



REPUBLIC OF KENYA



**KENYA LAW**  
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**Musumba v Akshar Mumias H & SL Limited (Miscellaneous Civil Application  
E098 of 2022) [2023] KEHC 2955 (KLR) (27 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2955 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
MISCELLANEOUS CIVIL APPLICATION E098 OF 2022**

**PJO OTIENO, J**

**MARCH 27, 2023**

**BETWEEN**

**KASSIM MAKOKHA MUSUMBA ..... APPLICANT**

**AND**

**AKSHAR MUMIAS H & SL LIMITED ..... RESPONDENT**

**RULING**

1. Before the Court is a motion seeking extension of time to file an Appeal out of time from the decision of the trial Court in Mumias PMCC No E47 of 2021 delivered on the June 28, 2022. In that decision the Applicant's suit was dismissed with costs. It is asserted by the Applicant that certified copies of Proceedings and Judgment were sought immediately but were not availed till the December 5, 2022.
2. It is further contended that the only reason for the delay was failure to avail the proceedings for purposes of the appeal and that the Court should extend time to enable the Applicant exercise his inderogable right to appeal. The Proceedings and Judgment were then exhibited to show that certification was done on the December 5, 2022, however, no draft grounds of appeal were exhibited, as alluded to in the affidavits, to show how the Judgment would be faulted if time be extended. The application also seeks an order that there be stay of execution if the time is enlarged.
3. When served with the application, the Respondent filed a Replying Affidavit in which he terms the application frivolous, scandalous and vexatious only purposed to unfairly consume judicial resource and time. It is added that the matter at trial was heard on the merits and the Applicant's claim dismissed on account of failure to prove his case by way of documents, that no proof had been availed to show that proceedings were applied for and lastly that orders are not merited because no offer has been made an offer to provide security for the due performance of the decree in the event the time is enlarged and the appeal ultimately fails.



4. When to enlarge time is a consideration for the discretionary power of the Court intended to meet the ends of justice by avoidance of hardship or injustice where the delay is not inordinate and the same is explained to the satisfaction of the Court.
5. In this matter, it is common ground that the Judgment was delivered on the June 28, 2022 but proceedings were availed and certified on the December 5, 2022. That being the case this application would have been avoided if the Applicant was to be advised to seek a certificate of delay so that by the time the current application was filed, the appeal itself could have been filed. That would have saved the litigants time and also unnecessary costs now occasioned by this application. For that reason the Court finds that with due counsel, this application would have been obviated and both time and costs saved. That however is a mistake of Counsel the Court is prepared not to visit upon the client.
6. That notwithstanding, the Courts takes the view that the Applicant only took a period between 5<sup>th</sup> December and 19<sup>th</sup>, of the same month, to lodge this application, a period of fourteen (14) days only. To Court that period is a period that is beyond being viewed as inordinate in delay.
7. On whether the explanation for delay is plausible, I do find that there is no denial that the Proceedings and Judgment were only certified on the December 5, 2022. It is also not denied that after the Judgment, there was a bill of costs filed and the same was only disposed of on October 27, 2022 after which is when the file was taken to the Registry for purposes of typing. I see that as an averment on oath by the Applicant at paragraphs 7 & 8 of the Affidavit in Support which has not been controverted by the Respondent in the Replying Affidavit. It is therefore the finding by the Court that the delay is not inordinate and the explanation for that delay is equally plausible.
8. For that reason, and the fact that every litigant is entitled to access justice by an appeal, I do find merit in the application and therefore enlarge the time by a period of seven (7) days from today for the Applicant to file the Appeal by lodging the Record of Appeal as well as Submissions on such appeal and serving same upon the Respondent. Once served, the Respondent shall have fourteen (14) days to file and serve own submissions.
9. Having enlarged time and to preserve the substratum of the litigation, I do grant stay of execution but on terms that the full decretal sum be deposited into an escrow account in the joint names of the Advocates for the parties within thirty (30) days from the date of this rule.
10. Time is of essence, for purposes of filing the Record of Appeal and Submissions, serving same and for deposit of the decretal sum. In the event that there shall be default to file any of the documents as aforesaid, the leave granted shall stand lapsed and any Appeal filed thereafter shall be of no consequence. However, if the default shall regard, the deposit of decretal sum, the stay granted shall stand discharged and the Respondent be at liberty to execute.
11. Even though the applicant has succeeded, it was his default which occasioned the litigation and it would be unjust to reward him with costs. For that reason and for having dragged the Respondent to Court, the costs of the application which is assessed at Kshs 7,000/= is awarded to the Respondent. Let that be paid within thirty (30) days from today and in default execution to issue.
12. Mention on May 8, 2023 for purposes of having the file closed.

**Dated, delivered and signed at Kakamega this 27<sup>th</sup> day of March 2023.**

**PATRICK J. O. OTIENO**

**JUDGE**

**In the presence of:**



No appearance for the Applicant

Mr. Migosi for the Respondent

Court Assistant: Polycap

