



**Kaitany t/a Oriental Rose Home v Murphy & another; Lisajoy Auctioneers
(Interested Party) (Civil Miscellaneous Application E561 of 2022)
[2023] KEHC 27108 (KLR) (Civ) (21 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27108 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL MISCELLANEOUS APPLICATION E561 OF 2022
AN ONGERI, J
DECEMBER 21, 2023**

BETWEEN

ROSEMARY KAITANY T/A ORENAL ROSE HOME APPLICANT

AND

MARTIN TIMOTHY MURPHY 1ST RESPONDENT

FRANCIAN MUTHONI MWANGI 2ND RESPONDENT

AND

LISAJLOY AUCTIONEERS INTERESTED PARTY

RULING

1. The application coming for consideration in this ruling is dated 19/5/2023 brought under Section 1B (1) and 3A of the *Civil Procedure Act*, Section 5, 77, 78(a) and (e) of the *Civil Procedure Act*, Order 12, rule 7 and Order 42 rule 6 rule 1 of the Civil Procedure rules seeking the following orders;
 - i. Spent
 - ii. This court grants the applicants leave to appeal.
 - iii. This court review and vary the order/ruling by Serгон J in case number HC MISC E561/2022 between Rosemary Kaitany vs Martin timothy Murphy and Francian Muthoni Mwangi and 1 other.
 - iv. This court calls file number SCCCOM CASE NO. E1078 of 2021 between rosemary Kaitany vs Martin Timothy Murphy and Francian Muthoni Mwangi and 1 other in the Small Claims Court to the High Court for directions.



- v. That the applicant deposits half of decretal sum pending the hearing and determination of the appeal.
 - vi. Costs be provided for.
2. The application is based on the following grounds;
- i. A ruling/judgment was issued by Serگون J. in HCC MISC/E561/2022 between Rosemary Kaitany vs Martin Timothy Murphy and Francian Muthoni Mwangi and 1 other against the applicant in their absence.
 - ii. The absence was occasion by the fact that the applicants were not served with the ruling notice and were therefore not aware of the ruling.
 - iii. The respondent has been keen on executing the ruling through attachment of the applicant's goods and assets.
 - iv. The respondents have appointed a firm of auctioneers who have been harassing the applicant making her life unbearable.
 - v. Unless this court intervenes by issuing stay order against the intended execution, the applicant is likely to suffer irreparably.
 - vi. It is fair, just and equitable that an applicant be granted leave to appeal.
 - vii. It is fair, just and equitable that the judgment and orders issued be stayed, the applicant is ready to deposit with the court security for due performance of the decree as required under Order 42 rule 6 of the [Civil Procedure rules](#).
 - viii. This application has been brought in good faith and without undue delay.
3. The application is supported by the supporting affidavit of the applicant sworn on 19/5/2023 which reiterates the grounds above.
4. The respondents filed a preliminary objection and replying affidavit both dated 18/7/2023 opposing the application. It is deposed in the replying affidavit of Martin Timothy Murphy dated 18/7/2023 that Applicant in Application dated 29/11/2022 was granted stay of execution Orders on condition that the Applicant deposits the principal sum of Kshs 460,000/- in court within 45 days.
5. He deposed further that the applicant did not comply with the aforementioned orders and the interim order of stay of execution was not extended. He indicated that the applicant has not given any good sufficient reason for delay in filing the appeal within the time provided under section 79G of the [Civil Procedure Act](#). Thus, the application is an afterthought, an abuse and misuse of the judicial process.
6. The parties filed submissions which I have duly considered. The applicant submitted that no appeal has been preferred in this matter and that the court has jurisdiction to grant the orders sought. Section 80(b) [Civil Procedure Act](#) allows a litigant to apply for review of a judgement where no appeal is allowed by law.
7. The applicant further submitted that the time within which she could prefer an appeal has already lapsed and therefore barred by statute. She indicated that the reason she could not appeal is that the judgement was delivered without any notice to the applicant and she only came to know of the judgement when auctioneers were sent to her house.



8. In support of her argument the applicant cited *Republic v Public Procurement Administrative Review Board & 2 others* [2018] eKLR where the court held that:

“the power to review a judgment or an order can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason.”

9. The respondent submitted that the ruling which the applicant intends to appeal against was delivered on 29/3/2023. The explanation tendered by the applicant is that the Respondent did not serve them with a ruling date.

10. That on 24/3/2023 a notice was published on the Kenya Law High Court Civil Division stating that the rulings which were to be delivered on 24/3/2023 before J. Serگون had been deferred to 29/3/2023.

11. Further, that notice was clearly issued and the Applicant was not one keen enough on following up with their application. The respondent argued that the Applicant has not advanced any sufficient reasons for their failure to file an appeal within the prescribed period.

12. The respondent submitted that for an application for review there has to be an apparent error on the face of the record and non-consideration of crucial evidence which could have made the court rule otherwise.

13. Further that a person cannot exercise both the right of appeal and review at the same time. Further, the applicant has not offered any security for the due performance nor averred that it is prepared to abide by any terms that this court may impose as a condition for granting the order for appeal out of time.

14. It was the respondent’s submission therefore that in light of the above the application herein is ploy aimed at vexing and frustrating the respondent’s efforts to enjoy the fruit of its judgement.

15. The issues for determination in this application are as follows;

- i. Whether the ruling dated 29/3/2023 should be reviewed set aside.
- ii. Whether the applicant should be granted leave to appeal out of time.

16. On the issue as to whether the ruling dated 29/3/2023 should be set aside, I find that the governing provision for review and setting aside court orders is Order 45 which provides as follows;

- “ (1) Any person considering himself aggrieved—
- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.



- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review”

17. I find that no grounds have been set out for review of the said ruling. It has not been shown that there is an error apparent on the face of the record or non-consideration of crucial evidence which would warrant the review of the ruling dated 29th March 2023.

18. On the issue as to whether leave should be granted to appeal out of time, I find that the court has the discretion to grant leave to appeal out of time if reasonable cause is established.

19. In the case of *Nicholas Kiptoo Korir Arap Salat Vs. J.E.B.C. and Others* [2014] eKLR (the Nicholas Salat case) it was stated as follows regarding filing of appeals;

“To file an appeal out of time and seek the Court to extend time is presumptive and inappropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence”.

20. The grounds to be considered were stated as follows in the *Nicholas Salat Case* (supra);

- “(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, 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 respondent 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.”

21. The Applicant submitted that the reason she could not appeal within time was that the judgement was delivered without any notice to her and that she only came to know of the judgement when auctioneers were sent to her house.

22. The court ought to consider several factors as observed by Odek JJA in *Edith Gichungu Koine Vs Stephen Njagi Thoithi* [2014] eKLR 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.”



- 23. I find that it is in the interest of justice that the applicant be granted leave to appeal out of time.
- 24. I grant the applicant leave to appeal out of time on condition that the appeal is filed within 30 days of this date.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 21ST DAY OF DECEMBER, 2023.

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A. N. ONGERI

JUDGE

In the presence of:

- for the 1st Applicant
- for the 1st Respondent
- for the 2nd Respondent
- for the Interested Party

NAIROBI HIGH COURT CIVIL MISC. APPL. NO. E561 OF 2022	0
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