



**Ouma & another v Huka (Miscellaneous Civil Application
E268 of 2023) [2024] KEHC 16088 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16088 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CIVIL APPLICATION E268 OF 2023
PN GICHOHI, J
DECEMBER 19, 2024**

BETWEEN

JOSEPH KATHETE OUMA 1ST APPLICANT

DERRICK OMONDI OGUTU 2ND APPLICANT

AND

HUKA KONTOMA HUKA RESPONDENT

RULING

1. The Applicants herein filed the Notice of Motion dated 14th August, 2023, under Article 159 (1) (d) of *the Constitution* of Kenya 2010, Section 1A, 3A, 79 G and 95 of the *Civil Procedure Act*, Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules seeking for the following Orders; -
 1. That the court be pleased to extend time for filling Appeal from the judgement of the Chief Magistrate’s Court at Molo, Hon. E.G.Nderitu (CM) delivered on 14th March, 2023 in Civil Suit No. 137 “B” of 2020 by thirty (30) days from the date of the Ruling herein.
 2. That the costs of this Application abide the outcome of the appeal.
2. The application is supported by the grounds on the face of the application
3. and the Supporting Affidavit of the 2nd Applicant (Derrick Omondi Ogutu) sworn on 14th August 2023.
4. The Applicant states that his vehicle registration No. KCD 076/ZB 4048 was involved in an accident and the victims sued him and the driver of the vehicle at Molo CMCC No. 137 “B” of 2020 and E062 of 2020.



5. He states that the firm of Peter M. Karanja Advocates were instructed by Orient Insurance Company Limited, their insurance, to defend the suit in the trial court since the 2nd Applicant was a policy Holder having taken a third-party insurance policy.
6. He states upon conclusion of the suit, the decision was in favour of the Respondent herein as against them and being aggrieved, they asked their insurer to Appeal the same to this Court. However, the Insurance Company did not act his request.
7. Having failed to file the Appeal, he approached the Insurance Company once again, this time he sought to have the firm of Advocates hand over the matter to the firm of Ochieng, Ogotu and Company Advocates through a consent. Still, the insurance company took them in circles, forcing their current advocates to file an application in the trial court to come on record for the purpose of filling this Application and subsequent Appeal.
8. He depones that as soon as the application seeking to have their current advocates on record was allowed, they moved with speed to file this application as the time within which an Appeal could be lodged had lapsed.
9. He further states that they have the judgement and the typed proceeding ready to lodge the Appeal as soon as the leave sought herein is granted. He states that the Appeal is arguable with high chances of success and urged this Court to give him a chance to argue his Appeal before this Court.
10. He explained that the award by the trial court is for payment of a sum of Kshs. 9,553,976/= which the Insurance will pay only Kshs 3,000,000/= and he will be forced to pay the deficit and therefore, he is likely to incur damage.
11. He attributes the delay in filling the appeal to the bureaucracy at the Insurance Company in handing over the matter to their current advocates to enable them lodge the Appeal. He therefore states that the delay is excusable.
12. The Respondent opposed the application by filling a Replying affidavit sworn on the 8th February, 2024 by Huka Kontoma Huka who terms the application herein is frivolous, vexatious, bereft of merit and an abuse of Court process.
13. He states that the Applicant seeks to Appeal against a decision made in his favour arising from a road accident that caused him sever injuries that rendered him destitute as he has been confined to a wheelchair.
14. He depones that the decree and certificate of costs both dated 6th June 2023 were served on the Applicant and consequently, Direct 'O' Auctioneers were instructed to execute the said decree. That subsequently, the Auctioneers carried out investigations and discovered several properties in the name of the 2nd Applicant.
15. However, three days of being served with the proclamation notice, the 2nd Applicant, in an attempt to defeat the execution, transferred ownership of one of the proclaimed motor vehicles registration number KCZ 947P Lexus Rx450H, to Simon Mannon Ogutt Adere. In the circumstances, he terms the application herein another decoy to delay and eventually defeat execution proceedings.
16. He states that the explanation given for the delay in filling the Appeal is unjustified as the Applicant had the option of filling the Memorandum of Appeal through another advocate before time lapsed. Further, the Applicant herein had filed an application before the trial court seeking stay of execution and which was granted, on condition that the sum of Kshs 6,276,988/= be paid by 3rd October, 2023, failure to which the Respondent was at liberty to execute.



