



**Muiru v Rashid (Civil Miscellaneous Application E299 of 2023)  
[2024] KEHC 7824 (KLR) (27 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7824 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL MISCELLANEOUS APPLICATION E299 OF 2023  
DKN MAGARE, J  
JUNE 27, 2024**

**BETWEEN**

**JAMES KIMANI MUIRU ..... APPLICANT**

**AND**

**YASSER HASSAN RASHID ..... RESPONDENT**

**RULING**

1. This is a Ruling over an Application dated 23/10/2023. The prayers sought are as follows: -
  - a. This Honourable Court be pleased to grant the Applicant leave to file Appeal out of time from the Judgement and Decree in Mombasa CMCC No. 1038 of 2020 delivered on 4<sup>th</sup> July 2023.
  - b. Costs be in the cause.
2. The grounds upon which the Application is made are stated in the Application and the Supporting Affidavit of James Kimani Muiru that the Applicant intends to appeal against the Judgement of the lower court.
3. Further, it was stated that the delay is excusable and is not inordinately long. It was also pleaded that the intended Appeal had high chances of success.
4. The Application was also grounded on the reason that the delay was caused by failure of communication between the Applicant and his advocates after the Applicant lost his phone and sim card and as he had moved to Murang'a it was difficult for him to timely get in touch with his advocates to peruse the judgement until October 2023 when he travelled to Mombasa.
5. The Application was opposed by the Grounds of Opposition dated 7/12/2023 on the grounds that the Appeal Applicant is guilty of laches.



6. Further, that the Applicant failed to demonstrate why they delayed in lodging the Appeal in time and the Judgement sum had already been settled.

### **Submissions**

7. It was submitted for the Applicant that substantial loss would occur to the Applicant as stipulated under Order 42 Rule 6 of the Civil Procedure Rules if the Applicant is not granted leave to lodge an appeal.
8. The Applicant also urged the court to apply discretion in its favour not to prevent an Appeal which was as of right and with chances of success.
9. The Applicant further submitted that the delay was occasioned by delays in communication leading to the failure to timely obtain copies of the typed court proceedings and Judgement from the lower court.
10. I was urged to allowed the Application.
11. On their part, the Respondent submitted that the Application ought to be dismissed since the judgement sum had already been settled at Ksh. 827,430 vide cheque dated 7/8/2023.
12. Further, that the reasons for extension of time were not satisfactory and the Applicant had not therefore shown sufficient cause to justify exercise of discretion of this court. Reliance was placed on the case of *Leo Sifa Mutiso v Rose Hellen Wanagari Mwangi* (unreported) Civil Application No. Nai 215 of 1997 as quoted in *Thuita Mwangi v Kenya Airways Limited* (2003) eKLR.
13. I was urged to dismiss the Application.

### **Analysis**

14. I have perused the Application, response and submissions and authorities filed by respective parties in support and opposition to the Application.
15. The issue before me is whether the delay in lodging a Memorandum of Appeal has been satisfactorily explained as to entitle the Applicant to the discretion to enlarge appeal time.
16. Waki, JA in *Seventh Day Adventist Church East Africa Ltd. & Another vs. M/S Masosa Construction Company Civil Application No. Nai. 349 of 2005* held that:

“As the discretion to extend time is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant; the period of delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with the time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors...In an application for extension of time, each case must be decided on its own peculiar facts and circumstances and it is neither feasible nor reasonable to lay down a rigid yardstick for measuring periods of delay as explanations for such delays are as many and varied as the cases themselves...The ruling striking out the appeal is not only necessary for exhibiting to the application for extension of time but also for consultations between the applicant’s counsel and their clients and the fact that the ruling was returned to Nairobi for corrections is a reasonable explanation for the delay... Where the Respondent has already recovered all the decretal sum and costs attendant to the litigation, the right of appeal being a strong right which is rivalled only to the right to enjoy the fruits of judgement, no prejudice would be



caused to the respondent who has enjoyed his rights in full if an opportunity is given to the applicants to enjoy theirs too, even if it is on a matter of principle.”

17. I have perused the reasons for the delay in the Application and the Supporting Affidavit. The Applicant states that there was delay in obtaining typed proceedings and Judgement of the Lower Court. On this subject, the Supreme Court of Kenya in (M.K. Ibrahim & S.C. Wanjala SCJJ) in *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR held as follows:-

- “(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 reasonable reason for the delay. The delay should be explained to the satisfaction of the court.

18. In *Dilpack Kenya Limited v William Muthama Kitonyi* [2018] eKLR Odunga J. observed that:-

“In an application for extension of time, where the Court is being asked to exercise discretion, there must be some material before the Court to enable its discretion to be so exercised. Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the court why the discretion should nevertheless be exercised in his favour and the rule is that where there is no explanation, there shall be no indulgence. See *Ratman vs. Cumarasamy* [1964] 3 All ER 933; *Savill vs. Southend Health Authority* [1995] 1 WLR 1254 at 1259.

