



Kinyua & another v Kechir aka Bel Kemboi (Miscellaneous Civil Application E002 of 2023) [2023] KEHC 27117 (KLR) (20 December 2023) (Ruling)

Neutral citation: [2023] KEHC 27117 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
MISCELLANEOUS CIVIL APPLICATION E002 OF 2023
SM GITHINJI, J
DECEMBER 20, 2023**

BETWEEN

AMINA WANJIRU KINYUA 1ST APPLICANT

DAMPALA UREN NJEMA 2ND APPLICANT

AND

ASBEL KIPKEMBOI KECHIR AKA BEL KEMBOI RESPONDENT

RULING

1. The Applicants brought this Application vide a Notice of Motion dated 31st January 2023 brought under Section 1A, 1B, 3 and 3A, 79G of the *Civil Procedure Act*, Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rules 1 and 3 of the Civil Procedure Rules seeking the following orders;
 1. Spent.
 2. That this honourable court be pleased to grant leave to the Applicant/ Intended Appellant to appeal out of time against the judgment of the honourable magistrate E. Kadima, Senior Resident Magistrate in Garsen magistrate Court Civil Suit No. E78 of 2021 and judgment delivered on 27/10/22.
 3. That this honourable court be pleased to stay execution of the judgment and decree in Garsen magistrate Court Civil Suit No. E78 of 2021 pending the hearing and determination of the intended appeal therein.
 4. Spent.
 5. That as a condition for stay of execution pending the hearing and determination of this intended appeal, the Applicant/Appellant be and is hereby ordered to provide /issue security for the entire decretal sum/amount in the form of a bank guarantee to be issued by Family Bank Limited.



2. The application is premised on the grounds set out on its face and the supporting affidavit of Arasa Nicodemus Legal Counsel at Directline Assurance Company Limited who deponed that they are the insurers of Motor Vehicle Registration Number KCC 570X. He stated that judgment was entered against the Intended Appellant who was ordered to pay the respondent general damages of Kshs. 650,000 and special damages of Kshs. 14,650 plus costs and interests. That since delivery of the judgment, stay of execution has since lapsed thus the defendant is exposed to imminent execution.
3. It was stated that there was a delay in obtaining a copy of judgment and they could not advise the client on time and the instructions to appeal were issued after stay of execution had lapsed and the time within which to file an appeal. It was also stated that, they wished to furnish a Bank Guarantee from family Bank as security for costs.
4. The Respondent filed a replying affidavit sworn by Geoffrey Kilonzo counsel for the Respondent who deponed that the application lacks merit and is an abuse of the court process as the Applicants were aware of the said judgment and has not shown sufficient cause for the delay. Mr. Kilonzo stated that the instant application was filed after 3 months which delay is inordinate and inexcusable and no sufficient cause has been shown. Additionally, the security offered by the Applicants in form of a bank guarantee is not enough as it expires periodically hence exposing the Respondent.

Analysis and Determination

5. I have considered the application, its grounds, sworn affidavits, submissions and authorities cited. The applicants seek leave to file appeal out of time and stay of execution of the judgment and decree pending the hearing of the intended appeal.
6. The applicants' prayer to file appeal out of time can only be allowed if they satisfy the court that they 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 vs County Government of Kisumu & others [2017]* eKLR while relying to its decision in the case of *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others Application No. 16 of 2014 [2014]* eKLR reiterated the considerations to be made in such a case to be 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."



7. The applicants had an obligation to explain to this court why they did not file the application soon after judgment was delivered on 27/10/2022. According to the Applicants, the delay was occasioned by failure to obtain a copy of the judgment on time. In my view, this explanation is not satisfactorily supported and there's no sufficient cause why the Applicants waited for three months after judgment had been delivered to bring the instant application. It follows that the prayer for leave to appeal out of time fails and the same is hereby dismissed.
8. As regards stay of execution, having found that the prayer for leave to appeal out of time is not merited, it follows then that an order for stay of execution lacks foundation and cannot issue. In other words, it has no legs on which to stand on.
9. In the end, the Notice of Motion dated 31st January 2023 fails for want of merit and the same is hereby dismissed with costs.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 20TH DAY OF DECEMBER, 2023.

S.M. GITHINJI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

