



REPUBLIC OF KENYA



**Omusikoye v Musungu & another (Miscellaneous Civil Application
E001 of 2024) [2024] KEHC 11362 (KLR) (27 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11362 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CIVIL APPLICATION E001 OF 2024**

AC BETT, J

SEPTEMBER 27, 2024

BETWEEN

PHARICE OCHUTSI OMUSIKOYE APPLICANT

AND

SIMON MUKUNGU MUSUNGU 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

(Being an application for leave to file an appeal out of time against the Judgment by N. R. AKEE (SRM) in Kakamega CMCC. No. 198 of 2012 delivered on 28th July 2021)

RULING

1. Before the court is the Appellant's application dated 2nd January, 2024, seeking the following reliefs:
 - i. Spent
 - ii. Spent
 - iii. That pending the hearing and determination of this application of interpartes, there be an order for stay of execution of the judgment of the subordinate court delivered on 11.08.2021.
 - iv. That pending the hearing and determination of the intended appeal, there be an order of stay of execution of the judgment of the subordinate court in Kakamega Chief Magistrates Civil Case no. 198 of 2012 delivered on 11.08.2021.
 - v. That this Honourable Court be pleased to grant leave to the Applicant to file an appeal out of time against the judgment and decree of the subordinate court delivered on. 11.08.2021.
 - vi. That the costs of this application be provided for.
2. The application is supported by the Applicant's Affidavit sworn on 2nd January, 2024.



3. The Application is opposed by the 1st Respondent through his Replying Affidavit dated 15th April, 2024. The 2nd Respondent never filed any response to the application.

Applicant's case

4. The Applicant avers that during trial of the matter before the subordinate court, he was represented by the firm of MS Ombae and Company Advocates whose proprietor one Mr. Ombae Advocate passed on before the matter was concluded.
5. The Applicant also averred that due to the demise of his advocate there was communication breakdown and that her efforts to get a refund from the said firm proved futile.
6. Further, the Applicant asserts that judgment was finally delivered on 11th August 2021 in his absence after several adjournments and that he only became aware of the judgment after he was contacted by auctioneers instructed by the decree holder.
7. The Applicant also states that he was never served with a notice of entry of judgment as required by law. It is his averment that upon making inquiries with the advocate appointed to wind his former advocate's law firm, he got to learn that an appeal had been preferred by the 2nd Respondent herein whereupon he instructed the firm of Khayumbi to pursue it only to find that the same had been dismissed with costs.
8. The Applicant states that the 1st Respondent has since raised a Proclamation against his assets and has now threatened to attach his home, which move would potentially render him homeless thus subjecting him to substantial loss.
9. It is also contended that the Respondent is a person of unknown means hence recovery of any amounts paid to him, if the intended appeal were to succeed may not be feasible.
10. The Applicant further states that though the firm of Khayumbi have since applied to have the appeal that was dismissed reinstated he has instructed them to withdraw it to pave way for the filing of his intended appeal.
11. Lastly, the Applicant avers that he is willing to provided security covering the entire decretal sum by submitting the title deed of his property claimed to be worth Ksh. 2,500,000/=.

Respondent's Case

12. In response, the 1st Respondent avers that the Applicant's assertion that he lost track of the matter before the trial court when his Advocate died is not true as the firm of Getanda duly came on record even before defence hearing was conducted.
13. Further, the 1st Respondent avers that the Applicant was represented by the said firm through Counsel namely, Nafuye who led him as he gave his evidence during defence hearing. That parties including the Applicant also filed their submissions through their respective advocates.
14. The 1st Respondent thus asserts that the Applicant has been actively involved in the matter before the trial court and cannot thus purport to claim that he was not aware of the date when the matter came up for judgment.
15. The 1st Respondent also reiterates that an appeal against the trial court's judgment had been preferred vide Kakamega HCCA NO. E48 OF 2022 which the Applicant was well aware of and even filed an application for stay of execution.



16. Lastly, the 1st Respondent states that the instant application is not merited as it is based on falsehood and was filed after inordinate delay.

Issues for Determination

17. It is apparent that the substantive orders sought by the Applicant in the instant application is an order staying execution of the Judgment of the lower court in Kakamega Chief Magistrates Civil Case No. 198 of 2012 and leave to lodge an appeal out of time against it.
18. As such, the Court discerns the main issues for determination follows:-Whether the Applicant is entitled to grant of leave to prefer an appeal out of time; and,Whether an order of stay of execution should issue.

Analysis and Determination

Whether the Applicant is entitled to grant of leave to prefer an appeal out of time

19. The Applicant inter-alia submitted that under the proviso to section 79G of the *Civil Procedure Act*, this court is clothed with the discretion to admit an appeal out of time provided the Applicant demonstrates sufficient reason for not lodging his/her appeal within the prescribed timelines.
20. In support of this assertion, the Applicant relied on the decisions of the court in Kennedy Ochieng Otieno & Another v Elisaphan Omolo Nyasita[2019]Eklr, Andrew Kiplangat Chemaringo v Paul Kibet[2018]eKLR and Pauline Yebei & Another Versus Andrew W. Kiprono(2020) eKLR.
21. Noteworthy, the Applicant attributed his delay to a communication breakdown between the advocate appointed to wind up his former advocate's firm.
22. The Applicant asserts that the said Advocate failed to give him a timely response until when time for lodging appeal had lapsed. He also urged the court to appreciate that the said advocate was not necessarily working under his primary instructions but rather those of the Law Society of Kenya to wind up his deceased advocate's firm which eventuality impaired the advocate client relationship between them.
23. Consequently, the Applicant asked this court to find that his failure to observe timelines for appeal was occasioned by his advocate's mistake (read failure) to communicate the true position and outcome of the case. The Applicant then relied on the decision of the court in Patriotic Guards Limited Versus James Kipchirchir Sambu[2018]eKLR.
24. The Applicant further faulted the lower court for having allegedly set down the matter for delivery of judgment on various occasions without delivering it only for it to later proceed to deliver it without notice to him.
25. The Applicant also submitted that the Respondent also never served any notice of entry of Judgment before commencing the execution exercise in a tactical move to deny him a timely opportunity to appeal.
26. The Respondent never submitted at length on this issue save for the fact he contended that the Applicant was not forthright in his explanation of the cause of his delay. He also surmised that granted this application was filed after a lengthy period of three years from the date of judgment, the delay is inordinate.



