



**Mulyungi & another v Mwendwa (Civil Appeal E038 of 2023)  
[2023] KEHC 20989 (KLR) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20989 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E038 OF 2023**

**FR OLEL, J  
JULY 31, 2023**

**BETWEEN**

**ROGEOUS MUTETI MULYUNGI ..... 1<sup>ST</sup> APPELLANT**

**NELSON MUTHANGYA KAVAL ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MARY KAVULA MWENDWA ..... RESPONDENT**

**RULING**

1. The application before this court is the Notice of Motion application dated 8<sup>th</sup> May 2023 brought pursuant to provisions of Section 1A, 1B, 3A, 79G and 95 of the *Civil Procedure Act*, Order 51 rule 1 and 3 of the *Civil Procedure Rules* and all other enabling provision of law. The main prayers sought by the applicants are for;

I. That time within which to comply with order/ruling issued/delivered on 16<sup>th</sup> March 2023 be enlarged and/or that the applicant be granted further 30 days or such other time as the court may specify to comply with the orders granted.

**II. That costs of this application be provided for.**

2. The application is supported by the grounds on the face of the said application and the supporting affidavit of Njoroge Caroline dated 8<sup>th</sup> May 2023 and 11<sup>th</sup> July 2023. The respondent opposed the said application by filing their replying affidavit dated 18<sup>th</sup> May 2023 and further Affidavit dated 13<sup>th</sup> July 2023 both sworn by Munyoki Muthangya, the respondent's advocate.

3. The Appellants averred that they had appealed as against the Judgment of Hon Andayi W.F (Mr) delivered in Machakos Cmcc No 349 of 2020 on 15<sup>th</sup> February 2023. Being aggrieved by the said judgment, the did file an application for stay pending appeal on 20<sup>th</sup> February 2023 and the same was



- allowed on 16<sup>th</sup> March 2023 on condition that they pay the respondent as sum of Ksh 150,000/= within 30 days and do give a bank guarantee to pay the other half of the decretal sum plus costs and interest.
4. The same guarantee was to be secured from a reputable financial Bank. The applicant was unable to comply with the orders as directed by court and submitted that the difficulty was occasioned by sporadic and unforeseen managerial changes of the signatories to the applicants advocate account and economic crises, but they were still willing to comply with the orders earlier issued with regard to security for stay and prayed for extension of time for another 30 days. This application was made without undue delay and the orders sought would not cause any prejudice to the respondent if allowed as sought.
  5. The applicant filed a further supporting affidavit where they stated that on 13<sup>th</sup> June 2023, they paid the respondent Ksh.150,000/= and also had a bank guarantee dated 26<sup>th</sup> May 2023 for Ksh.150,000/= and thus had complied with the initial orders issued.
  6. The Respondent did oppose this application through their replying affidavit and further affidavit filed. She stated that the delay in filing this application was inordinate, inexcusable and not merited. The applicant failed to honour terms of the ruling dated 16<sup>th</sup> March 2023 to pay Ksh.150,000/= within 30 days and paid it on 13<sup>th</sup> June 2023, which was over three months after the orders of the court were issued. The applicants had also unreasonably failed to provide the bank guarantee as directed and the application dated 13<sup>th</sup> February was deemed dismissed on failure to comply with the terms thereof. There was nothing the basis upon which the order for extension of time could be based.
  7. The reasons offered by the applicant were not plausible and were mere excuses made without any supporting documents and thus there was no basis for which the court could exercise discretion in the applicants favour.

### **Analysis & Determination**

8. I have carefully considered the Application, Supporting Affidavit, the Respondent's replying affidavit and discern that the only issue arise for determination is whether this court should extend time and allow the applicant to appeal out of time.
9. Applications for extension of time are governed under provisions of Section 79G of the *Civil procedure Act* and Order 50 rule 6 of the civil procedure Rules.

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 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 on time.