19. It follows therefore that the Applicants explanation for the delay is key in guiding the Court’s exercise of discretion on the issue of leave to appeal out of time.

20. It is self-evidence that the Judgment was available for the parties on the day of delivery on 4/7/2023 or soon thereafter. The copies were not sought by the Applicant. No letter was annexed seeking the judgment or paying for the same.

21. I also note that as the Judgement was delivered on 4/7/2023, the Appeal to this Court should have been filed by 3/8/2023. This Application was filed on 26/10/2023. There is a delay of about 3 months after the delivery of the impugned Judgment. The Applicant was under duty to show the reasons for delay. However short the period of delay, it must be explained. In *Alfred Iduvagwa Savatia vs Nandi Tea Estate & another* [2018] eKLR J. Mohammed JA cited Aganyanya, JA in [\*Monica Malel & Another V. R, Eldoret Civil Application No. Nairobi 246 of 2008\*](#) where the Learned Judge stated:-

“When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show .... the applicants are not quite sure of why the delay in filing the notice of appeal within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay.”



22. Further, Section 79(g) of the *Civil Procedure Act* provides as doth: -

“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.

23. Therefore, in my view, without a valid reason, this court has no jurisdiction to extend time. It is not manna to dish out. It is exercise of discretion. Unless the court is properly moved, it has no power to exercise discretion. It is not by whim but through judicious consideration that such an Application is considered.

24. The factors to consider in dealing with such an application are: -

- a. The length of delay.
- b. The reason for delay.
- c. The animus of the applicant.
- d. The prejudice to the Respondent.

25. The Applicant’s explanation is that he resided in Murang’a. That he lost his phone and sim card with contacts and as such lost contact with his advocates shortly before delivery of judgement so that he could not instruct his advocates to appeal in time. That upon seeing the Judgement in October 2023, he was aggrieved with the award and instructed his advocates to appeal.

26. In this matter, the reasons for the delay in my view establishes a sufficient cause. Moreover, the length of delay of about 3 months is not inordinate in the circumstances. There is also a plausible explanation as to the cause of the delay. The Court in *Asike-Makhandia J in Gerald Kithu Muchanje v Catherine Muthoni Ngare & another* [2020] eKLR stated that:-

“There is no maximum or minimum period of delay set out in law. However, a prolonged and inordinate delay is more likely than not to disentitle the applicant of such leave. Likewise, the reason or reasons for the delay must be reasonable and plausible. In *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR this Court stated:-

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

27. Given the circumstances of the case, I have also to consider both parties. The Applicant has the right of Appeal which they had given away but seek the intervention of court to redeem it. In my view the injustice to the Applicant if the application is dismissed exceeds the prejudice to the Respondent if the application is allowed.

28. I say so because even though the Respondent submitted that the judgement amount was settled, the intended appeal can only succeed or fail. If it succeeds, the Respondent pays the difference and if it fails, the Respondent pays nil. The Respondent however has unlimited right to defend against the appeal. In



Mary Wanja Mugwa and another (Suing as the Legal Administrator of the Estate of Francis Wahome Muchiri (Deceased) v Tom Mbutia Gitogo [2017] eKLR, the court stated as follows:

13. The delay herein is about one month. The short delay has been on the blamed Appellant's late appeal. While the Applicant may have been content with the lower court decision as it was, the appeal herein, if successful may mean further payment to the Appellant. I am conscious that the right of appeal ought to be allowed without too many impediments so as to facilitate the Applicant to ventilate issues raised in the appeal. In Bagajo –Vs- Christian's Children Fund Inc. [2004] 2 KLR 73 the court emphasized that in exercising its discretion relating to extension of time, "the court's primary concern should be to do justice to the parties".

29. In Harris Horn Senior, Harris Horn Junior vs. Vijay Morjaria Nyeri Civil Appeal No. 223 of 2007 when confronted with similar arguments, made observations therein inter alia as follows:

(32) As for the need to do justice to the parties before it, we have no doubt that this is the core business of the Court. However, a court of law cannot ignore principles of substantive law or case law governing the particular aspect of justice sought from its seat. Its primary role is to ensure that the justice handed out is kept anchored on both the law and the facts of each case."

30. I have also perused the draft and I am not convinced that it is frivolous. As was observed by the court in Mary Wanja Mugwa (supra):

14. Looking at the draft cross-appeal, I cannot say it is frivolous as it seems to raise some serious issues. Besides, the Appellant has already received the entire sum comprising the decretal sum and will therefore not be prejudiced unduly.

31. Therefore, this is a proper application to allow.

### **Determination**

32. The upshot of the foregoing is that I allow the Notice of Motion dated 23/10/2023 as follows:

- i. Time is extended for the Appellant to file an appeal out of time. The Memorandum of Appeal shall be filed within 14 days.
- ii. Each party to bear their own costs.

DELIVERED, DATED and SIGNED at NYERI on this 27<sup>th</sup> day of June, 2024. Ruling delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**

**JUDGE**

**In the presence of:-**

Ms. Nduku for the Applicant

No appearance for the Respondent.

Court Assistant – Jedidah

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