



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ogengo v Nandasaba & 4 others (Civil Suit 27 of 2018)  
[2023] KEHC 27460 (KLR) (25 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 27460 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL SUIT 27 OF 2018  
PJO OTIENO, J  
AUGUST 25, 2023**

**BETWEEN**

**GEORGE P. B. OGENGO ..... PLAINTIFF**

**AND**

**JAMES NANDASABA ..... 1<sup>ST</sup> DEFENDANT**

**MARTIN WANYONYI ..... 2<sup>ND</sup> DEFENDANT**

**KENNEDY WEPUKHULU ..... 3<sup>RD</sup> DEFENDANT**

**THE STANDARD LTD ..... 4<sup>TH</sup> DEFENDANT**

**CENTRE FOR HUMAN RIGHTS & DEMOCRACY ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. The 2nd Defendant, as a judgment debtor pursuant to the Judgment dated 12.2.2021, has filed two separate applications dated 19.6.2023 and 17.7.2023. The first application sought orders that time to appeal to the Court of Appeal be extended while the second application sought stay of proceedings before trial Court pending determination of the first appeal.
2. When the first application was scheduled for hearing, and after the Court was certified that the Respondent/Judgment debtor had been served but had not attended Court, the matter was directed to proceed ex parte and a ruling was reserved for the 27.7.2023 when unfortunately, the Court did not sit. That application and the ruling expected on it as said was whether the Applicant deserved extension of time to file a Record of Appeal out of time.
3. When the matter was placed before Chirchir J. on the 27.7.2023 the Judgment debtor/Respondent was granted leave of 7 days to file a response to the application of 17.7.2023. Pursuant to such leave, Grounds of Opposition dated 18/8/2023 was filed on the same day. That document resisted the



application on the grounds that it was incompetent, an afterthought, made in bad faith and an abuse of the Court process calculated to prejudice the Judgment debtor for being an end unto itself.

4. Having heard both parties on the 21.8.2023, I took the view and directed that both applications be dealt with together and a single ruling rendered. However, looking at the intended end of the second application afresh, it is apparent that it shall stand exhausted and overtaken by events once the application for extension of time is dealt with. To that extent, and the Court having set a ruling date earlier than the date scheduled for notice to show cause, it shall be moot to purport to consider the latter application upon delivery of a decision on extension of time.
5. On the merits, the jurisdiction of the High Court to extend time for doing anything under the *Court of Appeal Rules* is ordained by the stipulations of Section 7 of the *Appellate jurisdiction* to the effect that:-

“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”

6. Every time a litigant approaches the Court for extension of time, such litigant is by law obligated to explain the reasons for delay and demonstrate that the delay is not inordinate. The parameters for consideration in any application for extension of time was well and finally settled by the Supreme Court in *Nicholas Kiptoo Arap Korir Sestat -vs- IEBC* [2015] eKLR to be:-

“... we derive the following as the underlying principles that a Court should consider in exercise of such discretion that:-

1. 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;
  2. a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court;
  3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
  4. [where] there is a reasonable [cause] for the delay, the delay should be explained to the satisfaction of the Court;
  5. whether there will be any prejudice suffered by the respondents if the extension is granted;
  6. whether the application has been brought without undue delay; and...”
7. In this matter, the Judgment was delivered on the 12.2.2021 and a notice of appeal was lodged on the 23.2.2021. Soon thereafter there was an application dated 20.4.2021 seeking stay of execution pending an intended appeal which also exhibited a letter dated 15/2/2021 bespeaking proceedings and judgment for purposes of an appeal. The application equally exhibited a medical document stating that the Applicant suffers Type 2 diabetes mellitus and a valuation report stating that he owns a property worth Kshs. 23,000,000 and generates monthly rent of Kshs. 60,000/=. That application was allowed on the 20.12.201 on terms that the entire decretal amount be deposited into Court within 30 days from the date of the ruling. It appears no deposit was ever made.



8. A further perusal of the file reveals that the proceedings and judgment have been made ready and certified and indeed the applicant says that he is ready with the record of appeal for filing at any time. The reason adduced for failure to file the Record of Appeal in time is that he fell sick, did not visit his advocates who he had instructed to file the appeal and that when he visited the advocates on a date not disclosed, he was shown a letter dated 12.5.2022 demanding fees of Kshs. 20,000/= for filing.
9. The evidence exhibited to demonstrate sickness were medical chits dated 23.6.2023, 29.8.2022, 12.12.2022 and 30.5.2023. While the latter dated 23.6.2023 introduces the Applicant as a patient of Diabetes Mellitus, Type 2, the other documents show that he was admitted in hospital for 14 days in December 2022 and for seven (7) days in May 2023. There is totally no explanation why he took no steps to visit his Counsel between the date of the Judgment and the 15.8.2022, more than one year, when he was admitted in hospital. In fact, by his deposition at paragraph 4, he only became worse, healthwise, in 2022.
10. In the Courts assessment, the reasons advanced for failure to take steps has not been plausibly explained to warrant the exercise of discretion to extend time in his favour.
11. In any event, even the letter by Counsel dated more than one and a quarter (1¼) years after the delivery of the Judgment affords no assistance to the Applicant for it equally fails to explain why it took that length of time to be ready with the record of appeal. The period between the date of Judgment and that application for extension is equally inordinate and not explained.
12. In the absence of a plausible explanation for delay, which is indeed the cornerstone consideration, other considerations, whether the respondent stands to suffer any prejudice becomes immaterial. Without the foundation nothing stands.
13. A reading of the Court of Appeal decisions on extension of time<sup>1</sup> shows that the cornerstone consideration is the reasons for delay and its explanation. The rest, or others, including the prospects of success of the appeal are ancillary.
14. For this matter, while nobody can take sickness slightly, it has not been demonstrated that before 15.8.2022, when he was admitted in hospital, he was so incapacitated to an extent of not visiting his Advocates to pursue the appeal.
15. It is not enough to merely accuse the advocate to have failed to execute his instructions. He had a duty to follow his litigation and failure to do so for more than one year, if made the only basis to extend time, would be an act in rewarding indolence or just dilatoriness.
16. It is therefore the finding of the Court that the application dated 19.6.2023 lacks merit and the same is dismissed with costs.

**DATED, SIGNED AND DELIVERED IN KAKAMEGA THIS 25<sup>TH</sup> DAY OF AUGUST 2023.**

**PATRICK J. O. OTIENO**

**JUDGE**

In the presence of:

Applicant/Judgment Debtor in person

No appearance for the Respondent/Decree Holder

Court Assistant: Polycap

<sup>1</sup> Mugo –vs- Wanjiru [1970] EA 481 and Abdul Aziz Ngoma –vs- Mungai Mathayo [1976] KLR 61

