



REPUBLIC OF KENYA



KENYA LAW
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**Odekeyo v Wamwana (Civil Appeal 72 of 2018)
[2024] KEHC 11433 (KLR) (30 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11433 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL 72 OF 2018
DK KEMEI, J
SEPTEMBER 30, 2024**

BETWEEN

GILBERT MARTIN ODEKEYO APPELLANT

AND

ALEX WAFULA WAMWANA RESPONDENT

*(Application for leave to appeal out of time and for stay of execution
of decree and judgement issued on 28th April 2023, in Bungoma
High Court Civil Suit No. 72 of 2018 by Hon D.K. Kemei, J)*

RULING

1. This ruling determines the notice of motion application dated 20th May 2024, brought under certificate of urgency by the Applicant Gilbert Martin Odekeyo which seeks the following orders:
 - a. Spent
 - b. That this Honourable Court be pleased to extend time to the Applicant to enable him file his notice of appeal out of time.
 - c. That this Honourable Court be pleased to stay the execution of the decree and judgement pending determination of the appeal.
 - d. That the costs of this application be provided for
2. The application is premised on grounds on the face of the application and a supporting affidavit sworn by the Applicant sworn on 20th May 2024.
3. Vide directions as issued by the Court on 10th July 2024, the application was canvassed by way of written submissions. Both parties complied with the Court directives.



4. The Applicant's case is that he has an arguable appeal with a high probability of success and that if stay of execution is not granted, his appeal will be rendered nugatory thus exposing him to irreparable damage as the respondent might levy execution against him.
5. The Applicant further avers that the Judgement of the Court was delivered on 28th April 2023 in the absence of the Applicant and that his counsel on record was not aware of the same as they were never served with the judgement notice.
6. The Applicant further deponed that he is ready and willing to comply with the directions of the Court.
7. In response, the Respondent, Alex Wafula Wamwana, swore a replying affidavit on 29th May 2024, contending that the Applicant's application is bad in law, incompetent and an abuse of the Court process.
8. It was further deponed that the dismissed appeal was filed by the Applicant herein and that all along he was not keen on prosecuting the same and that since the judgement delivered on 28th April 2023, the Applicant has never bothered to find out the outcome and lodge his appeal against the judgement.
9. The respondent further contended that the Applicant is not sincere as the Advocate previously on record was aware of the judgement and that the bill of costs was duly served upon the said firm and that they attended Court for taxation as per the Court proceedings.
10. Further contention was that the Respondent is entitled to costs (taxed costs) and even if the same is paid and the appeal succeeds, the Respondent is a High School teacher by profession and can refund the same. He urged this Court to dismiss the application with costs to the Respondent.
11. I have considered the application by the Applicant, the grounds, supporting affidavit, grounds of opposition and written submissions for and against the application as supported by cited authorities. In my view, the main issue for determination is whether the application has any merit and therefore whether the orders sought should be granted.
12. Under Section 79G of the *Civil Procedure Act*, time for filing an appeal from judgment of the subordinate court to the High Court is thirty (30) days.
13. In this case, the judgment sought to be challenged was rendered on 28th April 2023. It follows that any appeal challenging that decision ought to have been filed on or before 28th May, 2023. Instead, the Applicant's counsel failed to file his appeal and has come before this Court seeking to have the time enlarged and the appeal filed out of time validated and be deemed to be duly filed within the time so enlarged.
14. The Respondent's counsel vigorously opposes the application stating that the same is an abuse and misuse of judicial process and an afterthought. Further, that the then Counsel for the Applicant was aware of the Judgement delivered and even participated in the Bill of Costs proceedings and that no evidence was availed to rebut the Court proceedings.
15. An application for extension of time must show good and substantial reasons for the delay, and, prima facie good cause why the intended appeal should be heard. Whilst the first leg requires a satisfactory justification, the second leg only requires one to show that the grounds of appeal are arguable. It is upon satisfaction of both the above that the Court will use its discretion to grant the application.
16. This discretionary power, however, is judicial in nature and must be confined to the rules of reason and justice. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and*



Boundaries Commission & 7 others {2014} eKLR set out the considerations to guide the Court in exercising its discretion in cases of this nature. It stated: -