27. I have considered the parties' rival pleadings and submissions on this issue. It cannot be gainsaid that this court indeed has the discretion to extend time for filing an appeal.
28. It must however be appreciated that such discretion can only be exercised in favour of a party who has submitted a cogent explanation or reason(s) for the delay.
29. In, *Edith Gichugu Koine v Stephen Njagi Thoithi* [2014] eKLR , the Court of Appeal observed that a court faced with an application for extension of time ought to take into account several factors including but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance.
30. In the instant case, the Applicant attributed his default inter-alia to the demise of his advocate. Unfortunately, the Applicant never even bothered to indicate when his former advocate died.
31. The Applicant only chose to lay blame on his subsequent advocate Mr. Getanda, albeit appointed to wind up his former advocate's firm without even disclosing when exactly he took up the matter.
32. The Respondent on his part averred that the Applicant has all along actively participated in the proceedings of the lower court and even testified in his defence while being led by one Ms. Nafuye holding brief for Mr. Getanda, Advocate. This assertion was in fact not controverted by the Applicant.
33. I have nonetheless taken the liberty of perusing through the proceedings annexed to the Applicant's application and noted that some pages are missing, it is evident that the Applicant was indeed represented by counsel on 11th August 2021 when Judgment was delivered.
34. I also note that save for alleging that there was a breakdown in communication between him and Mr. Getanda, the Applicant has not bothered to explain any efforts made in a bid to remedy the situation.
35. The Court needs not belabor the fact that litigants must always be vigilant in pursuit of their matters. Not even allegations of mistake of counsel can aid a litigant who has failed to diligently pursue his rights. See the decision of the Court of Appeal in *Tana & Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others* [2015] eKLR where it was inter alia held:

“As stated by this Court in the case of *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

It appears that the appellant fell short of this expectation. It bears repeating that no explanation was ever given as to why the particulars to the defence failed to be filed. Yet it is common ground that the appellant was aware of the order to that effect. While mere negligent mistake by counsel may be excusable, the situation is vastly different in cases where a litigant knowingly and wittingly condones such negligence or where the litigant himself exhibits a careless attitude...”

36. I must however state that on my part, I could not outrightly discern nor attribute any mistake on Mr. Getanda Advocate. I have also noted that even though the Applicant alleged that the matter had been set down for Judgment on several occasions without it being delivered and that the trial court proceeded to deliver it without notice, no evidence or even an indication of the dates in question have been submitted in support of this assertion.



37. Bearing in mind that the delay in bringing this application is well after two years, without a satisfactory explanation having been tendered, this court must find that the delay is inordinate.
38. As to whether the Respondent stands to suffer any prejudice, I note that the Respondent is yet to enjoy the fruits of his Judgment delivered way back on 11th August 2021. It would in fact seem that the filing of this application was spurred by his attempt to execute it.
39. While the grounds submitted in the annexed Memorandum of Appeal may be arguable, this court cannot ignore the fact that the Applicant has not tendered any reasonable explanation to explain the delay coupled with the fact that this application was perhaps only filed to forestall execution.
40. Besides, it is not contested that an appeal against the trial court's judgment had been preferred vide Kakamega HCCA NO. E48 OF 2022 over which an application for reinstatement was apparently filed by the Applicant, this application may well constitute an abuse of the court process especially noting that the Applicant has not submitted evidence of it having been withdrawn.
41. The Court also notes that the prayer for leave to file an appeal out of time is not legally tenable in the first place as section 79(G) of the *Civil Procedure Act* only vests discretion on this Court to admit an appeal filed out of time. This provision cannot thus be invoked to urge the Court to admit an appeal which has not even been filed!
42. In determining so, the Court is guided by the decision of the Court of Appeal in Charles Karanja Kiiru v Charles Githinji Muigwa [2017] eKLR where it was inter-alia held:-

“Having expressed ourselves as herein above the other issues that falls for considered is whether the appeal filed out of time on 24th October 2014 could be deemed as being properly on record. There is a plethora of authorities from the High court which interpret the proviso to Section 79G of the *Civil Procedure Act* to mean that an appeal filed out of time can be admitted as being properly on record once extension of time is granted. Emukule J. in the Gerald M'Limbine Vs Joseph Kangangi [2009]eKLR stated that:

“my understanding of the proviso to Section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal and at the same time seek leave of court to have an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the court's permission to admit a non-existent appeal out of the stipulated period to do so would actually be an abuse of the court's process under Section 79B.”(emphasis added)

43. For the reasons set out above, the Applicant's plea for leave to file an appeal out of time is hereby declined.
44. As to whether an order of stay of execution can issue, the court having found that the Applicant is not entitled to grant of leave to file appeal out time, it follows that the court cannot stay execution of the decree of the lower court while no appeal exists to warrant its subsistence.
45. In the circumstances, the application dated 2nd January, 2024 is hereby dismissed with costs to the Respondent.
46. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 27TH DAY OF SEPTEMBER, 2024.



A. C. BETT

JUDGE

In the presence of:

Nyaberi for Applicant

Ms. Chesire holding brief for Indimuli for Respondent

Court Assistant: Polycap

