



Ganira v Ndoji & another (Suing as the Legal Representatives of the Estate of Melvin Otieno-Deceased & another (Miscellaneous Civil Application E097 of 2022) [2023] KEHC 346 (KLR) (25 January 2023) (Ruling)

Neutral citation: [2023] KEHC 346 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION E097 OF 2022
JN KAMAU, J
JANUARY 25, 2023**

BETWEEN

CHARLES MAVUTSE GANIRA APPELLANT

AND

**CELINE AKINYI NDOJI & EUNICE ATIENO (SUING AS THE
LEGAL REPRESENTATIVES OF THE ESTATE OF MELVIN OTIENO-
DECEASED 1ST RESPONDENT**

MBUKINYA SUCCESS LIMITED 2ND RESPONDENT

RULING

Introduction

1. In his Notice of Motion application dated April 7, 2022 and filed on April 26, 2022, the Applicant therein sought for orders that this file be consolidated with Miscellaneous Civil Application No E085 of 2022, that the court be pleased to grant an order for stay of execution of the judgment and/or decree in Kisumu CMCC No 463 of 2016 that was delivered on January 26, 2022 pending the hearing and determination of the intended appeal and that he be granted leave to file his appeal out of time.
2. Edmond Mirembe, his Advocate, swore an affidavit on April 7, 2022 in support of the said application on his behalf. He averred that the Trial Court held him thirty (30%) per cent and the Third Party (sic) seventy (70%) per cent liable for Kshs 2,834,600/=.
3. He stated that he was granted an order for stay of execution for thirty (30) days but that the same lapsed as the Third Party (sic) filed an application to review the Judgment. He asserted that the delay in filing his Appeal had been explained and was thus excusable.



4. He contended that the liability and quantum that was awarded by the Trial Court was excessive and that if execution proceeded, he stood to suffer irreparable loss and prejudice as the ability of the 1st Respondents to refund the decretal amount was unknown. He added that his intended appeal raised triable issues and was meritorious with high chances of success and unless the proceedings herein were stayed, the suit (sic) stood to be rendered nugatory.
5. He averred that he was willing to provide a bank guarantee from Family Bank as a security for stay of execution pending the hearing and determination of the appeal.
6. In opposition to the said application, the 1st Respondents (sic) swore a Replying Affidavit on May 4, 2022. They asserted that the Applicant had slept on his rights for months from the time when the Judgment was delivered. It was their contention that equity aids the vigilant and not the indolent.
7. They further contended that the Applicant was fully aware of the judgment and the application for review that was filed by the 2nd Respondent herein wherein the Ruling was delivered on March 2, 2022, which said application did not hinder and/or stop him from filing an appeal against the Judgment and hence, the delay could not be excused.
8. They averred that the primary suit was filed in 2016 and that they had thus suffered prejudice and would continue to suffer the same unless the court decided otherwise. It was their contention that litigation must come to an end and hence, they should be allowed to enjoy the fruits of justice by the court ordering the Applicant to settle his part of the decree.
9. They were emphatic that the application was an abuse of the judicial process which this court must not shy from dismissing for lack of merit. They further averred that the Memorandum of Appeal attached by the Applicant was a sham and an afterthought and that there was nothing to show that they had attempted to execute.
10. They stated that in the event the court was inclined to grant the Applicant leave to appeal out of time, then the conditions provided under Order 42 of the Civil Procedure Rules should apply in that the Applicant ought to be condemned to remit half of the decretal sum to them and the remainder to be deposited in a joint earning interest account of both counsels within fourteen (14) days failure to which they be allowed to execute.
11. The Applicant's Written Submissions were dated and filed on May 30, 2022 while those of the 1st Respondents were dated June 14, 2022 and filed on June 17, 2022. The 2nd Respondent did not file any response and/or submissions. This Ruling is therefore based on the said Written Submissions which the parties relied upon in their entirety.

