



**Ongeri aka Liymsanu v Munyaka (Miscellaneous Civil Application  
E004 of 2024) [2024] KEHC 13469 (KLR) (29 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13469 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS CIVIL APPLICATION E004 OF 2024  
SM MOHOCHI, J  
OCTOBER 29, 2024**

**BETWEEN**

**ERICK NYANG'AU ONGERI AKA LIYMSANU ..... APPLICANT**

**AND**

**JACKSON MWANGI MUNYAKA ..... RESPONDENT**

**RULING**

1. Before Court for determination is the Applicant's Notice of Motion Application dated 17<sup>th</sup> January, 2024 brought under Sections 1A, 1B, 3A 79G and 95 of the [Civil Procedure Act](#) and Order 42 Rule 6 (1), (2) & (7), Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules wherein he seeks:
  - a. Spent
  - b. That the Honourable Court be pleased to grant the Applicant Leave to Appeal out of time in respect to the judgment /decree delivered in Nakuru CMCC No. E095 of 2021 by Hon. B. Ochieng (CM) .
  - c. Spent
  - d. That the Honourable Court be pleased to grant an order of Stay of Execution of the judgment and or Decree delivered on 7<sup>th</sup> September, 2023 and all consequential orders arising therefrom pending the hearing and determination of the intended Appeal herein.
  - e. This Court be pleased to issue an order for provision of a bank guarantee of Kshs 404,240 being the decretal sum.
  - f. The Honourable Court be pleased to issue any other order as it may deem just appropriate and expediate in the interest of justice;
  - g. Costs of this Application be provided for.



2. The Application was predicated on the grounds on its face, the Supporting Affidavit of Cythia Kemunto, Advocate sworn on the same date.

### **Applicant's Case**

3. She deposed that she took over the matter from one Miss Aguko who left the firm on 15<sup>th</sup> December, 2023. That judgement in Nakuru CMCC No. E095 of 2021 was scheduled for delivery on 11<sup>th</sup> May, 2023 but it was not ready on the said date and the Court directed that the judgement would be delivered on Notice. Their office received a demand letter demanding payment of the decretal sum and their office clerk upon following up with the registry, was informed that the judgement had been delivered on 7<sup>th</sup> September, 2023 but the said file had not been returned to the registry.
4. She deposed further that the clerk followed up with the registry and managed to obtain a copy of judgment on 1<sup>st</sup> November, 2023 with the judgment being delivered in favour of the Respondent. She argued that the judgement was delivered without Notice from the Court therefore stay of execution was not granted. That by the time she learnt of the existence of the judgement the period for lodging the appeal had lapsed.
5. She deposed further that they are apprehensive that the Respondent will commence execution proceedings thereby rendering the appeal nugatory. That the Applicant stands to suffer irreparable loss and damage if the Application is not allowed and he will be denied his right to appeal.
6. It was also contended that, the Respondent's income is unknown hence there is a likelihood that he may not be able to refund the decretal sum in the event the appeal succeeds. That they are willing to provide a bank guarantee from Family Bank for Kshs.3 million pending hearing and determination of the appeal.
7. She argued that the Applicant's right of appeal will be injured if the prayers sought are not allowed. That the Respondent will not be prejudiced in any way and that the Applicant is willing to abide by the terms and conditions that will be imposed The Application is made in utmost good faith and without undue delay.
8. In the Supplementary Affidavit sworn on 27<sup>th</sup> April, 2024 counsel deposed that on 6<sup>th</sup> January, 2024 while following up on payment, she was informed by finance team that the payment was going to be made. On 16<sup>th</sup> January she enquired again on whether payment had been made and was informed on 17<sup>th</sup> January, 2024 that the file had been rejected and she was instructed to appeal against the decision. That the instant application was filed immediately. That the instructions were communicated to Miss Aguko initially and since she had left they were unable to file the Application on time.
9. The Application was heard by way of written submissions. From the record, there is no copy of the Affidavit of Service despite counsel advising Court on 9<sup>th</sup> April, 2024 that the Application had already been served.

### **Applicant's Submissions**

10. The Applicant in the submissions filed on 3<sup>rd</sup> May, 2024 submitted that the Application has merit and relied on Section 79G of the *Civil Procedure Act* and the decision in Aviation Cargo Ltd vs St March Freight Services Ltd to submit that this Court has the discretion to extend time for filing appeal.
11. On factors that the Court should consider in such an Application, counsel relied on the position held in Edith Gichungu Koine vs Stephen Njagi ThoIthi [2014] eKLR to submit that sufficient cause had been demonstrated through email correspondences which showed effort to follow up on payment



and that the judgment was delivered without notice. That counsels were not aware of the terms of the judgment in order to advise their client.

12. Counsel also relied on the cases of *Belinda Mural & 9 Others vs Amos Wainanina* [1978] eKLR and *Shah H. Bharmal & Brothers vs Kumar* [1961] EA 679 and *Haman Singh & Others vs Mistri* [1971] EA 122. The Courts in these cases were of the view that mistake of a legal advisor may amount to sufficient cause. It was nevertheless submitted that despite there being no fault from counsel or the client the error should not be visited on an innocent litigant.
13. Counsel submitted that a proposal has been made to furnish a bank guarantee of Kshs 404,240 in order to ensure the Applicant is not locked out as he is entitled to the right to be heard and sought guidance in *Kamlesh Masukhala Damki Patni vs Director of Public prosecutions & 3 Others* [2015] eKLR where the Court was of the view inter alia that Courts should be hesitant to close the door of justice before a party is heard.

### **Analysis and Determination**

14. The sole issue for consideration by this Court is whether the Applicant has satisfied the threshold for grant of leave to file an appeal out of time.
15. The purported reasons underpinning the delay as is ascribed by the Applicant relates to efforts by the Applicant advocates from September 2023 to have the Judgment decree settled and that a third party (the insurance) in January 2024 rejected the same for an Appeal.
16. I am unpersuaded of this reason, infarct the reason reeks of shadowy actors puppeteering the intended Appeal even in the face of its own counsel advising the immediate settlement.
17. The Attached Copy of a bank guarantee in favor of Direct Line Insurance is dated 6<sup>th</sup> July 2023 for one year has expired.
18. I however view the failure to serve the Application upon the Respondent as a fatal error. This Court had directed the Applicant to serve the Application and file a return of service.
19. On the 9<sup>th</sup> of April 2024 Advocate Chemutai indicated to the Court that they had served but had been unable to file the Return of Service and would nonetheless be filing the same.
20. This Court has been unable to locate any filed Return of Service in compliance.
21. All in all, this Court does not find any merit Notice of Motion Application dated 17<sup>th</sup> January, 2024, the same is accordingly dismissed.
22. There shall be no Orders as to costs.

It is so ordered.

**SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 29<sup>TH</sup> DAY OF OCTOBER, 2024.**

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**MOHOCHI S.M**

**JUDGE**