17. He depones that pursuant to that Order, the insurance has only paid him Kshs 1,400,000/= and in four instalments, while the 2nd Applicant frustrates the execution process. In light of those circumstances, he states that the Applicant has not come to this Court with clean hands and therefore, he should not be given audience. He prayed that the application herein be dismissed with costs.
18. In his Further Replying Affidavit sworn on 17th April 2024, the Respondent reiterated his grounds in the replying affidavit and added that correspondence between the 2nd Applicant and his advocates commenced on 13th April, 2023, at the deadline of filing the intended Appeal, as such the Applicant was indolent.

Applicant's Submissions

19. The Applicant submitted that the power of the Court to extend time for filing an Appeal is discretionary and that the Applicant is required to give reasons for the delay. He argued that Section 79G and 95 of the *Civil Procedure Act* empowers this Court to admit an Appeal out of time provided that good and sufficient cause is explained. In support of that position, reliance was placed on the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commissions & 7 others* [2014] eKLR on considerations to guide the Court in exercising its discretion to extend time for filing an Appeal.
20. On delay, it was submitted that the reason for delay has been explained in the Supporting Affidavit and evidence adduced to support their averments that their insurers failed to instruct the advocates to Appeal the decision of the trial court and also refused to allow their former advocates to consent to their current advocates acting for them in the Appeal.
21. That this forced their current advocates to file a formal application to come on record after Judgement, which as soon as it was granted, they filed this application before this Court. It was therefore submitted that the delay has been explained and is thus excusable.
22. The Applicant submitted that they have a right to access justice and the right of appeal under Articles 48 and 50 respectively of *the Constitution*. He added that the draft Appeal has overwhelming chances of success because the traffic case at Molo Court exonerated the driver of the fateful accident from any criminal liability through acquittal under section 215 of the Criminal Procedure Code.
23. Further, it was submitted that there was evidence adduced that showed that the Respondents herein had packed on the wrong side of the road without indicating, therefore he contributed to the accident and hence it will not be possible for one to be held 100% liable.
24. The Applicant submitted that the damages awarded is excessive and exaggerated in the sense that quantum on loss of earning, diminished earning capacity, caregiver, costs of wheelchair and special damages were not supported by any evidence. They submit that the Respondent will not be prejudiced considering that the insurance has already paid him the sum of Kshs 2,950,000/=.

Respondent's Submissions

25. It is his submission that an Applicant seeking the discretion of the Court to enlarge time to file an Appeal out of time must give an explanation on; length of delay, reason for delay, chances of the Appeal succeeding if the Application is granted and degree of prejudice to the Respondent as was held in the case of *Janet Jeruto Tulong V Symon Songok Chesang* [2010] eKLR.



26. On delay, it was submitted that judgement in the trial court case was delivered on 14th March, 2023, while the application herein was filed on 15th August, 2023 which is more than 5 months and therefore, the delay is inordinate.
27. It is submitted that the Applicant was aware of the delivery of the trial court's Judgement and only sprang to action when they were served with the proclamation notice. He submitted that the explanation for the delay is not justified for the reason that the Applicant had the option of filling the Appeal in person and then amending the pleadings once leave to come on record is granted to his current advocates.
28. Citing the case of Peter Chere Kiiru V Charles Mulanda Manyelo[2019] eKLR, the Respondent further submitted that considering that this was an Appeal, the current advocate should have acted for the Applicant without first seeking leave of court.
29. It was also submitted that no evidence has been tendered to show that the 2nd Applicant instructed the insurance company to Appeal, thus the delay under this head does not hold water.
30. On whether the Appeal has any chances of success, it was submitted that the Applicant has annexed a copy of the decision of the Traffic Case but it is trite law that civil courts are not bound by the decision of criminal proceedings as the burden of proof is greatly different in each of them. That in any event, the traffic case was dismissed because the prosecution failed to summon witnesses in support of its case and therefore, the dismissal does not determine whether the Applicant was guilty or not.
31. On prejudice to the Respondent, it was submitted that contrary to the arguments of the Applicant, he has only been paid Kshs 1,700,000 by the Insurance Company out of a sum of Kshs 12,090,121. That the Applicant on the other hand has not paid a single cent which is a further indication that the Appeal is a decoy to further delay the payment of the decretal sum.
32. The Respondent further submitted that the Applicant's right to Appeal exhausted 30 days from the date of judgement.
33. On costs, the Respondent submitted that the Applicant has not demonstrated the grounds for extension of time to file appeal and therefore costs should be awarded to the Respondents.

