



**Ololo v National Housing Corporation (Miscellaneous Application
E279 of 2024) [2024] KEHC 13601 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13601 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS APPLICATION E279 OF 2024
RE ABURILI, J
OCTOBER 31, 2024**

BETWEEN

WILLIAM OLOLO APPLICANT

AND

NATIONAL HOUSING CORPORATION RESPONDENT

RULING

Introduction

1. The applicants filed an application dated 12th July 2024 under Certificate of Urgency in which they sought the following orders:
 - a. Spent
 - b. That the court be pleased to extend time within which to lodge an appeal.
 - c. That this Honourable Court be pleased to grant leave to the applicant to appeal against the judgment delivered on the 22nd day of November 2023.
 - d. That this Honourable court be pleased to grant leave to the applicant to file a reference against the ruling delivered on the 12th day of June 2024.
 - e. Spent.
 - f. That the court be pleased to stay execution of the decree pending the hearing of the intended appeal.
 - g. That the cost of this application be costs in the cause in any event.
2. The application was based on the grounds on its face as well as the applicant's Supporting Affidavit dated 12th July 2024.



3. The applicant averred that he filed a plaint against the respondents herein vide a plaint dated 27th December 2006 and with the respondents filing their defence vide a statement of defence dated 16th February 2007 and amended on the 14th February 2013.
4. The applicant further averred that after testifying he only became aware of the judgement against him on the 2nd July 2024 and the following day learnt about the same from his advocate and subsequently instructed them to file an appeal against the judgement which appeal had good chances of success.
5. The appellant further sought leave to appeal/ file a reference against the award of KShs. 440,040 to the 1st defendant.
6. The applicant further averred that he had been in Tanzania on a business trip and just came back on the 12th July 2024 to sign the affidavit and challenge both the judgement and ruling and further that the period was not inordinate but excusable.
7. Mr. Omondi for the applicant submitted that they were only appealing against the judgement dismissing its application dated 12.7.2024 and that they sought prayer for extension of time to lodge an appeal and stay of execution pending appeal. Mr. Omondi further submitted that their application was filed within time and that if stay was not granted, substantial irreparable loss would be suffered as the decree had been drawn and costs assessed.
8. In response Mr. Mwisigwa for the respondent opposed the application and submitted that there has been an inordinate and inexcusable delay in filing the appeal as the judgment was rendered on the 12.11.2023 thus the time elapsed was 8 months whereas the time for appeal under section 79G of the [Civil Procedure Act](#) was 30 days. Reliance was placed on the case of [Joseph Odinde Walome v David Mbadi Akello](#) [2022] eKLR.

Analysis & Determination

9. The three main issues for determination herein are: -
 - a. Whether the court should exercise its discretion to grant the applicant leave to file his appeal against the judgement delivered on the 22.11.2023 out of time;
 - b. Whether the applicant has met the prerequisite for grant of stay of execution pending appeal;
 - c. Whether the court should exercise its discretion to grant the applicant leave to file a reference against the ruling delivered on the 12th day of June 2024.
10. On the first issue, Whether the court should exercise its discretion to grant the applicant leave to file his appeal out of time, Section 79G of the [Civil Procedure Act](#) provides: -

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 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.
11. It is clear from the wording of section 79G of the [Civil Procedure Act](#) that before the court considers extension of time, the applicants must satisfy the court that they have good and sufficient cause for filing the appeal out of time.



12. This principle was enunciated in the case of *Diplack Kenya Limited v William Muthama Kitonyi* [2018] eKLR an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.
13. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat v IEBC and 7 others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that: -
 - “The underlying principles a court should consider in exercise of such discretion should include: -
 - a. Extension of time is not a right of any 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 for 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 by case basis;
 - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
 - f. Whether the application has been brought without undue delay.
14. Similarly, in the case of *Paul Musili Wambua v Attorney General & 2 others* [2015] eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following: -
 - “.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general, the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”
15. Applying the above principles to the present case, the judgement impugned was passed on the 22.11.2023 whereas the applicant herein averred that he only became aware of the judgement against him on the 2nd July 2024 and the following day learnt about the same from his advocate and subsequently instructed them to file an appeal against the judgement.
16. The applicant further averred that the reason why he filed the instant application on the 15.7.2024 is because of lack of communication from his erstwhile advocates and further due to the fact that he had been in Tanzania on a business trip and just came back on the 12th July 2024 to sign the affidavit and challenge both the judgement and ruling and thus the lapse in time in filing the said application was not inordinate but excusable.
17. It is evident that the over 7 months it took the applicant to file the instant application is inordinate. It is not enough for the applicant to lay the blame on miscommunication with his advocate or his long-



