



**Kamunya & another v Machani & another (suing as legal representative
of the estate of James Barasa) (Miscellaneous Civil Application
E031 of 2023) [2023] KEHC 2718 (KLR) (30 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2718 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CIVIL APPLICATION E031 OF 2023
RN NYAKUNDI, J
MARCH 30, 2023**

BETWEEN

LABAN KAMUNYA 1ST APPLICANT

DAVIS MUGADIA 2ND APPLICANT

AND

HARRIET MUTONYI MACHANI 1ST RESPONDENT

SAMWEL MAKOYI MACHANI 2ND RESPONDENT

SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF JAMES BARASA

RULING

Coram: Before Hon. Justice R. Nyakundi

Muma Nyagaka & Company Advocates for the Applicant

Awanga & Company Advocates for the Respondent

1. The applicant approached this court *vide* an application dated February 9, 2023 seeking the following orders;
 1. Spent
 2. Spent
 3. That this honourable court be pleased to extend and/or enlarge the time within which to appeal against the judgment of the Honourable E. Kigen (SRM) delivered on October 21, 2022 in Eldoret CMCC No 519 of 2019.



4. That this honourable court be pleased to grant an order of stay of execution of the judgment and/or decree of the trial court in Eldoret CMCC No 519 of 2019 entered on October 21, 2022 pending the hearing and determination of the intended appeal.
 5. That the memorandum of appeal annexed hereto be deemed as duly filed upon payment of requisite fees.
 6. That the costs of this application be provided for.
2. The application is premised on the grounds set out therein and the contents of the affidavit sworn by the applicant.

Applicant's Case

3. Learned counsel for the applicant submitted that he seeks for extension of time to file appeal on the ground that judgment was delivered in his absence and by the time he became aware of the delivery of the judgment when the prescribed statutory period within which to lodge an appeal had lapsed. Further, that their then counsel on record had not been given notice when the date of the judgement was deferred. He cited the case of *MFI Document Solutions Ltd v Paretto Printing Works Limited* [2021] eKLR where the court allowed failure to be notified of delivery of judgment as satisfactory explanation and allowed an application for extension of time. He urged that the delay in filing the appeal is not inordinate and excusable under the circumstances.
4. The applicant submitted that the decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion by the court. He cited the cases of *Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees* [2020] eKLR; *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018]eKLR and *Athuman Nusura Juma v Afwa Mohamed Ramathan* CA No 227 of 2015 in support of the submission that the factors guiding enlargement of time under section 79G of *Civil Procedure Act* are well settled.
5. Regarding the prayer for stay of execution, the applicant submitted that has demonstrated in his grounds that he will suffer substantial loss, unless the orders sought are issued. He has stated that he uses the suit motor vehicle to conduct his business and to drop his children to school The applicant is apprehensive that if stay is not granted, the respondent would not be in a position to refund the decretal sum paid out, in the event of the appeal resolves in his favour. He urged that the application was done in a timely manner and the same was not inordinate. Further, that the financial position of both the applicant and respondent remain in issue as execution involves money decree. He stated that he is ready and willing to offer such security as the court may deem fit, proper and just in the circumstances.

Respondent's Case

6. The respondent opposed the application *vide* a replying affidavit filed on February 21, 2023, stating that the applicants were well aware of the judgment date as they were served with a notice and an assessed bill of costs *vide* email and letters. Further, that they have not demonstrated that the respondent impecunious or satisfied the requirements for orders of stay pending appeal. The respondents deposed that the applicants have not given satisfactory reasons to warrant extension or enlargement of time. He maintained that they are people of means capable of offering restitution to the applicants but are amenable to have three quarters of the decretal sum paid to them plus the assessed costs and the balance be deposited in a joint interest earning account.
7. In their submissions, the respondents contended that the mere fact that the applicants state that the respondent's financial means are unascertainable is not an automatic ground for granting stay of



execution. They cited the case of Kericho HCC Misc Appl No 34 of 2011 – *Eldoret Bus Service Ltd v William Kipkorir & Anor* in support of their submissions. They also relied on Nairobi HCC 830 of 2003 – *Triton Petroleum Co Ltd v Kirinyaga Construction (K) Ltd*. They urged that the application has been brought after the lapse period and that the applicant has failed to demonstrate what kind of security they are willing to provide.

8. The respondents maintained that the applicants have merely alleged that they were not aware of the judgement but have failed to provide any evidence of follow up on the delivery of the judgement. They urged the court dismiss the application.