Determination

34. After considering the application, affidavits and submissions by parties, the broad issue for determination, is whether the application for extension of time is merited.
35. Section 79G of the [Civil Procedure Act](#) provides that: -

“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 to the appellant 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 a good and sufficient cause for not filing the appeal in time.”



36. In the Supreme court case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others[2014]eKLR set out the considerations to guide the court in exercising its discretion in cases of this nature. It stated as follows:-

“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; A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court; Whether there will be any prejudice suffered by the respondents if the extension is granted; Whether the application has been brought without undue delay; and whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

37. Applying the above principles to the present case, the judgment herein was delivered on 14th March, 2023, while the Application herein was filed on 14th August, 2023. This is done 5 months after judgement was delivered.

38. It is a fact that time within which the Appeal was to be filed lapsed on 13th April, 2023. Therefore, that the Applicant herein is not filling the Appeal as of right, instead, that he should demonstrate the grounds cited above before time can be extended for filling an Appeal.

39. The Applicant informed this Court that as soon as judgement was delivered, he approached his insurance to file an Appeal against the entire judgement. He gave several numbers of person in the insurance who he has been communicating with, he also produced a copy of a letter, directing his insurance to lodge an Appeal against the Judgement of the Court.

40. He stated that despite asking his insurance to lodge an Appeal no response or confirmation was received as such, he requested for consent from the insurance lawyers to grant consent to his current advocates in line with Order 9 Rule 9 of the Civil Procedure Rules. However, no consent was received, leading to the filling of a formal Applications, seeking for his current advocates to come on record which was eventually granted.

41. By the time leave was granted to his advocates to come on record, time within which the Appeal could be filed had lapsed, necessitating the filling of this application. The Respondent opposed on the application raising among others, an issue that in order to defeat execution, the 2nd Applicant herein engaged in selling one of his vehicles to a third party who filed objection proceedings before the trial Court.

42. As much as this issue has been raised by the Respondent, no evidence of the said fraud has been tabled before this Court and in any event the application herein is for the enlargement of time and not objection proceedings which are alive before the trial court.

43. The issue is whether the explanation given by Applicant is reasonable. It is apparent that the Applicant herein was not indolent. He actively engaged in following up on his insurance to appeal on his behalf and upon failure to act, he sought for their current advocates to be granted consent by their former Advocates as judgement had been delivered and leave was necessary for a new advocate to come on record.

44. It is when all these failed that the Applicant instructed their current advocates to file a formal application to come on record and finally filed this Application.



45. In those circumstances, this Court is satisfied that the delay in filling the Appeal, is reasonable.
46. On whether the Appeal is arguable of, the Applicant states that the trial court erred in apportioning liability and maintained that the Respondent was to blame for parking their car on the wrong side of the road, without giving indication.
47. On quantum awarded under various heads, he argues that the same were not supported by any evidence. That is an arguable issue. it is not necessarily one that will succeed.
48. It is trite that if a single arguable issue is raised, it should be given a chance for ventilation on the appeal- See the case of Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008. In this case, the Appellant is given that chance.
49. Finally, in striking the delicate balance of considering the interests of both parties, a court must be particularly mindful of the rights of the parties at stake in the case, and particularly the prejudice (if any) to be occasioned to either party.
50. On one hand is the decree holder seeking payment to enjoy the fruits of his Judgement and as of right, he is entitled to that. On the other hand, is the Applicant who seeks to approach the seat of justice to be heard on an Intended Appeal. In balancing these competing interests and considering the fact that execution proceedings are ongoing.
51. In the circumstances, granting the Applicant a chance to appeal will not cause prejudice to the Respondent. For avoidance of doubt, no stay of execution is granted.
52. In the circumstances, this Court makes the following orders: -
 1. The Applicant be and is hereby granted leave file an appeal out of time.
 2. The Memorandum and Record of Appeal be filed and served within 14 days from the date of this ruling.
 3. The costs of the application to abide the outcome of the Appeal.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 19TH DAY OF DECEMBER, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. Karanja Mbugua for Applicant

Mr. Gatonye for Respondent

Ruto, Court Assistant

