



**Cheruiyot v Kikaya (Miscellaneous Application E097 of 2022)  
[2023] KEHC 23021 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23021 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
MISCELLANEOUS APPLICATION E097 OF 2022  
SC CHIRCHIR, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**ELIJAH CHERUIYOT ..... APPLICANT**

**AND**

**DAVID KIKAYA ..... RESPONDENT**

**RULING**

1. Before this court is the Applicant's Notice of motion dated 16/12/2022. It seeks for leave to file an Appeal out of time and for stay pending Appeal.

The application is supported by the annexed affidavit of the Applicant and on the grounds appearing on the face of the application.

**The Applicant's case:**

2. It is the Applicant's case that he was not aware about the case, as he was not served with the court documents, and only got to know about it when he got a notice from the Judiciary, summoning him to appear in court for the hearing of the Notice to show cause.
3. The Applicant further states that upon receipt of the notification, he filed an Application in the lower court seeking to set aside the judgement but which Application was dismissed. He has since filed the present application seeking for extension of time to file the Appeal and for stay of execution pending the intended Appeal.
4. The Applicant contends that his right to fair hearing has been denied by the trial court; that he was neither served with the claim or Notice of judgement; that the delay in filing the appeal was occasioned by the fact that he was busy attempting to set aside the judgement in the trial court.
5. The Applicant further submits that he has an arguable appeal as the trial court lacked jurisdiction to adjudicate on this claim.



6. In his submissions, the Applicant reiterates the averments in the Affidavit and further submits that the present Application has been filed without unreasonable delay, and that the Applicant is willing to deposit any form of the security to secure due compliance.

### **Respondent's case**

7. It is the Respondent's case that the delay in filing the Appeal is inordinate; that the Applicant became aware of the judgement on 3/11/2022 but waited until 19/12/2022 to present this Application and only did so after being served with warrants of attachment.
8. The Respondent further argues that since the Applicant had vacated the premises at the time of filing suit in the lower court, the landlord - Tenant relationship had ceased to exist and therefore small claims court had jurisdiction to determine the claim. Further that the claim was for rent arrears and damages for damaged property.
9. That, in any event, the Authority used by the Applicant court in challenging the jurisdiction of the trial court, if applied, would have amounted to retrospective application of the Law.
10. In his submissions, the Respondent reiterates the averments in the Replying affidavit and further states that save for the question of jurisdiction, the Applicant has no defense on merit.

### **Determination**

11. I have considered the Application and the reply plus the parties' respective submissions. Two issues arise for determination in this Application:-
  1. Whether the Applicant should be granted leave to file Appeal out of time
  2. Whether the Applicant should be granted stay of execution pending the Appeal.

### **Whether the Applicant should be granted leave to appeal out of time.**

12. In the case of *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 Others* (2014) eKLR, the supreme court laid down the following considerations when a court is presented with an Application for extension of time:
  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 for 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 case by case basis
  4. Where there is reasonable reason for the delay, the delay should be explained to the reasonable satisfaction of the court.
  5. Whether there will be any prejudice suffered by the Respondent,s if the extension is granted.
  6. Whether the Application has been brought without undue delay.
  7. Whether in certain cases, like Election petitions, public interest should be a consideration for extending time."



13. The order of disallowing the Application for setting aside *ex parte* judgment was delivered on 21<sup>st</sup> November 2022. Pursuant to the provisions of Section 79(a) of the *Civil Procedure Act* as read with Order 50 Rule 4 of the Civil procedure Rules, at the time of filing the present Application, the Applicant had the right to file a memorandum of appeal against the aforesaid Ruling. One therefore fails to understand why he opted to file a draft instead.
14. Be that as it may, the Applicant has explained that he was caught up with seeking to set aside the judgment that he overlooked the time- bar for filing appeals. It appears to me that the Applicant is muddling up issues as he seems to be referring to the date of judgment instead of the date of the ruling dismissing the Application for setting aside.
15. *The constitution* under Article 159(2) D, Section 3A and 1A of the *Civil Procedure Act* exhorts the court to inter alia, keep focus on the dispensation of substantive justice. The court should, save in certain serious violations of procedure, ignore issues of technicalities if the same is in conflict with the ends of substantive justice. Consequently, notwithstanding the Applicant's apparent confusion on which order he is seeking to appeal against, I will treat the period of delay as between the 16<sup>th</sup> of January to-date. Which delay is not inordinate and the explanation, though based on misconception, is acceptable. I therefore hold that the explanation given is satisfactory.
16. There is already judgement in favour of the Respondent and allowing this prayer will cause some inconvenience. However, am of the view that this form of inconvenience can be compensated by costs.

#### **Whether the Applicant should be granted stay pending Appeal**

17. Order 42 Rule 6(2) of the *Civil Procedure Rules* sets out the conditions upon which stay pending Appeal may be granted and the principles have been expounded in many past decisions of the court. In the case of *Butt vs. Rent Restrictions* (1979) eKLR the following principals were set out by the court of Appeal:
  - a. "The power of the court to grant or refuse an application for stay is discretionary, and the discretion should be exercised in such a way as not to prevent an appeal.
  - b. The General principle in granting or refusing a stay is, if there is no overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.
  - c. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the Applicant at the end of the proceedings.
  - d. Finally, the court in exercising its discretion whether to grant or refuse an Application for stay will consider the special circumstances and it's unique requirements. The court in exercising its power under order XL1(b) ( current order 42 Rule 6(2) ),of the Civil Procedure Rules can order security upon Application by either party or by its own motion. Failure to put security of costs as ordered will cause execution to lapse".
18. I have previously considered the issue of delay. It is my finding that with the Ruling having been delivered on 21/11/2022 and the present application filed on 19/12/2022, the delay was not prolonged and not inordinate.
19. On the whether the appeal is arguable, the Applicant has raised the question of the jurisdiction of the small claims court to determine the issues arising from a tenant-landlord relationship or claims traceable to such a relationship. I am of the view that the question of jurisdiction is arguable as it goes into the core of the trial. The Applicant should be given a chance to ventilate it by of an Appeal. It



is important to remember that at this stage, the issue is not the success of the Appeal, but one which warrants the interrogation by the court (see Sammy Mwangi .vs. KCB (2020) eKLR).

20. None of the parties has addressed the court on the issue of substantial loss. However, from the decree, I notice that the Decree is for an all-inclusive sum of Ksh.771, 919. The award in my view is substantial in the circumstances.
21. On the security for compliance, the Applicant has indicated that it is ready to comply with such orders as the court may make.
22. In conclusion, the Application is merited and consequently, I make the following orders:
  - a). The Applicant is hereby granted leave to file the Appeal out of time.
  - b). The memorandum of Appeal to be filed within 14 days from the date of this Ruling .
  - c). There shall be a stay of execution of the decree in small claims case No. E0971/2022 pending the hearing and determination of the intended Appeal
  - d). The stay in ( c) above is conditional upon the Applicant depositing the decretal sum sum of Ksh.771, 919 in this court within 30 days from the date of this Ruling.

**DATED, SIGNED AND DELIVERED IN AN OPEN COURT AT KAKAMEGA THIS 29<sup>TH</sup> DAY OF SEPTEMBER 2023**

**S.CHIRCHIR**

**JUDGE**

In the presence of:

E. Zalo- Court Assistant.

No appearance by the parties.