Analysis & Determination

9. The issues that arise for determination are as follows;
 1. Whether the applicants should be granted enlargement of time to file the appeal
 2. Whether stay orders should be granted

Whether The Applicants Should Be Granted Enlargement Of Time To File The Appeal

10. Enlargement of time is provided for in section 79G of the [Civil Procedure Act](#) which 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 good and sufficient cause for not filing the appeal in time.”

11. The applicant is required to prove good and sufficient cause for not filing the appeal on time. In [Thuita Mwangi v Kenya Airways](#) [2003] eKLR, the Court of Appeal while considering rule 4 of the Court of Appeal Rules which was in *pari materia* with section 79G of the [Civil Procedure Act](#), reiterated its decision in [Mutiso v Mwangi](#) [1997] KLR 630 as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

12. The Supreme Court laid down the principles applicable in an application for leave to appeal out of time in the case of [Nicholas Kiptoo Korir arap Salat v IEBC and 7 others](#) [2014] eKLR where the court stated that;

“The underlying principles a court should consider in exercise of such discretion include;

1. 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;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;



3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case- to-case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;
6. Whether the application has been brought without undue delay.
7.”

13. I have considered the explanation for the delay in filing the appeal and it is my considered view that the reasons for the delay and it is my considered view that a period of four months is not inexcusable. Further, the same was as a result of mistake of the advocate which courts have often held should not be visited on the litigant. I stand guided by the case of *Belinda Murai & others v Amos Wainaina* (1978) LLR 2782 (CALL) where Madan, JA (as he then was) stated:

A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of Junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.

14. The orders for leave to extend time to file an appeal are discretionary in nature and therefore, the court is invited by the provisions of section 3A of the *Civil Procedure* court, and the provisions of the *Constitution*, to afford parties an opportunity to have their day in court.
15. It needs no emphasis that extension of time is a discretionary remedy which is exercised by the court judiciously and not whimsically. The jurisprudence around this question is well set as deducible from the Supreme Court decision in the *Salat Case* (supra). In order give prominence to the applicant’s notice of motion I reiterate the Court of Appeal decision in *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* (2013) eKLR. It was observed as follows:

“The discretion under rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice, I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decision of this court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance”

The respondent shall not suffer any prejudice if the application to file leave out of time is allowed.

Whether stay of execution should be granted

16. Stay of execution is guided by order 42 rule 6(2) of the *Civil Procedure Rules* which provides as follows;
- No order for stay of execution shall be made under subrule (1) unless—



- a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

17. It follows that the applicant needs to satisfy the court of the following conditions;

- a) Substantial loss may result to the applicant unless the order is made,
- b) The application has been made without unreasonable delay, and
- c) Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

18. The applicant contends that the respondents' means are unascertainable and therefore he is likely to suffer irreparable loss of the orders sought are not granted. The respondent has not responded to this claim. In the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike and another* [2006] eKLR the Court of Appeal stated that:

“This court has said before and it would bear repeating that while the legal duty is on an applicants to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such applicants to know in detail the resources owned by a respondent or the lack of them. 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 – see for example section 112 of the *Evidence Act*, chapter 80 Laws of Kenya.”

19. It follows that in the absence of the respondent showing that he has the resources to pay the decretal sum if the appeal succeeds, the applicant is at risk of suffering substantial loss.

20. The application was fled on February 9, 2023 while the impugned decision was delivered in October 21, 2022. I find that the delay was not unreasonable as the same has been aptly explained.

21. The applicant has made proposals on security and is willing to furnish the same. in the premises the application succeeds in the following terms.

1. This court hereby enlarges the time within which to appeal against the judgment of the Honourable E. Kigen (SRM) delivered on October 21, 2022 in Eldoret CMCC No 519 of 2019.
2. An order of stay of execution of the judgment and/or decree of the trial court in Eldoret CMCC No 519 of 2019 entered on October 21, 2022 is hereby granted pending the hearing and determination of the intended appeal on condition that the applicant furnishes security in terms of a bank guarantee within the next 30 days.
3. In default of compliance with clause No 2 above on deposit of security for due performance of the decree the right to stay execution and enforcement of the decree lapses.
4. That the memorandum of appeal annexed to the application herein be deemed as duly filed upon payment of requisite fees.



5. The applicant to pay the respondent thrown away costs assessed at Kshs 15,000 before the intended appeal is set down for hearing.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 30TH DAY OF MARCH 2023

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R. NYAKUNDI

JUDGE

In the presence of

Mr. Lemaiyan Advocate for the Respondent