- i. 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;
 - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
 - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
 - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - vi. Whether the application has been brought without undue delay; and
 - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."
17. In granting leave, the Court has to balance the competing interests of the Applicant with those of the Respondent, a position well stated in *M/S Portreitz Maternity v James Karanga Kabia* Civil Appeal No 63 of 1997 thus: - "That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right."
18. Rule 4 of the [Court of Appeal Rules, 2022](#) provides: -
- "The court may, on such terms as may be just, by order, extend the time limited by these Rules, or by any decision of the court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as reference to that that time as extended."
19. The main reason offered by the Applicant is that he and his former Advocates were not aware when the matter came up for judgement and that they were not served with a judgement notice, and that as per his former Advocates information, the matter came up severally for judgement without the same being delivered. He insisted that the judgement delivered on 28th April 2023 was done so in the absence of his Advocates and that the Respondent vide his Counsels filed a bill of costs which was never served upon his Advocates on record. He further contended that upon delivery of the ruling on the Bill of Costs, the Respondent instructed auctioneers to execute the costs of the Appeal herein and that he was served with a Notice of Proclamation and Warrant of Attachment.
20. In deciding whether sufficient cause has been shown, among the facts usually relevant are the degree of lateness, the explanation thereof and the prospects of success. This list is not exhaustive and that each case will depend on its peculiar facts and circumstances.
21. Equally important is that an application for extension of time must be filed without delay and/or as soon as an Applicant becomes aware of the need to do so. Thus, where the Applicant delays filing the application despite being aware of the need to do so, or despite being put on terms, the Court may take a dim view in the absence of a proper and satisfactory explanation for the further delays.



22. As to whether there is an appeal with chances of success, the Applicant has not annexed any memorandum of appeal to enable this Court consider the chances of success of the same. This is not to say that failure to annex a draft copy of memorandum of appeal would be fatal to the application herein but to demonstrate the arguability of the intended appeal.
23. I have evaluated the reason offered for the delay. I find and hold that the lack of awareness of the delivery of judgement and ongoing bill of costs proceedings are false. From the Court record, it is evident that the former Advocates were aware of the Judgement as per the order for directions on taxation issuing directions on the Respondent's Bill of Costs dated 4th May 2023.
24. In the instant case, the delay by the Applicant in filing the instant appeal has not been explained by the Applicant and that in his attempt to explain to the Court, he has blatantly lied to this Court that he was made aware of the judgment only when he was served with a notice of proclamation and warrant of attachment, when the Respondent sent auctioneers to attach his property in execution for costs. The Respondent has been denied the fruits of his judgement for close to one year now as the Court had to hear both parties on the application after granting a temporary stay of execution of ruling on the bill of costs on 10th July 2024 and fix a date for this ruling. The Applicant has accordingly come to this Court with unclean and dishonest hands and therefore he does not deserve the exercise of discretion of this Court. Indeed, the Applicant had been ably represented by his Advocates all the way to the filing and prosecution of the bill of costs. If anything, it is the Applicant's Advocates to brief him on the matter. The conduct of the Applicant in taking up a new advocate without calling for the progress of the matter from the former advocate indicated that he is not interested at all about the true situation regarding the delivery of the judgement. The Applicant has himself to blame for the turn of events. It is instructive that the Applicant has not seen it fit to secure a supporting affidavit from his erstwhile advocate regarding the claim that the judgement had been delivered in their absence. This could have bolstered the application. Hence, I find that no good and plausible reasons have been furnished by the Applicant to warrant the orders sought. Granting the application will cause prejudice to the Respondent.
25. For all the above reasons, I find and hold that the application for enlargement of time to file an appeal out of time challenging judgment in Bungoma High Court Civil Appeal No. 72 of 2018 is devoid of merit. The same is hereby dismissed.
26. Regarding the issue of whether the prayer for stay of execution of the judgement delivered on the 28th April 2023 is merited, this Court having found that the application for extension of time to file an appeal out of time is devoid of any merit and having dismissed that prayer, it follows that the Court cannot stay execution of the decree of this Court pending nothing.
27. For all the above reasons, i find and hold that the Applicant's application dated 20th May 2024 is without merit and is hereby dismissed. Each party to bear their own costs.

It is hereby so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF SEPTEMBER 2024

D. KEMEI

JUDGE

In the presence of :

Mrs Maheli for Appellant/Applicant

Wattangah for Respondent



