



REPUBLIC OF KENYA



**KENYA LAW**  
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**Watu Nominees Company Limited v Dama (Miscellaneous Application  
E087 of 2023) [2023] KEHC 26774 (KLR) (22 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26774 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
MISCELLANEOUS APPLICATION E087 OF 2023  
SM GITHINJI, J  
DECEMBER 22, 2023**

**BETWEEN**

**WATU NOMINEES COMPANY LIMITED ..... APPLICANT**

**AND**

**DAMA MAITHA BAYA ALIAS DAMA ZIROALIAS DAMA  
CHAZIRO ..... RESPONDENT**

**RULING**

1. For determination is the Applicant's Notice of Motion dated July 3, 2023 seeking the following orders;
  1. Spent.
  2. Spent.
  3. That this honourable court be pleased to grant leave to the Applicant to lodge/or file an appeal out of time.
  4. That the costs of this application be in the cause.
2. The application is founded on the grounds set out on its face and on the supporting affidavit of Symon K.Lariak the Assistant Manager- Legal Department of M/S GA Insurance Ltd the insurer of Motor vehicle registration no. KMFT 521G. He stated that judgment in Malindi CMCC No. E210 of 2020 was pronounced in absence of the parties on February 23, 2023 despite the court having previously not delivered judgment on the slated date. It was stated that they became aware of the judgment upon perusal of the court file on June 13, 2023 and upon relaying judgment to the Applicant, they were instructed to appeal. Further, that by the time instructions were issued the time to file an appeal had lapsed yet the Applicant intends to appeal against the judgment.
3. In response, the respondent filed a replying affidavit sworn by Geoffrey Kilonzo the Respondent's advocate who deponed that the instant application lacks merit and is an abuse of the court process. He



stated that judgment was delivered on 22/2/23 in favour of the Respondent and the Applicant was granted 30 days stay of execution which expired on 22/3/23 and the current application was filed on 3/7/23 which delay is an act of indolence. It was additionally stated that the Applicant has not attached a certificate of delay hence its grounds are nothing but a false narrative.

### **Disposition**

4. I have considered the application, its grounds, sworn affidavits, submissions and authorities cited. The applicants seek leave to file appeal out of time.
5. The applicant's prayer to file appeal out of time can only be granted if it satisfies the court that it had good and sufficient cause for not filing the appeal within time. The supreme court of Kenya sitting at Kisumu in the case of *County Executive of Kisumu v County Government of Kisumu & others* [2017] eKLR while relying on its decision in the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others* Application No. 16 of 2014 [2014] eKLR the Hon. Judges reiterated the considerations to be made in such a case as follows:
  1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
  2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
  3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
  4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
  5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
  6. Whether the application has been brought without undue delay; and
  7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."
6. The applicant has a duty to explain to this court why it did not file this application after judgment was delivered on 22/2/23. The Applicant's reason as to why they did not appeal within the prescribed period is that they were not aware of judgment date and the judgment was delivered in absence of the parties. It was averred that judgment was slated for 23/2/2023 and a notice was subsequently issued that the court would not be sitting and matters in the trial court would be given fresh dates. The Applicant attached in its Application a document showing the tracking of the activities of the matter. From the document, it is clear that the matter was scheduled for judgment on 22/2/2023 which date the Applicant concedes he was aware of. It is not clear how then they would change and say the matter had been scheduled for judgment on 23/2/2023. In my view, the applicant's advocate was aware of the judgment date and failure to attend was inadvertence on their part which is not a sufficient reason to extend time to file an appeal. The Applicant is not truthful as to the sequence of events which runs afoul of the maxim of equity that he who seeks equity must come with clean hands. In the circumstance, I find that the application fails for want of merit and the same is hereby dismissed with costs to the respondent.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 22<sup>ND</sup> DAY OF DECEMBER, 2023**



**S.M. GITHINJI**

**JUDGE**

In the Presence of:

1. Ms Atieno holding brief for Mr Baraka for the Applicant
2. Ms Nyambuto for the Respondent

