



REPUBLIC OF KENYA



**Marigu v Karangi & 4 others (Miscellaneous Application 32 of 2023)
[2023] KEHC 22916 (KLR) (27 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22916 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS APPLICATION 32 OF 2023
LM NJUGUNA, J
SEPTEMBER 27, 2023**

BETWEEN

IRENE MARIGU APPELLANT

AND

EDWARD NYAGA KARANGI 1ST RESPONDENT

PETER MUTURI JOHN 2ND RESPONDENT

CONSOLATA WANGIRI MUNYI 3RD RESPONDENT

PETER NYAGA JOHN 4TH RESPONDENT

SIMON KAMBI MUNYI 5TH RESPONDENT

RULING

1. A notice of motion dated July 10, 2023 has been lodged by the appellant/applicant before this court for determination, being supported by the grounds set out on the face of the application as well as the facts deposed in the supporting affidavit. The orders sought are as follows:
 - a. Spent;
 - b. Spent;
 - c. The applicant to be granted stay of execution of the judgment and consequential orders in Embu Chief Magistrate’s Court no. 217 of 2017 delivered on April 28, 2023 pending hearing and determination of the intended appeal;
 - d. The applicant be granted leave to file an appeal out of time against the judgment in Embu Chief Magistrate’s Court no. 217 of 2017 delivered on April 28, 2023;
 - e. Costs of the suit.



2. The Application made under sections 1A, 1B, 3A, 79G and 95 of the [Civil Procedure Act](#), order 42 rule 6 and order 50 rule 6 of the [Civil Procedure Rules 2010](#).
3. The main ground of this motion is that the applicant has applied for certified copies of proceedings and judgment but the same are yet to be supplied. That if the prayers sought are not granted, the applicant stands to be prejudiced especially if the grant is executed. A copy of the draft memorandum of appeal was attached to the affidavit in support of the application.
4. The application is unopposed.
5. The application was dispensed with through written submissions. The applicant stated that there is no inordinate delay as the motion was brought 43 days after the allowable period of 30 days. That the delay was occasioned when the court failed to issue certified copies of the judgment and proceedings in time. For this argument, she cited section 79G of the [Civil Procedure Act](#) and the cases of [Stecol Corporation Limited v Susan Awuor Mudemb](#) [2021] eKLR and [Almas Hauliers Ltd v Abdulnasir Abukar Hassan](#) [2017] eKLR.
6. The 1st respondent submitted that the application should be dismissed for want of merit as it offends mandatory provisions of the law. That the application should have been brought under sections 26 and 27 of the [Limitation of Actions Act](#). That the court must exercise its discretion in granting the prayers as was stated in the cases of [HGE v SM](#) [2020] eKLR, [Butt v Rent Restriction Tribunal](#) [1979] eKLR and [RWW v EKW](#) [2019] eKLR.
7. That according to order 42 rule 6(2) of the [Civil Procedure Rules](#), the applicant must demonstrate that they are likely to suffer substantial loss if the orders for stay are not granted. For this argument he relied on the cases of [Nicholas Stephen Okaka & another v Alfred Waga Wesonga](#) [2022] eKLR and [Mishael Ntouthi Mitheu v Abraham Kivondo Musau](#) [2021] eKLR. That order 42 rule 6(2) provides that the applicant must provide security for costs and they relied on the cases of [Absalom Dova v Tsrbo Transporters](#) [2013] eKLR, [Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 others](#) [2015] eKLR, [Arun c Sharma v Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others](#) [2014] eKLR and [Focin Motorcycle Co. Limited v Ann Wambui Wangui & another](#) [2018] eKLR. It is his submission that the application has not met the requirements for granting the orders and that costs should follow the event.
8. I have considered the application and the submissions, the issues for determination are whether the application meets the threshold for issuance of orders for stay of execution pending appeal and leave to appeal out of time.
9. The main ground for the delay in filing the appeal is that the applicant is yet to receive certified copies of the judgment and proceedings. There is a window of 30 days within which the appellant should file his appeal. However, sometimes this is not the case and the court usually has to apply its discretion in granting orders such as the ones prayed herein. Section 79G of the [Civil Procedure Act](#) provides as follows:

“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 a good and sufficient cause for not filing the appeal in time.”[Emphasis added].



10. Regarding leave to appeal out of time, the court is alive to the fact that its discretion cannot be applied arbitrarily but rather, there are factors to be considered. In the case of *Edith Gichungu Koine v Stephen Njagi Thoithi* (2014) eKLR the court held thus:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

11. I do note that the judgment was delivered on April 28, 2023 and the applicant formally requested for the certified copies of proceedings and judgment *vide* letter dated May 9, 2023. As at the time of filing the application on July 10, 2023, the proceedings and judgment had not been provided to the applicant. This cannot amount to inordinate delay as the applicant moved swiftly to comply with procedures on appeal. This is surely a flaw within the court system that cannot be visited on a litigant.
12. The 2nd-5th respondents submitted that the application was brought under the wrong sections of the law and that the applicant should have relied on sections 26 and 27 of the *Limitation of Actions Act*. I have read these sections vis a vis the provisions of section 79G of the *Civil Procedure Act* and in my view, the applicant relied on the correct laws. The provisions alleged by the respondents are not applicable in this application as this is not a tortuous claim but rather, a succession cause.
13. The issues in the draft memorandum of appeal are legitimate and in my view the applicant is bound to suffer prejudice if the orders are not stayed and leave granted to file the appeal out of time. Article 48 of the *Constitution of Kenya, 2010* guarantees every person right of access to justice. Further, article 50(1) of the *Constitution* provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. This court in the case of *Kamuti v Kariuki* (Miscellaneous Civil Cause E001 of 2023) [2023] observed that:

“The ultimate goal and purpose of the justice system is to hear and determine disputes fully. It follows that no person who has approached the court seeking an opportunity to ventilate their grievances fully should be locked out unless for a good reason.”

14. In the case of *Kamlesh Mansukhalal Damki Patni v Director of Public Prosecution & 3 others* [2015] eKLR, the Court of Appeal stated:

“It must be realized that courts exist for the purpose of dispensing justice. Judicial officers derive their judicial power from the people, or as we are wont to say in Kenya, from Wanjiku, by dint of article 159 (1) of the *Constitution* which succinctly states that “judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.” Judicial officers are also state officers, and consequently, are enjoined by article 10 of the *Constitution* to adhere to national values and principles of governance which require them whenever applying or interpreting the *Constitution* or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity, are upheld. For these reasons, decisions of the courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve. Such decisions may involve only parties inter se (and hence only parties’ interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the court in exercising its judicial authority to ensure



dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice.” (Emphasis added).

15. In conclusion, having considered the submissions by both parties, and the relevant caselaw, I find that it is proper to exercise the discretion of this court in favour of the applicant. This court will not punish the applicant for the court system’s inadvertence.
16. Accordingly, I find that the application has merit and is hereby allowed with orders as follows:
 - a. The applicant is hereby granted leave to file the appeal out of time and the same to be filed within 14 days from the date of this ruling;
 - b. Execution of the judgment and subsequent orders in Embu Chief Magistrate’s Court No. 217 of 2017 delivered on April 28, 2023 is hereby stayed pending hearing and determination of the appeal;
 - c. The appeal to be prosecuted within 120 days from the date of filing, failing which, it shall stand dismissed.
 - d. Each party to bear their own costs.
17. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF SEPTEMBER, 2023.

L. NJUGUNA

JUDGE

.....**for the Applicant**

.....**for the Respondents**

