



**Oketch v Atulo (Suing on Behalf of Erastus O Atulo) (Miscellaneous Civil Application E084 of 2023) [2024] KEHC 13257 (KLR) (27 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 13257 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
MISCELLANEOUS CIVIL APPLICATION E084 OF 2023  
MS SHARIFF, J  
AUGUST 27, 2024**

**BETWEEN**

**MAVINE OKETCH ..... APPLICANT**

**AND**

**JOSECK OSALE ATULO ..... RESPONDENT**

**SUING ON BEHALF OF ERASTUS O ATULO**

*(Being an appeal from the Ruling of Honorable S. N. Telewa (SRM) at the Chief Magistrate's Court at Kisumu, in Civil Case No. 182 of 2017 delivered on 7th December 2022)*

**RULING**

1. Vide a Notice of Motion dated 12.6.2023 the applicant Mavine Oketch moved this court under the provisions of Order 42 Rule 6, of the Civil Procedure Rules 2010, Sections 1A, 1B, 3A and 79G of the Civil Procedure Act for the following orders:
  - i. Spent
  - ii. That this court be pleased to grant the applicant leave to appeal out of time against the ruling delivered by Hon. S. N. Telewa (SRM) on 7<sup>th</sup> December 2022.
  - iii. That this court be pleased to issue an order of stay of execution of the ruling entered and delivered against the applicant on 7<sup>th</sup> December 2022 pending the hearing and determination of the intended appeal.
  - iv. That the cost of this application be provided for.



## Background

2. The applicant herein is the 3<sup>rd</sup> defendant in Kisumu CMCC No. 182 of 2017: *Joseck Osale Atalo suing on behalf of Erastus O. Atulo v Evans Okoth Aduwo, Peter Nambugu and Mavine Oketch*. Whereas this court does not have the benefit of perusing the pleadings in that suit a reading of the ruling annexed to the applicant's supporting affidavit as 'MO2' reveals that he was being sued by the respondent ostensibly as the beneficial owner of a motor vehicle registration No. KAE xxxX a Peugeot saloon.
3. The applicant had, in the trial court, successfully applied for setting aside of the ex parte Judgment and dismissal of the suit against him vide the aforesaid ruling delivered on 29<sup>th</sup> September 2021. Subsequent thereto the respondent applied for review of the orders made in the said ruling and on 7<sup>th</sup> December 2022 the trial court allowed the respondent's application and reinstated the suit against the 3<sup>rd</sup> defendant/applicant.
4. Being aggrieved by the said reinstatement, the applicant has now moved this court for leave to lodge an appeal out of time. The reasons for the delay have been stated in the supporting affidavit of the applicant to be want of supply to the applicant by the trial court of the impugned ruling and proceedings in good time despite his prompt request for the same. The applicant maintains that he has an arguable appeal given that he posits the trial court became functus officio when it allowed his application vide the ruling on 29.9.2021.
5. Whereas this court encouraged parties to negotiate the subject of this application, no consensus had been reached.
6. The respondent opposes this application by way of an affidavit in reply filed on 18<sup>th</sup> July 2023. It is the respondent's position that whereas this court has the requisite jurisdiction to exercise discretion in extending the time for lodging an appeal, the applicant has not made out a case for such exercise of this court's discretion. [The applicant has assigned blame on the trial court for his delay yet he had already drafted a memorandum of appeal and no reason has been advanced as to why that draft memorandum of appeal was not filed in good time. The respondent maintains that the grant of the prayers sought will occasion delay in hearing the primary suit and he will thus be prejudiced. Further that the intended appeal has no prospects of success and is just but an abuse of court process.
7. This application was canvassed by way of written submissions. The parties' rival submissions have been duly considered.

## Legal Analysis And Determination

8. Section 95 of the *Civil Procedure Act* Cap 21 Laws of Kenya confers discretion on a court to enlarge time for a party to execute a prescribed act. It thus states as follows:

'Section 95'

"Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time enlarge such period, even though the period originally fixed or granted may have expired."