Legal Analysis

12. The court dealt with the issues that had been raised herein in separate and distinct shown hereinbelow.

I. Review and Appeal

13. The 1st Respondent argued that the law only permitted a party to either explore an appeal or review and not both and that as the 2nd Respondent had filed a review, the law did not authorise him to file an appeal. They were therefore objecting to the consolidation of the applications in the present suit and Miscellaneous Civil Application No E085 of 2022.
14. Section 80 of the Civil Procedure Act Cap 21 (Laws of Kenya) provides that:-

“ Any person who considers himself aggrieved –



- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is hereby allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
15. Further, Order 45 Rule 1(a) and (b) of the [Civil Procedure Rules, 2010](#) stipulates as follows:-
- “Any person considering himself aggrieved—
- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”
16. It is evident that there is nothing in the law that prohibits a party to appeal at the High Court after its application for review is dismissed.
17. A party is only barred from filing an application to review an order that has been made pursuant to an application for review as provided in Order 45 Rule 6 of the [Civil Procedure Rules](#) that states that:-
- “No application to review an order made on an application for a review of a decree or order passed or made on a review shall be entertained.”
18. Notably, the application for review was on the question of the failure by the Trial Court to consider the Applicant’s Written Submissions and not on the question of apportionment of liability and the quantum that was awarded which was the subject matter of the intended Appeal herein.
19. This court therefore found and held that the present application was properly before it for determination. Whether or not it was merited was a different matter altogether.

II. Leave to file an Appeal out of Time

20. The Applicant submitted that by the time the Third Party’s (sic) application for review was disposed of, the time within which he was to lodge an appeal had lapsed. He argued that the right to appeal was paramount in resolution of dispute and that as much as the court’s intervention was discretionary, it must cautiously deny such right to a litigant (sic).
21. He placed reliance on the case of Siaya HCCC Misc E024 of 2021 [Steelcol Co-operation Limited v Susan Awuor Mudembe](#) (eKLR citation not given) where the court considered the mistake of the counsel and the innocence of the applicant in favour of the applicant (sic).
22. It was his case that the delay was not inordinate and could be remedied. He relied on the case of [Charles Karanja v Charles Githinji](#) [2017] eKLR where the court enlarged time within which the applicant was to file appeal out of time.



23. He also relied on the case Machakos Civil Appeal No E052 of 2021 *Michael Ntouchi Mtheu v Abraham Kivondo Musau* (eKLR citation not given) but did not espouse the holding he was relying upon.
24. On their part, the 1st Respondents submitted that the Applicant relied on Order 22 Rule 22 of the *Civil Procedure Rules* and was therefore required to demonstrate sufficient cause which may include reasons for delay.
25. They argued that an appeal ought to be filed within thirty (30) days from the date of judgment/decree of the trial court failure to which a party would be required to seek for enlargement of time pursuant to Section 79G of the *Civil Procedure Rules* (sic) and which the Applicant herein had not relied on.
26. They asserted that the Applicant had not demonstrated the substantial loss that he would suffer if the orders he had sought were not be granted. They further argued that the fact that no sufficient reason for delay had been demonstrated, that would bar the court from exercising its discretionary powers. They also relied on the case of *Joseph Odide Walome v David Mbadi Akello* [2022] eKLR where it was held that the discretion of the court could only be unlocked by a cogent, full, honest and plausible disclosure for the reason of the delay. It was not clear what the holding of the case of *Loice Khachendi Onyango v Alex Inyangu & Another* [2017] eKLR was as none was highlighted.
27. Notably, both parties reiterated the facts they had set out in their respective affidavit evidence. The Applicant also introduced new facts in his Written Submissions. This court did not therefore find value in setting the same out in the Ruling herein.
28. That being said, the guiding principles to be met in an application seeking leave of the court to file an appeal out of time/extension of time were then laid out in the case of *Thuita Mwangi v Kenya Airways Limited* [2003] eKLR and were reaffirmed in the case of *Growth Africa (K) Limited & Another v Charles Muange Milu* [2019] eKLR.
29. In exercising its discretion to allow an application seeking extension to file an appeal out of time, a court has to be satisfied that the omission or commission was excusable. In other words, there must be a plausible explanation for the delay in doing an act.
30. Although this court found that the Applicant and his advocates did not act diligently as nothing barred them from having filed an appeal while the 2nd Respondent's application was being heard and/or determined, such failure was not an entirely unexpected omission.
31. This court could not fault them for having awaited the Ruling on the 2nd Respondent's application for review as the same may have had an impact on the apportionment of liability. This court was therefore persuaded to find and hold that mistakes of a party and/or its advocate ought not to bar it from seeking leave to file an appeal out of time as it had a right of fair hearing under Article 50(1) of the *Constitution of Kenya, 2010*. The explanation for the omission to file the appeal within the stipulated time was plausible, excusable and satisfactory explanation for the delay in filing the appeal on time despite the omission not having been prudent.
32. The decision the Applicant intended to appeal against was delivered on January 26, 2022. The present application was filed on April 26, 2022. Three (3) months had since passed. As this court had found the reason for the delay that was advanced by the Applicant to have been excusable, it came to the firm conclusion that the length of the delay was not inordinate and/or unreasonable.
33. The court was not called upon to consider the merits or otherwise of the appeal at this juncture. Nonetheless, an applicant had to demonstrate that it has an arguable ground of appeal. The court



