



**Karanja & another (Suing as the Administrators of the Estate of
Elijah Karanja Ngugi) v Thaiya (Miscellaneous Civil Application
E045 of 2024) [2024] KEHC 16075 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16075 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS CIVIL APPLICATION E045 OF 2024
FN MUCHEMI, J
DECEMBER 19, 2024**

BETWEEN

PETER NGUGI KARANJA 1ST APPELLANT

MAGDALENE MAGALA MWANGI 2ND APPELLANT

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF ELIJAH KARANJA
NGUGI**

AND

JOSEPH KIBUI THAIYA RESPONDENT

RULING

Brief facts

1. This application dated 22nd March 2024 seeks for orders of leave to file an appeal out of time against the judgment in Thika CMCC No. E013 of 2023 delivered on 7th December 2023.
2. In opposition to the application, the respondent filed grounds of opposition dated 16th September 2024.

Appellant/Applicant's Case

3. The applicant states that on 7th December 2023, the Magistrate court in Thika CMCC No. E013 of 2023 entered judgment dismissing the suit for the reason that the applicants had failed to prove their case on a balance of probabilities.
4. Being aggrieved by the decision of the court, the applicants are desirous of filing an appeal. In this application, the applicants seek leave to lodge an appeal. The applicants state that the delay was occasioned by them as they could not instruct their advocates on time to lodge an appeal until they



obtained a copy of the judgment. The applicants further state that they then prepared an opinion for authority either to settle or proceed with an appeal occasioning delay.

5. The applicants state that the intended appeal has merit in that they are dissatisfied with the judgment on quantum. The applicants argue that striking out their suit was inordinate in the circumstances and that the Magistrate's court failed to take into account their pleadings and submissions while making the dismissal order.
6. The applicants aver that the respondent will not suffer any prejudice in the event the application is allowed whilst they will suffer substantial loss if the orders sought will not be granted.

The Respondent's Case

7. The respondent argues that the application lacks merit, is flawed, untenable, misconceived and ought to be dismissed. The respondent further states that the applicants have failed to demonstrate what substantial loss they are likely to suffer unless the orders sought are issued.
8. Parties disposed of the application by way of written submissions.

The Applicants' Submissions

9. The applicant submits that the judgment in Thika CMCC No. E013 of 2023 was delivered on 7th December 2023 whereby their case was dismissed with costs to the respondent. Being dissatisfied with the judgment, the applicants submit that they are desirous of challenging the decision of the trial court but the time within which to file an appeal has lapsed.
10. The applicants submit that the delay in filing the appeal was not intentional but was caused by the fact that it took a long time than anticipated to obtain a copy of the judgment to enable them read the judgment and make an informed choice on whether to appeal. The applicants state that they needed to revise and understand the reasons behind the dismissal of the suit before they could instruct their advocates to proceed to appeal.
11. The applicants rely on Section 79G of the *Civil Procedure Act* and the cases of *Diplack Kenya Limited vs William Muthama Kitonyi* [2018] eKLR and *Del Monte Kenya Limited vs Patrick Njuguna Kariuki* (2015) eKLR and *Njoroge vs Kimani* (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) and submit that acting in good faith, they did not want to file an appeal blindly until they had reviewed the entire judgment. Thus, they argue that they have shown good cause for the delay.
12. The applicants submit that the subject matter being substantial, if the respondent proceeds with execution, they stand to suffer irreparable loss of paying costs of the suit and interest. It is further argued that the appeal raises triable issues with high chances of success and failure to grant orders of stay. According to the Applicant, the appeal stands to be rendered nugatory in the event that orders are not granted. Further, the applicants submit that the respondent has not demonstrated that he is able to refund the sum if the appeal succeeds.

The Respondent's Submissions

13. The respondent relies on Section 79G of the *Civil Procedure Act* and the case of HC. Misc. Application No. 40 of 2007; Gerald Milimbine vs Joseph Kangangi and submits that the application is an abuse of the court process as the applicants have not filed an appeal and it is therefore not open to the court to exercise its discretion under Section 79G of the *Civil Procedure Act*.
14. The respondent further relies on Order 42 Rule 6 of the *Civil Procedure Rules* and the case of *Vishram Ravji Halai vs Thornton & Turpin* [1990] KLR 365 and submit that the judgment of the lower



court was issued on 7th December 2023 while the current application was filed on 22nd April 2024, approximately 3 months after the lapse of the statutory period for filing an appeal. The applicants have attributed the delay to factors beyond their control without explaining the delay.

The Law

Whether the applicants were required to file a substantive appeal and seek orders to have it admitted out of time.

15. The respondent argues that the present application is incompetent and ought to fail since the applicants failed to file a substantive appeal first.
16. In *Charles N. Ngugi vs ASL Credit Limited* [2022] eKLR, the court held that:-

From the provisions above, it is noteworthy that the phrase used is “appeal may be admitted out of time.” This therefore means that an appeal may indeed be admitted out of time. However the intended appeal ought to have already been filed before or together with an application seeking leave to extend time for filing an appeal. In *Mugo & Others vs Wanjiru & Another* [1970] EA 482 the court stated as follows:-

Clearly, as a general rule the filing and service of the notice of appeal ought to be regularized before or at least at the same time as an application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused.

17. The learned judge further held that-

...nevertheless, I am inclined to allow the applicant leave to file his intended appeal noting that two (2) months is not inordinate. In my view whether one files the appeal first and seeks extension of time or files the application for extension of time contemporaneously with the Memorandum of Appeal amounts to the same thing. The appeal cannot be heard until time is enlarged. These are just semantics which do not affect the core issue of extending time.

18. From the above, what is paramount is that the law permits that time be enlarged. Furthermore, courts are enjoined to render substantive justice to the parties. It is my considered view that the application is properly before the court.

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

19. 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.

20. 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.

21. 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.

22. 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.”

23. The applicants have attributed the delay to themselves arguing that they received the judgment late and before instructing their advocates to lodge the appeal, they took time to peruse it. I have perused the court record and noted that judgment in Thika CMCC No. E013 of 2023 was delivered on 7th December 2023. The applicants have not disclosed the date they obtained the judgment or how long it took them to peruse it before instructing their advocate. Furthermore, the current application was filed on 19th April 2024 which is about four months after judgment was delivered. It is evident that the delay in filing the appeal was caused by the applicants themselves and not by any other person. In my view the applicants were indolent. The issue of filing an appeal may have come as an afterthought or it is meant to delay execution of the judgment.
24. It is my considered view that the applicant has failed to explain the delay to the satisfaction of the court and as such does not deserve the orders sought.



25. On the perusal of the intended Memorandum of Appeal and the judgment of the trial court and noted that the appeal does not raise pertinent issues of law and fact. Thus, it is evident that the chances of the appeal succeeding if the instant application is granted are not high. In the circumstances it is my considered view that the applicants have not established to the satisfaction of the court why time should be enlarged to enable them file their appeal.
26. Consequently, I find that this application lacks merit and is hereby dismissed with costs.
27. It is so ordered.

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

F. MUCHEMI

JUDGE

