



**Kamuti v Kariuki (Miscellaneous Civil Cause E001 of 2023)
[2023] KEHC 19299 (KLR) (27 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19299 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS CIVIL CAUSE E001 OF 2023
LM NJUGUNA, J
JUNE 27, 2023**

BETWEEN

STANEU MURIUKI KAMUTI APPLICANT

AND

FABIAN KIVUTI KARIUKI RESPONDENT

RULING

1. The application before this court is a notice of motion dated 16.01.2023. It has been brought under order 42 rule 6, order 50 rule 6 and order 51 rule 1 of the Civil Procedure Rules, sections 1,1A,3 3A of the Civil Procedure Act and wherein the applicant sought for orders that:
 - i. Spent.
 - ii. Leave be granted to the applicant to file Memorandum of Appeal out of time and/or time be extended for the applicant to lodge an appeal.
 - iii. Costs of this application be in the cause.
2. The application is premised on the grounds on its face and it is supported by the affidavit sworn by Ajaa Olubayi, the advocate on record for the applicant.
3. The application seeks for orders as prayed for the reason that the judgment in the matter herein was delivered on 30.11.2022 without the knowledge of the applicant. That for reasons not clear, the respondent's advocate did not inform the applicant on delivery of the judgment in good time. It was averred that the applicant only came to learn of the judgment on 07.12.2022 when his advocates wrote to both the court and the respondent's advocates inquiring about the delivery of the said judgment. It is his case that he took time enquiring from the court registry whether pleadings are filed online or physically and the same consumed a lot of time and thereafter, the office was closed for December holidays and only resumed on 10.01.2023. That the applicant applied for stay of execution before the



lower court pending the hearing and determination of the application herein. It was prayed that in the interest of justice, this court allows the application.

4. The respondent in opposing the application filed a replying affidavit sworn on 30.01.2023 wherein it was deposed that the application is unmerited, misconceived and bad in law. That the applicant has been enjoying stay of execution since 30.11.2022 and he is still out to buy more time by filing the present application. It is his case that the applicant is forum shopping for favourable orders from various courts as he had filed a similar application before the lower court in CMCC E079 of 2021 and obtained stay orders which he did not honour. The respondent decried the applicant's action as one that seeks to delay the respondent's enjoyment of the fruits of his judgment. He deposed that litigation must come to an end and for the reason that the applicant has not demonstrated that he deserves the orders sought, this court should decline to exercise its discretion in his favour and dismiss the application.
5. The application was disposed off by way of written submissions.
6. The respondent in opposing the application submitted that the applicant does not deserve the discretion of the court as he was duly informed of the delivery of the judgment on 01.12.2022; which was a day after the judgment was delivered by Hon. Kwambai. That the applicant has further failed to demonstrate that he has an arguable appeal. The respondent submitted that the applicant has sought an equitable remedy and is thus bound by the equitable principle that he who seeks equity must do equity. Reliance was placed inter alia on the cases of *Nicholas Kiptoo arap Korir Salat vs Independent electoral and Boundaries Commission & 7 others* [2014] eKLR and *Thuita Mwangi Vs Kenya Airways* [2003] eKLR.
7. That it is not disputed that the judgment in the lower court was delivered on 30.11.2022. The applicant claim that he was unable to file appeal on time because there was a delay in securing typed proceedings is not tenable. It was argued that a party does not require typed proceedings to lodge a memorandum of appeal but it is the record of appeal that requires typed proceedings. It was contended that, no appeal has been filed against the judgment of the lower court and therefore, the application herein is just an afterthought. This court was therefore urged to dismiss the application herein.
8. I have perused the application and the response thereto by the respondent and it is my view that this court has been called upon to determine whether the application herein has merits.
9. In this case, the judgment sought to be challenged was rendered on 30.11.22. It follows that any appeal challenging that decision ought to have been filed on or before 11.12.2022. The application herein was filed on the 17.01.2023 seeking leave to file the appeal.
10. Counsel for the respondent has viciously opposed the application stating that the same is an abuse of court process. Further that, the applicant is only intent on delaying the respondent's enjoyment of the fruits of his judgment.
11. In *Charles Karanja Kiiru Vs Charles Gitthinji Muigwa* [2017]eKLR the Respondent delayed for 41 days before filing an appeal and the High Court enlarged time to enable the respondent file an appeal out of time. The appellant was aggrieved by the order enlarging time claiming that the learned Judge erred in law and fact by exercising his discretion and extending time for filing an appeal out of time yet no sufficient reason had been offered to justify the same. The Court of Appeal cited this court's decision in *Wanjiru Mwangi & another* [2015] eKLR and *APA Insurance Co. Ltd Vs Michael Kinyanjui Muturi* [2016] eKLR in dismissing the appeal.



12. Under Section 79G of the Civil Procedure Act:

“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.” [Emphasis added].

13. The Court of Appeal in the above Case stated that in an application for extension of time to file an appeal, the court ought to take into account several factors as observed by Odek JJA in Edith Gichungu Koine Vs Stephen Njagi Thoitbi [2014]eKLR thus:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

14. The Court of Appeal further stated that there is also a duty imposed on courts to ensure that the factors considered are consonant with the overriding objective of civil proceedings litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court.

15. In the instant application, the advocate for the applicant has stated that the judgment was delivered on 30.11.2022 without his knowledge and further, the respondent’s advocate did not inform him of the delivery of the judgment in good time. It was averred that he only came to learn of the judgment on 07.12.2022 when he wrote to both the court and the respondent’s advocates inquiring about the delivery of the said judgment. It was his case that he took time to enquire whether pleadings are filed online or physically and the same consumed a lot of time and thereafter, the office was closed for December holidays and he only resumed on 10.01.2023.

16. In Kamlesh Mansukbalal Damki Patni Vs Director of Public Prosecution & 3 Others [2015]eKLR, the Court of Appeal articulated that:

“It must be realized that courts exist for the purpose of dispensing justice. Judicial officers derive their judicial power from the people, or as we are wont to say in Kenya, from Wanjiku, by dint of article 159 (1) of the Constitution which succinctly states that “judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.” Judicial officers are also state officers, and consequently, are enjoined by article 10 of the Constitution to adhere to national values and principles of governance which require them whenever applying or interpreting the Constitution or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity, are upheld.

For these reasons, decisions of the courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve. Such decisions may involve only parties inter se (and hence only parties’ interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the court in exercising its judicial authority to ensure dispensation of justice as this is what



lives up to the constitutional expectation and enhances public confidence in the system of justice.” (emphasis added).

17. Article 48 of *the Constitution* guarantees every person right of access to justice, in addition, under article 50(1) of *the Constitution*, every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
18. The ultimate goal and purpose of the justice system is to hear and determine disputes fully. It follows that no person who has approached the court seeking an opportunity to ventilate their grievances fully should be locked out unless for a good reason.
19. No doubt, the discretion of this court to enlarge time for filing of an appeal is unfettered. However, that discretion must be exercised judiciously and not capriciously. On the material placed before me, I am satisfied that the delay is not inordinate or unreasonable. This is not to say that this court would condone or forgive inordinate delays but that it must do whatever is necessary to rectify mistakes where it serves the interests of justice.
20. For all the above reasons, I find and hold that the application is merited and the same is hereby allowed. The appeal to be filed within 14 days from today. The costs of the application shall abide the outcome of the appeal.
21. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF JUNE, 2023.

L. NJUGUNA

JUDGE

.....**Applicant**

.....**Respondent**

