



REPUBLIC OF KENYA



**Maina v Kiplangat (Civil Miscellaneous Application E1236 of 2023)
[2024] KEHC 6149 (KLR) (Civ) (24 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6149 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL MISCELLANEOUS APPLICATION E1236 OF 2023

AN ONGERI, J

MAY 24, 2024

BETWEEN

NAOMI WANJIKU MAINA APPELLANT

AND

ANDREW KIPLANGAT RESPONDENT

RULING

1. The application coming for consideration is the one dated 14/12/2023 brought under Sections 79G and 95 of the *Civil Procedure Act*, Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules* seeking the following prayers;
 - i. Spent.
 - ii. That this Honourable Court be pleased to grant the Proposed Appellant leave to appeal out of time against the whole judgment and decree of Hon. J. W. Munene Senior Resident Magistrate and Adjudicator, delivered on 17th February, 2022 in Nairobi Small Claims Court case No. E7915 of 2024
 - iii. That the Proposed Appellant do file and serve the Memorandum of Appeal annexed hereto within seven days.
 - iv. That the costs of this application be provided for.
2. The application is based on the following grounds;
 - i. That the Judgment in Nairobi Small Claims Court Case No. E7915 of 2022 was delivered on 17th February, 2022 and the Court dismissed the Proposed Appellant's case.



- ii. That the Proposed Appellant instructed its then Advocates on record to apply for typed proceedings so as to appreciate the reasoning of the Magistrate/ Adjudicator and thereby make an informed decision on whether or not to lodge an appeal.
 - iii. That instead for lodging an appeal, the said Advocates applied for review and setting aside of the Order dismissing the Judgment. The Application was heard and dismissed on the 21st of June, 2023.
 - iv. That the Proposed Appellant instructed its Advocates currently on record to request for a typed copy of the judgment and proceedings and lodge and Appeal against the Judgment of the Court.
 - v. That by then, the time allowed to file an Appeal had run out.
 - vi. That the Respondent is unlikely to suffer any prejudice,
 - vii. The delay occasioned herein is not so inordinate^{^} or so great as to be inexcusable.
3. The respondent filed grounds of opposition as follows;
- i. The Application before court has been brought and presented to court in bad faith.
 - ii. The Application is vexatious, unmeritorious, an abuse of the court's process and untenable and therefore the orders sought cannot issue in their standing form.
 - iii. The Application is totally and incurably defective and cannot stand the test of suit for non-conformity and non-compliance.
 - iv. The Application has been made in futility by virtue of the provision of Civil Procedure Act and Rules.
 - v. The Application is incompetent by virtue of the provisions of Civil Procedure Act and the Rules.
 - vi. The Applicant has failed to demonstrate as to what substantial loss, if any, the Appellant will suffer should the stay order sought herein is not granted.
 - vii. The Application has not been brought within the legal provisions and the Parameters to warrant granting of the orders sought.
 - viii. The orders sought will substantially, if not irreparably be prejudicial to the Respondent.
 - ix. The orders sought have solely been presented to aid the deponent's selfish interest as opposed to the respondent and the interest of justice, given the inordinate delay i.e. over one year since the judgment in Nairobi Small Claims case No. E7915 of 2022 was delivered on 17/02/2022 with justification at all.
 - x. The Application before court is untenable, incompetent, and fatally defective since and should therefore be dismissed and/or struck out with costs.
 - xi. That by dint of the civil procedure rules and Act, the entire application has no legal basis and hence a waste of judicial time, an abuse of the due process of the court and an exercise geared towards miscarriage of justice.
4. The parties filed written submissions as follows; the applicant submitted that the trial court in Nairobi Small Claims Court Case No. 7915 of 2022 delivered its judgement on 17/2/2022 and the court



dismissed the applicant's case. The applicant then instructed her then advocates to request for the typed judgement and proceedings but the advocates did not follow the said instructions and instead filed an application for review and setting aside the order dismissing the suit. The applicant only came to learn that the said advocate had not followed her instructions on August 2023 when she requested for a copy of the memorandum of appeal for her records.

5. It was the applicant's submission therefore that the delay in filing the notice of appeal was as a result of an omission on the part of her former advocates. The failure by the advocate to follow instructions resulted in oversight leading to lapse of time and such an error should not prejudice her right to appeal.
6. It was the applicant's submission that the intended appeal raises substantial issues that need to be heard and determined. The intended appeal is arguable as it seeks to challenge the manner in which the trial court arrived at its judgement dismissing the case on the basis that there was no proof that the KShs. 200,000 was advanced to the respondent yet there was a signed acknowledgement of receipt of the funds. The applicant additionally indicated that the respondent will not suffer any prejudice if the application herein is allowed.
7. The sole issue for determination in this ruling is whether the applicant should be granted leave to file their appeal out of time.
8. The governing provision is 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.

9. The court has a discretion to allow a party to file an appeal out of time. In *County Government — Vs- Kenya Ferry Services & Anor* [2019] eKLR, at paragraph 25 the Supreme Court held that;

“25] Concerning extension of time, this Court has already set the guiding principles in the Nick Salat Case as follows:

“... 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.

“... we derive the following as the underlying principles that a Court should consider in exercising 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 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. whether there will be any prejudice suffered by the respondents, if 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”

10. In the current case, it was the mistake of the advocate that caused the delay.
11. It is not in the interest of justice to visit the advocates mistake upon the applicant.
12. It is also not in dispute that the applicant filed an application for review that was heard and dismissed on the 21st of June, 2023.
13. The respondent will not be prejudiced since the applicant’s suit was dismissed.
14. The application dated 14/12/2023 is allowed.
15. The memorandum of appeal to be filed within 7 days.
16. The appeal to be filed within 30 days.
17. The costs to abide the appeal.
18. This miscellaneous file to be closed and appeal file opened.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF MAY, 2024.

A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