9. The applicant herein was supposed to have filed his appeal within 30 days from the 7<sup>th</sup> of December 2022 as prescribed by Section 79G of the *Civil Procedure Act* which provides thus:

'79G'



“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. There exists a rich repertoire of precedents on extension of time for filing an appeal and parties herein have extensively cited several cases to this end. This court is persuaded by the holding of Ngungi J as he then was in the case of *Efrain Yossef v Rosemary IN. Kibiu* (2018) eKLR where the learned Judge, currently of Court of Appeal set outline the determinant factors as follow:
  - a. The length of the delay.
  - b. The reason for the delay.
  - c. Probability of success of the intended appeal.
  - d. The degree of prejudice to the respondent if the application is granted.
  - e. The importance of compliance with time limits to the particular litigation or issue.

#### **Length of the delay and reason thereof**

11. The Impugned ruling was delivered on 7<sup>th</sup> December 2022 while the applicant moved this court on 12<sup>th</sup> June 2023. This court had observed at the ex parte stage on 4<sup>th</sup> July 2023 that the applicant’s letter dated 11<sup>th</sup> December 2022 that he relies on to support his contention that a request for supply of certified copies of the proceedings and Judgment was made clearly stated that Kisumu Chief Magistrate was situated in Nairobi. The applicant did not seek leave to file any further affidavit to prove that despite the error in the citation of the physical address of Kisumu Chief Magistrate Court, that indeed the said letter was served upon the executive officer in Kisumu Chief Magistrate court and not in Nairobi, as addressed. The applicant’s said reason for delay thus crumbles.
12. This court agrees with the respondent that no reason has been advanced to justify the failure by the applicant to lodge his appeal given that a draft memorandum had already been drawn by his advocates. It would have been prudent for him to do so while awaiting provision of the certified proceedings and ruling. It is also noteworthy that the letter dated 11.12.2022 requested for supply of proceedings and Judgment yet what the applicant wants to challenge is a ruling. There is no Judgment on record and I am at loss of the applicant’s request for supply of a Judgment as at the 14<sup>th</sup> of December 2022.
13. The applicant has thus failed to the satisfaction of this court, the 6 month’s delay in moving the court, which period of delay I do find to be unreasonably inordinate. This court places reliance on the case of *Aviation Cargo Support Limited v St Mark Freight Services Limited* wherein G.B.M Kariuki JA rendered himself on the issue of delay as follows:

“ Even where an appeal is meritorious, if the delay is too inordinate and has not been explained at all, leave ought not be granted to lodge record of appeal out of time. An aspiring appellant ought to be zealous and to take the initiative to comply with the law.”



### **Probability of success of the intended appeal**

14. I have perused the draft appeal and one of the grounds of the intended appeal is that the trial court became functus officio upon rendering its initial ruling. This court finds that ground as a sound one. The other grounds raised in the draft appeal are equally arguable wherefore I do find that the intended appeal has high probability of success.

### **Degree of prejudice to the Respondent**

15. As regards the degree of prejudice that the respondent herein is likely to suffer, this court notes that a stay of proceedings will indeed procrastinate the conclusion of the initial suit that is still pending before the trial court and the respondent will thus be prejudiced by the delay.
16. This court cannot over emphasize the need for any litigation to be conducted and concluded timeously, dependent on the circumstances of each case. The respondent herein is entitled to litigate his claim devoid of undue huddles more so due to the fact that the initial ex parte Judgment entered against the applicant has since been set aside and the applicant has been accorded an opportunity to participate in the proceedings before the trial court. This court opines that the playing field is now level for the parties to put forth their respective cases before the trial court.
17. Premised upon the analysis made hereinabove this court is not inclined to extend time and the applicant's application herein is thus disallowed. Each party to bear it's own costs.

**DELIVERED, SIGNED AND DATED AT KISUMU THIS 27<sup>TH</sup> DAY OF AUGUST 2024**

**MWANAISHA S SHARIFF**

**JUDGE**