- alleged business trip which no evidence has been presented before it. A party must be vigilant and follow up with his advocates on the way his case is being prosecuted.
18. Whereas it is true that the court has unfettered discretion, like all judicial discretion it must be exercised upon reason not capriciously or sympathy alone and justice is justice to both the Plaintiff and the Defendant; so, both parties to the suit must be considered.
 19. I am not satisfied that the applicant merits grant of leave to file his appeal out of time however, it is trite that a court of law should be hesitant at closing the door to the corridors of justice prior to a litigant being heard on his complaint.
 20. Article 48 of the Constitution guarantees every person access to justice, in addition, under Article 50(1) of the Constitution, every person has the right to have any dispute that can be resolved by the application of law decided in affair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
 21. The ultimate goal and purpose of the justice system is to hear and determine disputes fully. It follows that no person who has approached the court seeking an opportunity to ventilate their grievances fully should be locked out. In the instant case, the applicant filed the appeal one day late and has approached this court for extension of time as stipulated in Section 79G of the Civil Procedure Act, the proviso thereof. Reasons or no reasons for that delay, it is before the court seeking to be granted a chance to agitate its appeal challenging the judgment of the lower court.
 22. There is no evidence that the application is an afterthought or how the same is intended to abuse court process. Further, it is not uncommon for clients to instruct their counsel who procrastinate on filing court processes and only wake up when time for such filing has elapsed. Courts have over time excused parties where such delay is not inordinate as is in this case and even in cases where there is inordinate delay, depending on the circumstances of each case and reasons for the delay, courts have accorded parties an opportunity to be heard on appeal. Furthermore, there is no evidence to demonstrate what prejudice the Respondent will suffer if the applicant is granted extension of time. It is also worth noting that the annexed Memorandum of appeal attached by the applicant raises prima facie issues for determination by the necessary appellate court.
 23. I will thus grant the appellant leave to file his appeal out of time.
 24. On the second issue as to whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal, it is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules stipulates: -
 1. “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.
 - (2) No order for stay of execution shall be made under sub rule 1 unless: -



- a. The Court is satisfied that substantial loss may result to the 1st Applicant unless the order is made and that the application has been made without unreasonable delay; and
 - b. Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.
25. Thus, under Order 42 Rule 6(2) of the [Civil Procedure Rules](#), an applicant should satisfy the court that:
 1. Substantial loss may result to him/her unless the order is made;
 2. That the application has been made without unreasonable delay; and
 3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
26. Substantial loss was clearly explained in the case of [James Wangalwa & another v Agnes Naliaka Cheseto](#) [2012] eKLR: -

“No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the [CPR](#). This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
27. The applicant is silent in his affidavit on how he stands to suffer substantial loss. It is only in oral submissions that he contends that he stands to suffer irreparably loss as the decree has been drawn and costs accessed. In my view, what the applicant is referring to by referencing to the drawing of a decree is execution proceedings. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show the manner in which execution will irreparably affect him or will alter the status quo to his detriment therefore rendering the appeal nugatory. The applicant has failed to demonstrate substantial loss in my considered view.
28. I have already found that the instant application was not made without unreasonable delay and so there is no need to rehash the same.
29. As to security of costs, Order 42 rule 6 requires the provision of security as a pre-condition for allowing a request to stay execution. The applicant has not stated that he is willing to provide security and has conveniently evaded that issue. However, it does not mean that when a party does not offer any security for due performance of decree then he can be denied a stay. What the provisions stipulate and contemplate is that the court has the discretion in ordering what security to be deposited for due performance of decree. In this case, I find no reason to grant a conditional stay as regards security for due performance of decree this being a case of malicious prosecution and false imprisonment.
30. In the end, I find that the applicant is entitled to exercise his constitutional right of appeal. I therefore proceed to grant leave to the applicant to file an appeal out of time against the judgment delivered in on the 22.11.2023 in Kisumu CMCC No 576 of 2019. I further order that there shall be stay of execution of decree in Kisumu CMCC No 576 of 2019 pending the hearing and determination of the appeal.



31. Finally, as to whether the court should exercise its discretion to grant the applicant leave to file a reference against the ruling delivered on the 12th day of June 2024, Paragraph 11 of the [Advocates Remuneration Order](#) (ARO) stipulates as follows on the filing of reference objecting to the decision of the Taxing Master:-
- 1) Should any party object to the decision of the Taxing Officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation which he objects.
 - 2) The Taxing Officer shall forthwith record and forward to the objector the reasons or his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by Chamber Summons, which shall be served on all the parties concerned, setting out the grounds of his objection.
 - 3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
 - 4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by Chamber Summons upon giving to every other interested party not less than three clear days' notice in writing or as the court may direct, and may be so made notwithstanding that the time sought to be enlarged may have expired.” (Emphasis supplied).
32. The discretion of this court to enlarge time is elaborately discussed in the case of the [County Executive of Kisumu v County Government of Kisumu and 8 others](#) [2017] eKLR where the Supreme Court of Kenya held thus:

