



REPUBLIC OF KENYA



KENYA LAW
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**Kahuhia v Muthoni (Miscellaneous Civil Application E001 of 2022)
[2023] KEHC 20690 (KLR) (Civ) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20690 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

MISCELLANEOUS CIVIL APPLICATION E001 OF 2022

JN MULWA, J

JULY 25, 2023

BETWEEN

JEREMIAH KAHUHIA APPLICANT

AND

BEATRICE MUTHONI RESPONDENT

RULING

1. By an application dated 3/1/2022 the Applicant sought Orders of stay of execution of the Judgment and Ruling of the trial Court in CMCC NO.5888/2007 delivered on the 27/4/2021 and 3/9/2021 respectively, as well as leave to file appeal out of time against the Ruling dated 3/9/2021. It is premised upon provisions of Sections 1A, 1B and 3a, and 79G of the *Civil Procedure Act*.
2. The impugned Judgement dated 27/4/2021 condemned the Applicant/Defendant in the trial Court to pay to the Respondent Kshs.1,679,779/- as damages arising from a Road traffic Accident that claimed the life of the Respondents kin, one George Githinji Gitau.

By the Supporting Affidavit sworn by the Applicant on the 3/1/2022, it is avered that the trial court dismissed his application for stay pending listing of a Moratorium against the insurance of the accident vehicle, United Insurance Company Ltd by its Orders of 3/9/2021 leading to this application.
3. Further, it is stated that soon thereafter, the trial magistrate proceeded on leave and obtaining of the Court file from the Magistrate's Office took time causing the prescribed time for filing an appeal to lapse. A certificate of delay issued by the Executive Officer confirming that the court file was unavailable upto the 31/12/2021.
4. In opposing the application the Respondent filed a Replying Affidavit sworn on the 9/6/2021 that raised issues as to the existence of a moratorium against the Insurance; that the Judgment debtor was not a policy holder and therefore could not benefit from the moratorium, if any.



In addition, it is urged by the Respondent that equity should not on the issues, the parties filed written submissions that I have carefully considered.

The applicant's submissions are dated 12/7/2022 where for the applicant, they are of even date.

Leave to appeal out of time.

5. I have considered the reasons for the delay as certified by the Certificate of Delay dated 31/12/2021 copy of the Judgment and Ruling issued by the Executive Officer. It is about two months taking away the statutory period when the High Court was on its December recess.

It is also noted that this application was filed only three days thereafter under a Certificate of Urgency.

It is the Respondents Submission that as at date of the Certificate of Delay, the Applicant ought to have filed the appeal from 23/12/2021 which was within the statutory period; and therefore the Court ought not indulge an indolent litigant in that respect, who chooses to ignore the Statutory Procedures of the Court and an indolent litigant who chooses not to comply with Statutory timelines; in view of the long delay, and fullness that the intended appeal lacks merit and only on afterthought.

6. The court has carefully considered the parties arguments in their affidavits for and in opposition as well as it he cited authorities.

The conditions that an applicant must meet to be granted leave to file appeal out of time are well stated in the case *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission (IEBC)* (2014) eKLR thus:

Reasons for the delay. Whether there are any extenuating circumstances that enable the Court to exercise its discretion in favour of the Applicant. Extension of time is not a right of a Party but an equitable remedy that is only available to a deserving Party or the Court's discretion.

7. It is also trite that a Party seeking extension of time bears the burden of laying a basis to the Court's satisfaction.

Upon persuading the Court to its satisfaction, that no prejudice or loss will be caused to the opposing party, then, the upon may exercise its discretion in favour of the Applicant upon conditions.

8. I have considered the reasons for the delay by the Applicant. Indeed the Applicant has tried to convince the Court that the delay was not deliberate as was partly caused by the trial magistrate who locked up the trial court file in chambers when he proceeded to his leave and a Certificate of delay issued by the Executive Officer of the Court; among other stated reasons.

9. In the case *Jaber Mohsen Ali & Another vs Priscillah Bolt & Another* E&L No.200 of 2014 (2014) eKLR, the Court held that what is unreasonable delay is dependent on the surrounding circumstances of each case; and that even one day after Judgement could be unreasonable delay depending on the Judgement of the Court and any Order given thereafter.

10. Further, in *DilpackKenya Limited vs William Muthama Kitonyi* (2078) eKLR, the Court rendered that:

“If the Appellant had a good case on merits but is out of time and has no valid excuse for the delay, the Court must guard itself against the danger of being led away by sympathy, and the Appeal should be dismissed, even at the risk of injustice and hardship to the Appellant.....” See also *Joseph Schmaderer -vs- Serah Njeri Ngene* (2021) eKLR *Mureen Agutu vs Paul Mboya* (2019) eKLR, among others.



11. There is no dispute that the delay was unreasonable but again, was sufficiently explained to the Court's satisfaction. Notwithstanding I find no unreasonable prejudice to the Respondent if the application is granted as opposed to the loss if it is denied.
12. The decretal sum is in the sum of Kshs.1,679,779.80/- plus costs and interest at the date of the application, 3/1/2022.
13. Consequently, the application dated 3/1/2022 is hereby allowed upon the following conditions.
 - a. The applicant is allowed to file Appeal out time; the Memorandum of Appeal shall be filed and served within 7 days of this Ruling.
 - b. The Record of Appeal shall therefore be filed and served within 60 days thereafter.
 - c. As a condition for an Order of Stay of Execution pending hearing and determination of the intended Appeal, the Applicant shall pay to the Respondent Beatrice Muthoni through her Advocates 50% of the Judgment sum within 30 days of this Rulings and the balance thereof, 50% to be deposited in a joint interest earning account in the parties Advocates names at any KCB Branch in Nairobi within a period of 30 days.
 - d. In default of (c) above, the Order of stay of execution shall lapse automatically.
 - e. Each party shall bear own costs of this Application.

Orders accordingly.

DATED, DELIVERED AND SIGNED IN NAIROBI THIS 25TH DAY OF JULY 2023.

JANET MULWA

JUDGE

