



**Kamau & another v Karanja (Miscellaneous Civil Application
E149 of 2024) [2024] KEHC 16166 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16166 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS CIVIL APPLICATION E149 OF 2024
FN MUCHEMI, J
DECEMBER 19, 2024**

BETWEEN

NGUGI KAMAU 1ST APPELLANT

ISAAC GACHAU 2ND APPELLANT

AND

ERICK KAMAU KARANJA RESPONDENT

RULING

Brief facts

1. The application dated 18th September 2024 seeks for orders of leave to file an appeal out of time against the judgment in Thika CMCC No. 1054 of 2016 delivered on 9th July 2024. The applicant further seeks for orders of stay of execution in respect of the judgment in Thika CMCC No. 1054 of 2016 delivered on 9th July 2024 pending the hearing and determination of the appeal.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 14th October 2024.

Appellants'/Applicants' Case

3. The applicants state that the judgment in Thika CMCC No. 1054 of 2016 was delivered on 9th July 2024 whereby the trial court entered judgment in favour of the respondent finding the applicants 100% liable and awarding the respondent general damages for pain and suffering at Kshs. 450,000/- as well as costs and interests.
4. Being aggrieved with the said decision, the applicants state that they intend to lodge an appeal however the statutory time within which to do so has lapsed. The applicants further state that the 30 days stay of execution granted in the matter has since lapsed and unless stay of execution is granted, the appeal shall be rendered nugatory and the applicants will suffer irreparable loss and damage.



5. The applicants aver that they received a copy of the judgment from their advocates on 5th August 2024 and immediately proceeded to review it. Upon receiving a copy of the judgment, the applicants state that they reviewed the same and instructed their advocates to lodge an appeal against the quantum of damages awarded.
6. The applicants argue that the delay in getting the judgment was due to the delay in the release of the file from the magistrate's chambers and subsequent typing of the same at the registry.
7. The applicants further argue that the decree is for a substantial sum of money and if paid to the respondent, they are apprehensive that they will not be able to recover the whole sum. The applicants further state that the respondent has not disclosed or furnished the court with any documentary evidence to prove his financial standing.
8. The applicants state that their insurance company, Directline Assurance Limited is ready and willing to furnish security in the form of a bank guarantee from DTB Bank.
9. The applicants state that the application has been done without any unreasonable delay. Further, the applicants state that the application will not occasion any prejudice to the respondent.

The Respondent's Case

10. The respondent states that he filed a suit in the lower court being Thika CMCC No. 1054 of 2016. The respondent further states that the suit was concluded and judgment delivered on 9th July 2024 where Ms. Onach was present holding brief for Mr. Kinuthia for the applicants.
11. The respondent avers that the file was returned to the registry and the court uploaded the judgment in the Court Tracking System (CTS) on 10th July 2024 at 8.07.23. Further, on 23rd July 2024, the respondent states that his advocates on record wrote a letter to the applicants informing them of the judgment delivered on 9th July 2024 and forwarded a demand letter which was received by the applicants' advocates on 24th July 2024.
12. The respondent argues that the current application was filed on 18th September 2024, which is sixty (60) days after the judgment and thus the delay is inordinate and the same has not been explained. The reason given by the applicants is false and malicious as the judgment did not need to be typed as the same was already typed at the time of delivery and uploading.
13. The respondent states that the bank guarantors being brandished by the applicants has expired. That notwithstanding, the respondent argues that the applicants ought to deposit the whole decretal sum in a joint interest earning account in the names of the advocates on record.
14. The respondent argues that the current application is an afterthought, malicious and a waste of the court's time.
15. Directions were issued that the application be canvassed by way of written submissions and the record shows that only the respondent complied by filing submissions on 2nd May 2024. The applicants on the other hand had not filed their submissions by the time of writing this ruling.

The Respondent's Submissions

16. The respondent reiterates what he deponed in his affidavit and further submits that the delay of 60 days is inordinate and inexcusable as the applicants and their advocate indicate that they knew that the delivery of judgment was on 9/7/2024.



17. The respondent relies on the case of Bernard Gachie Kamau vs [*Director of Public Prosecutions & 4 Others Civil Application No. NAI E382 of 2021*](#) and submits that the reasons given by the applicants for the delay are not sufficient to warrant the court exercise its discretion in their favour.

The Law

Whether the court should exercise its discretion to grant the applicants leave to file their appeal out of time;

18. Section 79G of the [*Civil Procedure Act*](#) states:-

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.

19. 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. This principle was enunciated in the case of *Diplack Kenya Limited vs 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.
20. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat vs 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.



21. Similarly in the case of Paul Musili Wambua vs 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.”
22. The applicants have faulted the trial court for the delay in filing their appeal because the file was released from the learned magistrate’s chambers late and the subsequent typing of the judgment at the registry.
23. On perusal of the record, judgment in the trial court being Thika CMCC No. 1054 of 2016 was delivered on 9th July 2024 in the presence of both counsels for the parties, with Ms. Onacha holding brief for Mr. Kinuthia for the applicants. The trial court further granted stay of execution of the judgment for 45 days. It is evident that the magistrate had already typed the judgment at the time of delivering it. The judgment was uploaded in the CTS on 10th July 2024 which was one day after judgment.
24. The respondent further annexed a letter dated 23rd July 2024 to the applicants’ advocates informing them of the said judgment and outlining their costs. The said letter was received by the applicants’ advocates on 24th July 2024 whereby they affixed their stamp on the respondent’s copy. Thus it is evident that the applicants were aware of the said judgment from 9th July 2024 and that the judgment was already typed at the time of delivery. The same. judgment was uploaded in the CTS on 10th July 2024. As such, the judgment was accessible in the system a day after delivery. The applicant cannot fault the court registry for their delay to file the appeal. It is therefore my considered view that the applicants have not given any plausible explanation on the reasons for delay.
25. The record further shows that the current application was filed on 20th September 2024 and the judgment was delivered on 9th July 2024 which is a delay of about two months and 11 days. Although such delay may not be referred to as inordinate and inexcusable, the reasons given for the delay are not sufficient to warrant the court to exercise its discretion in favour of the applicants.
26. Accordingly, I find that the applicants have not established to the satisfaction of the court that they deserve enlargement of time to appeal.
27. On the perusal of the intended Memorandum of Appeal and the judgment of the trial court and noted that the appeal does not raise arguable points of law and fact. Thus, without delving to the merits of the appeal, the chances of the appeal succeeding if the instant application is granted are not high.
28. In the circumstances it is my considered view that the applicants have not passed the test of enlargement of time to appeal.
29. This court having declined to grant the prayer for enlargement of time, the prayer for stay of execution of the trial court’s judgment and decree automatically fails since there is no existent or intended appeal.
30. It is thus my considered view that the application dated 18th September 2024 lacks merit and is hereby dismissed with costs.



31. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 19TH DAY OF
DECEMBER 2024.**

F. MUCHEMI

JUDGE

