



**Oyimba v Director of Public Prosecutions & another (Constitutional Petition  
E003 of 2022) [2023] KEHC 23070 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23070 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CONSTITUTIONAL PETITION E003 OF 2022  
SC CHIRCHIR, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**SHELTON WEKULO OYIMBA ..... PETITIONER**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 1<sup>ST</sup> RESPONDENT**

**HON ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. What is coming up for determination is the petitioner's notice of motion dated 2/5/2023. It seeks for the following prayers:
  - a) Spent
  - b) That this honourable court be pleased to grant leave to the appellant to file his appeal out of time.
  - c). That pending the hearing and determination of this Application interparties this honorable court be pleased to maintain the status quo of stay order in KKCMCR case no. E94 of 2022 coming up on May 3, 2023.
  - d). That pending appeal in the court of appeal this honorable court be pleased to stay any orders of this honorable court made on 28/3/2023 in respect of judgement in petition no. E003 of 2022 involving the parties.

**The Applicant's case.**

2. The application is supported by the affidavit of the applicant. It is the applicant's case that he never received Notice of the delivery of the judgement; that he intends to appeal against the said judgement and that criminal case no. E94 of 2022 needs to be stayed so as to give him a chance to appeal. He



further states that the continued proceedings in criminal case will prejudice his appeal and finally that unless stay is granted he would face irreversible harm, loss and damage and the appeal will be rendered nugatory.

### **The Respondent's case.**

3. In response, the respondent filed a preliminary objection on 3 grounds namely:
  - a). That the application herein is res-judicata as the issues herein were determined by Justice Hon. John W. Anuro in his ruling delivered on 28/1/2023.
  - b). That this honorable court has no jurisdiction to entertain the application dated 3/5/2023 as the court has become fuctus officio having fully discharged its duty in the matter.
  - c). That the application is an abuse of the court process.
4. The court gave directions for the application to proceed by way of written submissions.

### **Applicant's submissions**

5. It is the applicant's submission that although the court had indicated that judgement will be delivered on notice, no such notice was issued, and the fact of the judgment having been delivered was unknown to him. Thus, he argues, since he was not aware, he has made sufficient case for the extension of time.
6. The applicant further submits that he has already filed the notice of appeal and a draft memorandum of Appeal and therefore this court should allow the application.
7. On whether this court should stay proceedings in Kakamega Chief Magistrate's court criminal case No. E94 of 2022, he argues that he is being harassed by way of multiplicity of charges and therefore this court should stay the said criminal case
8. Finally, it is submitted that this court has powers to stay its own orders.
9. The Respondent did not file any submissions.

### **Determination**

10. Three issues arise in this application. These are:
  - a). Whether this application is Res-judicata
  - b). Whether this court should enlarge time for filing an appeal.
  - c). Whether this court should stay its judgement delivered on March 28, 2023.

### **Whether this matter is Res judicata**

11. The *Black's law dictionary* (10<sup>th</sup> Edition) define Res judicata as "an issue that has been definitely settled by judicial decision – and the 3 essential elements are : (1) An earlier decision on the issue, (2) a final judgement on merit and (3) the involvement of the same parties, or parties in priority with the ongoing parties".
12. The stay of proceedings in Kakamega Chief Magistrate's court criminal case No. E94 of 2022 was the subject of Justice Wananda's judgement delivered on 28/3/2023. The Applicant herein was seeking to stay the same proceedings in the trial court. He has come back with a similar prayer. The said prayer is res judicata. I need not belabour this point. It cannot be revisited by this court.



13. If the Applicant was dissatisfied with the judgement of Justice Wananda , he ought to have moved to the court of Appeal. I agree with the respondent that this court is functus officio in as far as this prayer is concerned. To that extent, the respondent’s objection in this regard on the preliminary stage is upheld.

#### **Whether the judgement of this court should be stayed pending appeal**

14. When the Applicant approached this court, it was seeking for stay of proceedings in criminal case no. E094/2022. The court declined to stay the said proceedings. There are no orders issued by the high court that are legible for stay. The prayer sought therefore is incapable of being granted.

#### **Whether this court should enlarge time for filing an appeal**

15. Section 7 of the [Appellate Jurisdiction Act](#), grants the High court power to extend time for giving notice of intention to appeal from a judgement of the High or for making an application for leave to appeal.
16. The institution of an appeal is by way of filing a Notice of appeal. The Applicant herein has already filed the Notice, which he did with the present application. The Notice was filed out of time. The fate of that Notice can only be determined by the court of Appeal and not this court, as no such power has donated to this court. The prayer for extension of time has therefore become moot.
17. Further, the High Court has no power to determine issues of filing other documents other than the Notice of appeal. The Applicant is seeking that this court extends time for filing the appeal which, I take it to have been referring to the memorandum of appeal. This court has no such power. The power to extend time for filing other documents is the exclusive jurisdiction of the Court of Appeal under Rule 4 of appeal Rules.
18. I have noted that the Applicant has relied on the section 79G of the [Civil procedure Act](#) to argue his case in his regard. However, appeals to the court of appeal is governed by the [Appellate jurisdiction Act](#) and not the [Civil Procedure Act](#). In any case, this is a criminal matter and the [civil procedure Rules](#) are inapplicable.
19. The Applicant has relied on the decision of *Mugo & others B.Wanjiru & Ano* (1970) EA 480, to argue his case. However the issue in that case was leave to file the record of Appeal and not the Notice of Appeal and as earlier stated , this court has no jurisdiction to determine anything else save that which is authorized under section 7 of the [Appellate Jurisdiction Act](#).
20. In conclusion, the entire application fails. The same is hereby dismissed.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 29<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**S.CHIRCHIR**