Order 50 Rule 6 of the civil procedure provides that;

“where a limited time has been fixed for doing any act or taking of any proceedings under these rules, or by summary notice or by order of the court, the court shall have power to enlarge time upon such terms(if Any) as the justice of the case may require, and such enlargement maybe ordered although the application for the same is not made until after the expiration of time appointed or allowed.”



10. Extension of time is not a right of a party. It is an equitable remedy that is only available to deserving parties at the discretion of the court, which discretion has to be exercised judiciously and not on whims, sympathy and/or caprice. The court also has to consider the period of delay, reasons for the delay, chances of appeal succeeding and finally the decree of prejudice to the respondent.
11. In the case of *Salat v Independent Electoral and Boundaries Commission & 7 others* the supreme court held that the following factors were to be considered in an application to extend time to appeal out of time;
  - a. Extension of time is not a right of a party. It is an equitable remedy that is only available to deserving parties at the discretion of the court.
  - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
  - c. Whether the court ought to exercise the discretion to extend time, is a consideration to be made on a case to case basis.
  - d. Whether there is reasonable reason for the delay, which ought to be explained to the satisfaction of the court.
  - e. Whether there would be any prejudices suffered by the respondent if the extension was granted.
  - f. Whether the application had been brought without undue delay; and;
  - g. Whether in certain cases, like election petition, public interest ought to be considered for extending time.
12. Also in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi Civil Application No 255 of 1997*{Unreported} the court of Appeal expressed itself thus;

“It is well settled that the decision whether or not to extend time for appealing is essentially discretionary. It is also well settled that in 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 delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”
13. Giving consideration to the above guiding factors, I do find that on 16<sup>th</sup> March 2023, this court did grant the applicant’s time to pay part of the decretal to the respondent and provide a bank guarantee for the balance. The applicants failed to comply with the conditions for stay as granted and the reason given was that they were not able to comply with the earlier orders issued for the reason that they had unforeseen managerial changes of the signatories to their client account and due to economic hardship.
14. In the said *Salat* case {supr} the supreme court also did observe that;

“Extension of time being a creature of equity, one can only enjoy if he acts equitably; He who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time lapse. Extension of time is not a right of a litigant against a court but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it.”



15. The reasons offered for the delay are at best lame and no proof has been tabled to show what were the managerial changes which forced the applicants to delay in complying with the terms of stay as earlier directed. The other reason for economic hardship too has no basis as the applicant specifically asked to be allowed to give a bank guarantee and the said prayer was partially granted. They cannot turn around and be heard to say they could not provide for the same within time.
16. Where no plausible reason as been proffered, no discretion can be exercised in favor of the applicant. The amount to be paid to the respondent was paid three months late, while the guarantee they have purported to provide too was secured after filing the application for extension of time and over two and half months late considering the direction given by court on 16<sup>th</sup> March 2023
17. On the possibility of the appeal succeeding, this court finds that this is a secondary issue. As held in Athuman Nusura Juma v Afwa Mohammed Ramadhan [2016] eKLR
 

“Whether the intended appeal has merits or not is not an issue to be determined by a court when dealing with an application of this nature but by the court dealing with the merits of the appeal, that is why the requirement that the intended appeal be arguable is preferred with the word(possibly).”
18. On prejudice, this court has to balance the rights and interest of both parties to ensure both are fairly served. The respondent too stands to be prejudice by the casual and indifferent manner with which the applicant has handled the orders earlier issued as to terms for stay. To again extend time without any proper reason being advanced would be unfairly giving the appellant a second bite on the cherry, when they are underserving of the same

**Disposition**

19. Taking all relevant factors into consideration I do find that this application is wholly unmerited and find it fit for dismissal. The same is hereby dismissed with costs of Ksh.30,000/= payable to the respondent.
20. I do grant stay of execution for 21 days to enable the appellant to pay the balance of the decretal sum and the costs taxed herein.
21. It is so ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 31ST DAY OF JULY 2023.**

**RAYOLA FRANCIS OLEL**

**JUDGE**

Delivered on the virtual platform, Teams this 31st day of July2023.

**In the presence of;**

..... Appellant  
 ..... for Respondent  
 ..... Court Assistant