- perused the draft Memorandum of Appeal that was annexed to the present application and noted that the intended appeal had essentially sought to challenge both award on liability and quantum.
34. The court found and held that the question as to whether or not the Trial Court appreciated the evidence that was adduced when making the award on general damages was an arguable ground of appeal that the Applicant ought to be given an opportunity to canvass on merit.
 35. In determining whether or not to grant an order for extension to do any act, the court also had to consider if the opposing side would suffer any prejudice if extension of time was granted. This court was not satisfied that the 1st and 2nd Respondents would suffer any prejudice if the Applicant exercised his constitutional right of appeal. If there was any prejudice, they did not demonstrate the same.
 36. Indeed, as has been alluded to hereinabove, every party has a right to access any court or tribunal to have his or her dispute heard and determined in accordance with Article 50(1) of the Constitution of Kenya. Even where a party delays in doing an act, there is always a provision of the law that would give it reprieve to seek justice. Notably, while Section 79 G of the *Civil Procedure Code* provides for the period of thirty (30) days for an aggrieved party to lodge an appeal at the High Court, Order 50 Rule 6 of *Civil Procedure Rules* empowers the court to enlarge the time to do a particular act.
 37. Notably, Order 50 Rule 6 of *Civil Procedure Rules* stipulates as follows:-
 - “Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise”.
 38. Taking all the factors hereinabove into account, it was the considered view of this court that the Applicant ought to be given an opportunity to have his Appeal heard on merit as he would suffer great prejudice if he was denied an opportunity to have his Appeal heard on merit.
 39. Going further, weighing the Applicant’s right to have his dispute determined fairly in a court of law as provided in Article 50(1) of the *Constitution of Kenya* and the equally important 1st Respondents’ fundamental right that justice delayed is justice denied as stipulated in Article 159(2)(b) of the Constitution of Kenya, this court determined that there would be more injustice and prejudice to be suffered by the Applicant if he was denied an opportunity to ventilate his intended Appeal on merit without an order for stay of execution pending the intended appeal being granted herein.

III. Stay of Execution Pending Appeal

40. The Applicant explained that he was a man of no means but pointed out that he could deposit his logbook of the subject motor vehicle and sign a personal guarantee on the same (sic) as security.
41. On their part, the 1st Respondents submitted that the Applicant had to provide security as they had relied on Order 22 Rule 22 of the *Civil Procedure Rules*.
42. Notably, before such an order for stay of execution pending appeal can be granted under Order 42, Rule 6(2) of the *Civil Procedure Rules*, an applicant has to demonstrate the following:-
 1. That substantial loss may result unless the order is made.



