17. The Court of Appeal in *Vishva Stone Suppliers Company Limited v RSR Stone* (2006) Limited (2020) eKLR stated that such appeal:

“... may not succeed as in law an arguable appeal need not succeed so long as it raises a bona fide issue for determination by the Court.”



18. In *Visbva's case*, the Court emphasized the right of appeal in the following terms:

“Turning to the request to allow the applicant to exercise his now undoubted constitutionally underpinned right of appeal, the position is.... crystalized in the case of Richard Ncharpi Leiyagu v IEBC & 2 Others (supra); Mbaki & Others v Macharia & Another [2005] 2EA 206; and the Tanzanian case of Abbas Sherally & Another v Abdul Fazaiboy, Civil Application No. 33 of 2003; for the holding inter alia that:

- (i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;
- (ii) the right to be heard is a valued right; and
- (iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice;...”

19. Moreover, there is no demonstration that the prejudice to be visited upon the Respondent if the motion is allowed will be so grave that it cannot be adequately compensated by an award on costs.

20. In the circumstances of this case, the court is persuaded to exercise its discretion in favour of the Applicant. Consequently, the Notice of Motion dated 15th June, 2023 is hereby allowed as prayed, thereby resulting in the following orders:

- a. The Applicant shall file and serve its memorandum of appeal within 14 days from this day.
- b. The costs of the Motion are awarded to the Respondent in any event.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 26TH DAY OF APRIL 2024.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: N/A

For the Respondent: Ms. Kizi

C/A: Erick

