



REPUBLIC OF KENYA



**Sagwe & another v Onyango (Civil Appeal E640 of 2022)  
[2023] KEHC 24072 (KLR) (Civ) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24072 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E640 OF 2022**

**JN MULWA, J**

**OCTOBER 26, 2023**

**BETWEEN**

**JARED MOCHECHE SAGWE ..... 1<sup>ST</sup> APPELLANT**

**PHILIP NJOROGE ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JACKSON ONYANGO ..... RESPONDENT**

**RULING**

1. This ruling is in respect of the Appellants Notice of Motion application dated 29/08/2022 in which they seek leave of court to file appeal out of time, and stay of execution of the trial Court's judgment in Milimani CMCC No. E4677 of 2020 delivered on the 26/11/2021 awarding the respondent Kshs. 1,005,050/- in damages plus costs and interest pending the hearing and determination the intended appeal.

It is premised upon provisions of order 50 Rule 6, Order 51 Rule 1 of the *Civil Procedure Rules* and Sections 95, 1A,1B and 3A of the *Act*.

2. Reasons for application are stated at the face thereof as well as at the Supporting Affidavit sworn by Martha Mugo, the appellants advocate, basically stating that the decretal sum awarded to the respondent is substantial and not in relation to the injuries sustained hence the need for review of the damages.

No reasons are stated as to the delay in filing of the appeal within the statutory period of 30 days of delivery of the judgment.



3. In opposing the application, the respondent filed a Replying Affidavit sworn on 1/11/2022 urging for dismissal of the motion as no sufficient reasons have been tendered by the applicants as to the delay, but only made to deny the respondent enjoyment of his fruits of judgment.
4. Further, at Prayer 3 of the Motion, the appellants seek to stay the hearing of a Declaratory Suit filed at the trial court against their insurance company being CMCC No. E3295 of 2022 pending hearing and determination of the intended appeal.
5. By the pleadings as filed, there appears to be two judgments of the trial Court in CMCC No. E4677 of 2020 delivered on 26/11/2021, and in a Declaratory Suit CMCC No. E3295 of 2022.  
The Judgment in the Primary Suit was delivered on the 26/11/2021. The appellants seek an order to stay hearing of the Declaratory Suit CMCC No. E3295/2022.
6. I have looked at the plaint filed in respect of the Declaratory Suit against the Insurer of the appellant's vehicle, and the proceedings so far undertaken.  
In the said Suit, the respondent Jackson Onyango is the Plaintiff suing Directline Insurance Company seeking for a declaration that the award of damages to himself in the primary Suit be satisfied by the said Insurance Company.
7. In their Submissions, the appellants urge the Court to grant leave to file appeal out of time because they say they have an arguable appeal, that they have tendered sufficient cause for the delay of close to three years, and that a denial of the stay orders would cause them to suffer substantial loss as the respondent will proceed to execute the Decree.  
They therefore have invoked the Court's discretion to extent the time, citing general authorities on the Court's exercise of its discretion.
8. On the matter of stay of execution, the appellants are willing to offer security for the due performance of the decree if the Court grants them leave to file appeal out of time; for the only reason that the respondent has not stated his financial standing should the appeal be successful, that in the premises he would be would be unable to pay back the decretal sums, which would render the appeal nugatory.
9. The Respondent in his submissions argues that the Declaratory Suit is only made to deny him enjoyment of the award by the application under review.

### **Extension of Time**

10. Section 79G of the [Civil Procedure Act](#) provides for 30 days after judgment to file an appeal; but also that an appeal may be filed out of the Statutory period on condition that the applicant satisfies the Court that he has a good and sufficient cause for not filing the appeal in time.
11. The delay in this instant matter is well over six months. No single reason has been explained at all by the applicants why it took them over six months to file this application.

I agree with the respondent that filing of the application under review must have been triggered by the filing of the declaratory suit.

In *Mutiso v Mwangi*, [1997] eKLR 630, *Korir v IEBC & 7 others* [2014] eKLR, *Scania East Africa Ltd & 2 others v Patrick Mutisya Kioko; Zoa Taka Limited v Dennis Kyalo* [2022] eKLR, *Duncan Kinyua Mugambi v Salome Wambui Njora* [2022] eKLR, among others, Courts pronouncements across board is that; and specifically citing the holding in *Nicholas Kiptoo Korir* (*supra*) Extension of time is not a right of any party. It is an equitable remedy



that is only available to a deserving party or the discretion of the Court. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court. Whether there is a reasonable reason for the delay; that the delay should be explained to the satisfaction of the Court. Whether there will be any prejudice suffered by the Respondent if extension is granted. Whether the application has been brought without undue delay.

12. I have stated earlier that no explanation has been provided to this Court for the delay, which in the circumstances is inordinate. For six months after delivery of judgment, the applicants have not requested for proceedings from the trial Court. This is not what a vigilant litigant would do in pursuit of Justice. Equity aids the vigilant, not a litigant who goes into slumber and only wakes up when execution proceedings or other proceedings against it are instituted.
13. As for the arguability of the intended appeal and without delving into the merits of the intended appeal, I am not persuaded of the same. I say so because there is already a Declaratory Suit filed; and an application for striking out the appellants' defense which is ready for hearing and determination.
14. I have also been urged to stay proceedings of the Declaratory Suit filed against the Appellants Insurer. I am not persuaded to do so as no reasons whatsoever have been advanced for such a drastic measure. It would be prudent that the pending application for striking out the defense be heard and a determination made by the court on merit.  
  
The court finds no convincing reasons to cut the lawful Court process short. Let each of the parties be heard and a determination be made on merit. That is what fair hearing is all about.
15. At the end, this Court is not satisfied that the applicants have met the threshold for grant of leave to appeal out of time of the trial Court's Judgment delivered on the 26/11/2021. The court would be granting an order in vain if an order of stay of execution of the same Judgment is made, as there would be nothing upon which the stay order would stand.
16. Consequently, the application dated 29/08/2022 is dismissed with costs to the Respondent.  
  
Orders accordingly.

**DATED, DELIVERED AND SIGNED IN NAIROBI THIS 26<sup>TH</sup> DAY OF OCTOBER 2023.**

**JANET MULWA**

**JUDGE**

