



REPUBLIC OF KENYA



KENYA LAW
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**Okuku v Mayabi (Civil Appeal E011 of 2023)
[2023] KEHC 25682 (KLR) (24 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25682 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E011 OF 2023
WM MUSYOKA, J
NOVEMBER 24, 2023**

BETWEEN

GEOFFREY WANDERA OKUKU APPELLANT

AND

TITUS ODINGA MAYABI RESPONDENT

*(An appeal arising from the judgment of Hon. EC Serem, Resident Magistrate,
RM, delivered on 27th February 2023, in Busia CMCCC No. 220 of 2017)*

RULING

1. I am called upon to determine an application, dated 19th June 2023. The same was filed herein by the appellant on even date. It seeks stay of execution of orders made on 27th February 2023, in Busia CMCCC No. 220 of 2017, pending the hearing and determination of the application. The grounds are that the trial court had noted inconsistencies in the evidence, but, in spite of that apportioned liability against him at 50:50; that although the witnesses for the respondent alleged negligence against him, the police abstract placed on record had exonerated him; that there was no evidence that he was overtaking; that as the motorist on the road, he had a right of way over the respondent who was joining the road; that he had an arguable appeal; among others. His affidavit in support of the application, dated 19th June 2023, is along similar lines. He has attached a copy of the judgment of 27th February 2023; and the original trial court records have been availed, and have the original judgment.
2. The reaction to the application is in the form of an affidavit, sworn by the respondent, on 29th June 2023. He avers that the application was based on an appeal filed out of time, for judgment was delivered on 27th February 2023, and time for filing appeal lapsed on 13th March 2023, and any appeal should have been filed with leave of court. It is further averred that despite being given a 60 day stay by the trial court, the appellant did not file appeal within that period. It is argued that the instant application is calculated to defeat the judgment of the trial court. He has attached a copy of the application filed at



- the trial court, a 60 day stay of execution order made by the trial court on 18th April 2023, and a copy of the judgment of 27th February 2023.
3. Directions were given on 4th July 2023, for canvassing of the application, by way of written submissions. I have seen, on record, written submissions filed by the appellant.
 4. The memorandum of appeal, which commenced these proceedings, was filed on 19th June 2023; while the judgment appealed against was delivered on 27th February 2023. An appeal against that judgment should have been filed within 30 days, from 27th February 2023. 30 days expired on or about 29th March 2023, when counted including weekends; and on or about 12th April 2023, when counted excluding the weekends. The purported filing of the appeal on 19th June 2023 was way out of time. I have not seen any proof that the same was filed with leave of court, and the present application does not seek leave to file it out of time.
 5. I note that what is before me is not an application for stay pending appeal, but pending the hearing and determination of the application inter partes. The alternative prayer is for stay for 60 days pending filing of a record of appeal. Ideally, where an appeal is filed, stay would be sought pending hearing and determination of the appeal. There is no valid appeal herein, as the memorandum herein was filed way outside time, without leave. I note that the appellant was granted 60 days by the trial court, to do whatever he wanted to do within that time. That would have been adequate for him to obtain certified typed copies of the proceedings, and to apply for leave to file appeal out of time. He does not appear to have done so, and he has offered no explanation. The trial court records have been availed, and I see that they have a certified copy of the proceedings and judgment. The appellant should have collected the same, prepared the record of appeal and filed it, together with an accompanying certificate of delay. The face of the application and the contents of the supporting affidavit demonstrate that the appellant could have arguable points on appeal, but that is of no use where the appeal is invalid, for having been filed out of time, without leave.
 6. As there is no valid appeal before me, there would be no basis for granting the orders sought in the application, dated 19th June 2023, and I hereby dismiss the same with costs. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 24TH DAY OF NOVEMBER 2023

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant

Advocates

Mr. Swaka, instructed by Swaka & Company, Advocates for the appellant.

Mr. Otsiula, instructed by Otsiula & Company, Advocates for the respondent.