- “(23) It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The Court delineated the following as “the underlying principles that a Court should consider in exercise of such discretion:
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 a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”



33. This Court enjoys wide discretionary powers under the *Civil Procedure Act* and Rules more specifically as stipulated in section 1 (A), 1(B),3(A), section 79 (G) on overriding objective, the inherent jurisdiction and on account of sufficient cause to exercise jurisdiction in matters of this nature for the interest of justice.
34. It is noted that paragraph 11 (1) (2) of the *Advocates Remuneration Order* does not speak to the relevant factors that the Court should consider when exercising its discretion on whether or not an extension of time should be granted. Guidance must therefore be solved from case law in *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* [2013] eKLR the Court of Appeal while referring to other authorities observed; -

“The discretion under rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance. In *Henry Mukora Mwangi v Charles Gichina Mwangi* – Civil Application No Nai 26 of 2004, this Court held; -

“It has been stated time and again that in an application under rule 4 of the Rules the learned single Judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize this principle by referring to the decision in *Mwangi v Kenya Airways Ltd* [2003] KLR 486 in which this Court stated;-Over the years, the Court has, of course set out guidelines on what a single judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance, in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* – Civil Application No Nai 255 of 1997(unreported), the Court expressed itself thus; -

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of the delay; secondly, the reasons for delay; thirdly(possibly), the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

35. As stated in the above cases, the length of the delay and reasons for non-compliance of the time lines are important factors to influence the exercise of discretion of the Court.
36. In calculating the length of delay in making the application for an extension of time the period will start running from 12th day of June 2024 when the bill of costs was taxed by the taxing master to the 15th July 2024 which time the aggrieved applicant lodged the instant application for extension of time. The delay in filing the application was on or about an overreach of 7 days. In seeking to balance the interest of the respective parties the failure to comply was not inordinate.
37. In addition, the applicant in his affidavit has explained the reasons which let time to lapse. The applicant averred that the reason why he filed the instant application on the 15.7.2024 is because of lack of communication from his erstwhile advocates and further due to the fact that he had been in Tanzania on a business trip and just came back on the 12th July 2024.



38. As earlier noted, The Ruling of the Taxing Master having been made on 12th June 2024 following the procedure set out in Paragraph 11 of the Remuneration order outlined above, he ought to have indicated which items of the Bill of Costs he objected to before the expiry of the 14 days which would have been on the 3rd July 2024.

39. Having said that, the Applicant ought to know that having been sued by the Respondent, it was his obligation to ensure that the suit filed against him was expeditiously prosecuted in court by making all necessary follow ups. He was not supposed to sit pretty and wait until an execution order is served upon him for him to rush to his Advocate's chambers for an interpretation of the same. In the case of *Savings & Loan Limited v Susan Wanjiru Muritu Nairobi* (Milimani) HCCC No 397 of 2002, the court stated thus: -

“Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former advocate's failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the Defendant to be prompted to action by the Plaintiff's determination to execute the decree issued in its favor, is an indictment of the Defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favor of such a litigant.” [own emphasis]

40. Similarly, in *Duale Mary Ann Gurre v Amina Mohamed Mahamood & another* [2014] eKLR, Hon Justice Mutungi held as follows: -

“An advocate is the agent of the party who instructs him and such instructing client as the principal continues to have the obligation and the duty to ensure that the agent is executing the instructions given. In the case of litigation, the suit belongs to the client and the client has an obligation to do follow up with his Advocate to ensure the Advocate is carrying out the instructions as given. The litigation does not belong to the Advocate but to the client. If the Advocate commits a negligent act the client has an independent cause of action against the Advocate.”

41. From the above-mentioned authorities, it is clear that a litigant has a duty to follow up on his case after he has instructed an advocate. However, in the instant case, the delay in bringing forth the instant application seeking leave to file a reference out of time is only of 8 days which in my view cannot be deemed to be inordinate.

42. I thus grant the applicant leave to file his reference against the ruling of the Hon. Cheruiyot made on the 12th June 2024 in kisumu CMCC No 576 of 2019. The Reference shall be filed and served within 14 days of the date hereof.

43. Final orders



- a. The applicant is granted leave to file an appeal out of time against the judgment delivered in on the 22.11.2023 in Kisumu CMCC No 576 of 2019. The appeal shall be filed and served within 14 days of today;
- b. I further order that there shall be stay of execution of decree in Kisumu CMCC No 576 of 2019 pending the hearing and determination of the intended appeal;
- c. The applicant is granted leave to file a reference from the taxation of party and party bill of costs assessed by the lower court on 12th June, 2024;
- d. The applicant shall pay costs of the application on all the limbs as allowed, which costs are assessed at Kshs 30,000 to be settled within 30 days of today and in default, the respondent is at liberty to execute.

44. This file is therefore closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 31ST DAY OF OCTOBER, 2024

R.E ABURILI

JUDGE

