



**Mogo Auto Limited v Oyugi (Civil Appeal E069 of 2023)
[2024] KEHC 8074 (KLR) (28 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 8074 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E069 OF 2023
MS SHARIFF, J
JUNE 28, 2024**

BETWEEN

MOGO AUTO LIMITED APPELLANT

AND

MOSES OCHIENG OYUGI DEFENDANT

RULING

1. The purported Appellant moved this court vide a notice of motion dated 4th August, 2023 supported by an affidavit of Vincen Munyaga Githaiga and brought under the provisions of article 159 of the Constitution of Kenya 2010, Sections 1A, 1B, 3A and 79G of the Civil Procedure Act, and Order 50 Rule 6 of the Civil Procedure Rules 2010, and craves for the following orders:-
 1. Spent.
 2. This honourable court be pleased to grant leave to extend the time for filing of the appeal herein.
 3. The annexed memorandum of appeal in Kisumu High Court HCCA *No. E69 of 2023* on the court record be deemed as duly filed.
 4. That costs of the application be provided for.
2. The Applicant sets forth several grounds for making this application the most salient one being that whereas the memorandum of appeal was lodged in the court registry on 5th May, 2023 at 11.08 am, through the court's email, the same was never assessed in time hence the delay in filing the appeal within the requisite 30 days from the date of delivery of the impugned ruling. Copies of the email trails have been annexed as annexure E003.
3. This application is resisted by the Respondent who swore an affidavit in reply on 29th April 2024 wherein he states that the application herein was filed one year after the ruling, and that the delay



in moving the court has not been explained. Further that this court is *functus officio* on the issue of legality of the applicant's memorandum of appeal given that it sustained the respondent preliminary objection vide a ruling delivered herein on 5th March 2024. The Respondent further deposes that the Applicant is guilty of contempt of court due to its non compliance with the order made on 5th April 2024 herein and on 5th April, 2023 in the subordinate court in Winam CMCC E285 of 2022.

4. The Appellant has filed submissions while the Respondent opted not to.

Analysis and Determination:

5. The issues that emerge for determination are as follows:-

- a) Whether this court is *functus officio*;
- b) If not, whether the 'Appellant' deserves orders for enlargement of time;
- c) Whether enlargement of time will be prejudicial to the Respondent.

6. On whether this court is *functus officio*, I would state that save for this current application, the Appellant had previously not approached this court for similar orders and indeed this court had not made any finding on the issue of enlargement of time wherefore this court has the requisite jurisdiction to entertain this application.

7. I will now address the issue of whether the Appellant ought to be granted leave to lodge an appeal out of time. I have analyzed the affidavit in support and specifically annexures marked as E003 which clearly demonstrates that the Appellant had lodged its memorandum of appeal via Kisumu court's email on 5.5.2023 at 11.08 am and the said email was duly acknowledged by the Deputy Registrar.

8. The application herein was filed approximately 3 months after the lodging of the appeal and I would assume that it could have been informed by the filing of the notice of preliminary objection by the Respondent. The delay was not of one year as deposed by the Respondent.

9. 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”.

10. This court has discretion to enlarge time when the Appellant presents a plausible and satisfactory reasons therefore. See *Stanley Kaboro Mwangi & 2 others v Kanyamwi Trading Company Ltd* (2015) eKLR. In the case of *Edward Kamau & Another v Hannah Mukui Gichoki & Anor* (2015) eKLR, Lady Justice Aburili encouraged a similar application and rendered herself thus:

“The right to appeal, it has been held time and again, is a constitutional right which is the cornerstone of the Rule of Law. To deny a party that right would in essence be denying them access to justice which is guaranteed under Article 50(1) of the *Constitution* which latter right cannot be limited under Article 25 of the said *Constitution*..”



11. The case of *Daphe Parry v Murray Alexander Carson* (1963) EA 546 dealt with the question of what constitutes sufficient explanation for delay and held that:
- “Though the provision for extension of time requiring sufficient reason should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the Appellant, its interpretation must be in accordance with judicial principles.”
12. This court is bound by the decisions of superior courts and must apply the principle of stare decisis. By virtue of the provisions of article 163 (7) of the *Constitution* of Kenya 2010, this court is bound by the decisions of the Supreme Court. In the case of *Mombasa County Government v Kenya Ferry Services & Anor* (2019) eKLR the Supreme Court reiterated the holding in laid down principles for extension of time as it had earlier on set out in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission & Others* (2014) eKLR thus when faced with the application for extension of time, this court should consider the following:-
- a) extension of time is not a right to a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the court.
 - b) a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the court;
 - c) whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
 - d) where there is a reasonable cause for the delay, the same should be expressed to the satisfaction of the court;
 - e) whether there will be any prejudice suffered by the Respondents, if extension is granted;
 - f) whether the application has been brought without undue delay; and
 - g) whether in certain cases, like election petitions, public interest should be a consideration for extending time”.
13. On the issue whether a grant of this application will prejudice the Respondent, I do note that the Respondent is already enjoying orders made by the trial court wherefore no prejudice will be occasioned to him in the event that the Appellant’s memorandum of appeal is admitted out of time.
14. On the issue of arguability of the appeal I have perused the memorandum of appeal and I cannot say that the grounds set forth therein are not arguable save for the error in the face of the memorandum of appeal, which errors are amenable to corrections.
15. On the balance I am persuaded that the delay in lodging the appeal in time was occasioned by a delay in court’s registry in processing the invoice and the Appellant ought not be shut from the seat of justice.

Disposition:

16. On the balance this court finds that the application herein is well merited and the same is allowed and I do thus make the following orders:-



- a) The Appellant is directed to file a memorandum of appeal and record of appeal and its submissions within 10 days from the date hereof.
- b) The Respondent is directed to file and serve its submissions within 20 days from the date hereof.
- c) The costs of this appeal shall abide the outcome of the appeal.
- d) Mention on 30.7.24 to confirm compliance.

DELIVERED, SIGNED AND DATED AT KISUMU THIS 28TH DAY OF JUNE, 2024.

M. S. SHARIFF

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JUDGE

