



**Muriithi v Mathenge (Miscellaneous Civil Application E244 of 2022)
[2023] KEHC 27524 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 27524 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION E244 OF 2022
F WANGARI, J
OCTOBER 27, 2023**

BETWEEN

JULIUS NJIRU MURIITHI APPELLANT

AND

CHRISTOPHER G MATHENGE RESPONDENT

RULING

1. The Applicant vide an application dated 11/11/ 2022 and filed on date 14/11/2022 sought for the following orders: -
 - a. Spent
 - b. That the Honourable Court be pleased to grant the Applicant leave to Appeal out of time.
 - c. That this court be pleased to order a stay of execution of the Judgement and Decree issued by the Principal Magistrate's Court in Mombasa by Hon. M.L. Nabibya on 2nd August, 2022 pending hearing and determination of this application.
 - d. That this court be pleased to order a stay of execution of the Judgement and Decree issued by the Principal Magistrate's Court in Mombasa by Hon. M.L. Nabibya on 2nd August, 2022 pending hearing and determination of the intended appeal.
 - e. That as a condition for stay of execution pending the hearing and determination of this appeal, the Applicant/ Appellant be and is hereby ordered to provide security for the entire decretal sum in the form of a Bank Guarantee to be issued by Family Bank Limited.
 - f. Spent
 - g. That the costs of the application abide the outcome of the appeal.



2. The Appellant relied on grounds that the delay in filing the appeal was due to the fact that they could not get a copy of the typed judgement. Further, warrants of attachment and a proclamation notice has already been issued and execution may commence any time. It was stated that they were willing to furnish a bank guarantee as security.
3. The application was opposed through the Respondent's Replying Affidavit dated 23/11/2022. It was stated that the Appellant did not give any plausible reasons as to why there is a delay in filing the appeal, there are no merits in the draft Memorandum of Appeal, and that the application is just meant to delay the Respondent from enjoying the fruits of her judgment.
4. Directions were taken that the application be disposed of by way of written submissions. Both parties complied by filing the rival submissions.

Analysis and Determination

5. I have considered the application, the Applicant's submissions, authorities cited as well as the law and in my view, the following are the issues for determination;
 - a. Whether the application is meritorious;
 - b. What is the order as to costs?
6. On the first issue, the application basically seeks for leave to file an appeal out of time. Section 79G of the *Civil Procedure Act* is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. It 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 good and sufficient cause for not filing the appeal in time.”
7. The decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion just like any other exercise of discretion by the court. Some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time were suggested by the Court of Appeal in *Thuita Mwangi V Kenya Airways Ltd* [2003] eKLR. They include the following: -
 - i. The period of delay;
 - ii. The reason for the delay;
 - iii. The arguability of the appeal;
 - iv. The degree of prejudice that will be suffered by the Respondent if the extension is granted;
 - v. The importance of compliance with time limits to the particular litigation or issue;
 - vi. The effect if any on the administration of justice or public interest if any involved.
8. On the period of delay, the Applicant in his application and supporting affidavit stated that judgment in the lower court was delivered on 2/8/2022. The appeal ought to have been filed within 30 days after delivery of judgment. This application was filed on 14/11/2022 which is over 90 days after judgment



was delivered. The Applicant states the copy of the typed judgment court not be availed by the court, and it is after the copy was availed that this appeal was filed.

9. From the records, there is no document attached to show that indeed the Appellant was following up on the typed copy of the judgment. A letter to the court requesting for the typed copy of judgment would have sufficed.
10. On arguability of the appeal, the Appellant submits that the award on general damages was excessive and undeserved. I have perused through the judgment subject to this appeal, based on the injuries sustained, the award is sufficient and even if the matter would proceed to the main appeal, the discretion of the Honourable Magistrate in the award of general damages would not have been disturbed.
11. On the degree of prejudice, it has not been demonstrated what prejudice would be suffered by the Respondent at this juncture. Be that as it may, any prejudice to be suffered can be alleviated through award of costs.
12. The upshot of the foregoing is that I am inclined to disallow the application dated 11/11/2022, and thus exercise my discretion in favour of the Respondent.
13. On the issue of costs, the same follows the event. This is what section 27 of the Civil Procedure Act decrees. However, this court has discretion to either award or not award any costs. This was well enunciated by the Supreme Court in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others [2013] eKLR. The Appellant being unsuccessful, he shall bear the costs of the application.
14. Flowing from the foregoing, I proceed to make the following orders: -
 - a. The application dated November 11, 2022 lacks merit and is thereby dismissed.
 - b. The costs of the application awarded to be Respondent.

Orders accordingly

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 27TH DAY OF OCTOBER, 2023.

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F. WANGARI

JUDGE

In the presence of:

Mirembe Advocate for the Appellant

M/S Ngigi Advocate h/b for Ngure Advocate for the Respondent

Barile, Court Assistant

