



**Guatai v Kimathi (Miscellaneous Civil Application E006 of 2023)
[2023] KEHC 20911 (KLR) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20911 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
MISCELLANEOUS CIVIL APPLICATION E006 OF 2023
AK NDUNG’U, J
JULY 26, 2023**

BETWEEN

SAMUEL KIRIMI GUATAI APPLICANT

AND

NELSON KIMATHI RESPONDENT

RULING

1. This ruling concerns the notice of motion herein dated February 13, 2023. The application seeks, firstly, leave to appeal out of time and, secondly, stay of execution of decree in Nanyuki CMCC No E41 of 2020 pending hearing and determination of the intended appeal. The prayer for temporary stay was granted on February 14, 2023. What is sought to be appealed against is the lower court judgment on award of general damages for pain and suffering.
2. It was deponed in the supporting affidavit that the judgment was delivered on May 17, 2022. The judgment of the lower court was not however attached to the application. The judgment having been passed on May 17, 2022, appeal ought to have been lodged on or before June 17, 2022 according to section 79G of the *Civil Procedure Act*, Cap 21 which states 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.”
3. The present application for leave to appeal out of time was filed on February 13, 2023; therefore, the delay that we are dealing with here is about eight (8) months.



4. Under the proviso to section 79G aforesaid, this court may admit an appeal out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.
5. The reasons for the delay in lodging his appeal are set out on the face of the application and more particularly deponed to in paragraphs 3, 4, 9, and 10 of the supporting affidavit annexed to the application. Those reasons are –
 - i. That the Applicant’s advocate communicated the outcome of the judgment to the Applicant’s insurance company who then asked the advocate to commence a post judgment negotiation with the Plaintiff’s advocate.
 - ii. That negotiations were commenced but Miss. Mbaabu who was handling the matter left the firm of the Plaintiff’s advocate and Mrs. Mungai took over the matter but left before they could conclude on negotiations.
 - iii. That the delay was caused by the fact that parties were negotiating settlement of the judgment.
 - iv. That the delay is excusable as parties were pursuing amicable settlement of the judgment.
6. The Application was opposed by the Respondent who filed grounds of opposition dated June 20, 2023 opposing the application on the ground that the Applicant filed the appeal without first seeking extension of time and that the Applicant has not shown that he had a good and sufficient cause for not filing the appeal in time but shifted the blame to the Respondent for their own inaction. Further, the court cannot exercise discretion to extend time in absence of plausible and satisfactory explanation for delay.
7. The application was canvassed by way of written submissions. The Applicant submitted that there were post-judgment negotiations for settlement of the judgment which the Respondent did not deny hence, a presumption in favour of the Applicant’s averments is warranted; that the Applicant has an arguable appeal since an award of Kshs 1,000,000/- as general damages for pain and suffering was inordinately high and not in tandem with the facts of the case; that no prejudice will be occasioned to the Respondent and that the Applicant is willing to abide with any conditions the court may impose.
8. On the application for stay of execution, the Applicant submitted that the Respondent has threatened to proceed with execution and paying the decretal sum would cause substantial loss to the Applicant.
9. The Respondent in his written submissions argued that the Applicant filed Civil Appeal No 2 of 2023 without leave of the court as attached to the supporting affidavit. Further, the Applicant has not proved the failure to file the appeal was due to the Respondent’s advocate hence his claim is just a mere allegation and that the Applicant has failed to prove the averments in the supporting affidavit.
10. I have considered the rival submissions of the learned counsels. I note with concern that the copy of the judgment ought to be appealed from is not attached to the Applicant’s application and this court has not been able to appreciate what case was before the trial court and the manner in which it dealt with the evidence tendered before it. Nevertheless, the draft memorandum of appeal was attached.
11. The Respondent claimed that the Applicant filed the appeal under Civil Appeal No 2 of 2023 without first seeking the leave of the court as per the attachment in the Applicant’s supporting affidavit. I have perused the affidavit and memorandum attached to the Applicant’s supporting affidavit and noted that the memorandum of appeal does not bear the appeal number as alleged by the Respondent. Not unless the Respondent has another copy that was not filed before this court.



12. Moving on, it is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. The Court of Appeal in *Tbuita Mwangi v Kenya Airways Ltd* [2003] eKLR while relying on the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, (Civil Application No Nai 255 of 1997) (unreported); stated that;

“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 the delay: secondly, the reason for the 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”. (Emphasis added)

13. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v. The Independence Election & Boundaries Commission & 7 Others*, [2014] eKLR held that a court exercising its discretion to extend time has to consider the following factors;

- a. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party 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 should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
- e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
- f. Whether the application has been brought without undue delay; and.....

14. To enable this court to exercise its discretion in favour of the Applicant, the Applicant had the duty to satisfy the court that he had good and sufficient cause for not filing the appeal in time. The reason advanced by the Applicant is that there were post-judgment negotiations between the Applicant’s advocate and the Respondent’s advocate. That the counsels who were handling negotiations left the Respondent’s advocate firm before negotiations could be concluded.

15. The reasons advanced by the Applicant are not substantiated by any proof. No correspondences were attached to show that indeed there were negotiations between the parties. The Respondent also claimed that the Applicant reasons were just mere allegations and cannot blame the Respondent for not filing the appeal on time. The delay as seen earlier is about eight (8) months. The alleged negotiations did not suspend the law relating to the filing of an appeal. There is no documented consent that the Applicant was to hold its hands before filing appeal pending the negotiations. It is therefore my considered view that the reasons advanced by the Applicant are not sufficient and fall far short of the required threshold.

16. With the result that the application lacks merit and is dismissed with costs to the Respondent.

DATED SIGNED AND DELIVERED AT NANYUKI THIS 26TH DAY OF JULY 2023

A.K.NDUNG’U

JUDGE