2. That the application has been made without unreasonable delay.
 3. Such security as the court orders for the due performance of the decree has been given by the applicant.
43. The three (3) conditions for the grant of an order for stay of execution must be met simultaneously as they are conjunctive and not disjunctive.
 44. The decretal sum herein was Kshs 2,834,600/=. The 1st Respondents did not file an Affidavit of Means to demonstrate that they would refund the Applicant the said sum in the event he was successful in his intended appeal. The Applicant expressed reasonable fear that they would not be able to pay it back the remaining decretal sum.
 45. In this regard, this court had due regard to the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR where the Court of Appeal held thus:-

“Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...”
 46. Further, as this very court held in the case of *G.N. Muema P/A(Sic) Mt View Maternity & Nursing Home v Miriam Maalim Bishar & another* [2018] eKLR, the rigmaroles of recovery of decretal sum by a successful appellant could amount to substantial loss.
 47. In the absence of proof that the 1st Respondents would be able to refund the Applicant the entire decretal sum without any hardship, this court was not persuaded that it should order that the Applicant release half of the decretal sum to the 1st Respondents herein as there was likelihood of the Applicant suffering substantial loss. The Applicant had thus satisfied the first condition of being granted an order for stay of execution pending appeal.
 48. Having found that the present application had been filed without unreasonable delay, this court was satisfied that the Applicant had met the second condition of being granted an order for stay of execution pending appeal.
 49. The Applicant had indicated that he was willing to provide security. It was therefore the considered opinion of this court that he had demonstrated that it had complied with the third condition of being granted an order for stay of execution pending appeal.
 50. Having said so, this court took the view that security in form of log book of the subject Motor Vehicle was not suitable considering that there were many possibilities of the said Motor vehicle not being available for the 1st Respondents to recover the decretal sum in the event the intended appeal did not succeed. In fact, the Applicant had stated in his Written Submissions that he was not a man of means. This court therefore determined that the security to be furnished herein would be in form of money to safeguard the 1st Respondents’ interests.

IV. Consolidation of Matters

51. Notably, the 1st Respondents had opposed the consolidation of the application herein with the application in Miscellaneous Civil Application No E085 of 2022 on account of the fruit of their judgment being delayed. However, neither the Applicant nor the 1st Respondents submitted on the question of consolidation of this application with Miscellaneous Civil Application No E085 of 2022.



As this court opted to hear both applications simultaneously, it did not find it necessary to hear the prayer for consolidation of the two (2) matters first as the same would have caused delays.

Disposition

52. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application dated April 7, 2022 and filed on April 26, 2022 was partly merited and the same be and is hereby allowed in the following terms:-
1. The Applicant be and is hereby directed to file and serve its Memorandum of Appeal within fourteen (14) days from the date of this Ruling.
 2. The Applicant be and is hereby directed to file and serve his Record of Appeal within one hundred and twenty (120) days from the date of this Ruling.
 3. The Deputy Registrar High Court of Kenya Kisumu is hereby directed to facilitate the expeditious typing of the proceedings in the lower court to enable the Applicant comply with the timelines within which to file his Record of Appeal as aforesaid.
 4. There shall be a stay of execution of the decree in Kisumu CMCC No 463 of 2016 on condition that the Applicant shall deposit into an interest earning account in the joint names of his counsel and counsel for the 1st Respondents herein a sum of Kshs 850,380/= being thirty (30%) percent of the decretal sum of Kshs 2,834,600/= within one hundred and twenty (120) days from the date of this Ruling.
 5. For the avoidance of doubt, in the event, the Applicant shall default on Paragraph 52(4), the conditional stay of execution shall automatically lapse. The Respondents shall be at liberty to take such appropriate action in the event the Applicant shall default on Paragraph 52(1) and (2) hereinabove.
 6. Either party is at liberty to apply.
 7. Costs of the application will be in the cause.
53. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF JANUARY, 2023.

J. KAMAU

JUDGE

