



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mohamed v Diya (Miscellaneous Application E004 of 2023)  
[2023] KEHC 26773 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26773 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARSEN  
MISCELLANEOUS APPLICATION E004 OF 2023  
SM GITHINJI, J  
DECEMBER 20, 2023**

**BETWEEN**

**FATUMA ABDI MOHAMED ..... APPLICANT**

**AND**

**AMINA DECHE DIYA ..... RESPONDENT**

**RULING**

1. Before this court for determination is a Notice of Motion dated 19<sup>th</sup> June, 2023 and filed on 22<sup>nd</sup> June 2023, said to be brought pursuant to section 1A,1B, 3, 3A, 79G and 95 of the Civil Procedure Act, Order 22 rule 22, Order 42 rule 6, Order 50 rule 6 and Order 51 Rules 1&3 of the Civil Procedure Rules, 2010. The Applicant seeks 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, SRM in Garsen Magistrate Court Civil Suit No. E51 of 2019 and judgment delivered on 10/03/22.
  3. That this honourable court be pleased to stay execution of the judgment and decree in Garsen Magistrate Court Civil Suit No. E51 of 2019 pending the hearing and determination of this application and 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.
  6. That the costs of this application abide the outcome of the intended appeal.



2. The application is premised on the grounds on the face of it and supported by the affidavit sworn by Arasa Nicodemus on the even date. The said Arasa deposed that the impugned judgment in this case was delivered on 10<sup>th</sup> March 2022 against the Applicant who was ordered to pay the Respondent a decretal sum of Kshs. 252,550/-. That by dint of the principles of subrogation, the Applicant's insurance Directline Assurance Limited which is to settle that amount intends to appeal against the decision. He added that stay of execution granted at the lower court has since lapsed and the Applicant is exposed to imminent execution. That the delay in filing the appeal was occasioned by unavailability of a copy of the judgment in good time.
3. Mr. Arasa annexed a copy of the draft memorandum of appeal and asserted that the appeal raises pertinent points of law with overwhelming chances of success. He was apprehensive that the decretal amount is a substantial sum and if paid the Applicant may not be able to recover the same from the Respondent. He expressed willingness to provide security for the entire decretal sum by way of a bank guarantee.
4. In opposition, the Respondent relied on a Replying Affidavit sworn by Yvonne Mbithe Mutete on 30<sup>th</sup> June 2023 wherein she deposed that the application was an afterthought, incompetent, an abuse of the court process and it had been overtaken by events. According to Ms. Yvonne, the Respondent served the Applicant with a copy of the decree and statement of costs on 14<sup>th</sup> April 2022 and that it was only after a declaratory suit had been filed that she filed the present application to obstruct execution. She added that the delay was inexcusable and not explained; and that the Applicant has not demonstrated why stay should be granted.
5. The application was canvassed by way of written submissions which I have carefully perused. I have as well considered the authorities cited to me by the parties.
6. The first issue for determination and which will determine whether or not to grant stay of execution, is whether leave to file appeal out of time should issue. In other words, has the Applicant demonstrated to this court that time to file her appeal should be extended?
7. Section 79G of the *Civil Procedure Act* is the operative law in answering this question. It provides that:
 

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”
8. The above provision means that the Applicant's prayer to file appeal out of time can only be allowed if she satisfies the court that she had good and sufficient cause for not filing the appeal in time. The Supreme Court in the case of *County Executive of Kisumu -v- County Government of Kisumu & others* [2017] eKLR while relying on the 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 as follows:
 

“(23) It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its



discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The Court delineated the following as:

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. ...”
9. In the present case, it is undoubted that the impugned judgment was delivered on 10<sup>th</sup> March 2022. Statutorily, the appeal was to be filed on or before 10<sup>th</sup> April 2022. The Applicant did not do so. She explained that the delay was occasioned by her inability to obtain a copy of the judgment in time. I have perused the application and affidavit thereto; there is no evidence that the Applicant tried to request or retrieve a copy of the judgment from the lower court. In any event, it is evident that the Applicant became aware of the judgment as early as on 14<sup>th</sup> April 2022 when the Respondent forwarded to her advocates on record, a copy of the statement of costs. No satisfactory explanation is given as to why the Applicant had to wait for over a whole year to file the present application even after it had become obvious that the execution process had commenced.
10. The only reasonable conclusion is that the Applicant has been indolent to pursue her interests. As already established by the apex court, an application for extension of time is not a right to a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court. In the given circumstances, I find no ground to exercise this discretion in favour of the Applicant. Having declined to extend time to file the intended appeal, I find no need to consider the application for stay.
11. The outcome is that the notice of motion dated 19<sup>th</sup> June 2023 lacks merit and is hereby dismissed with costs.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 20<sup>TH</sup> DAY OF DECEMBER, 2023.**

**S.M. GITHINJI**

**JUDGE**

In the Presence of; -

Miss Nyambuto for the Respondent

Mr Arasa for the Applicant (absent)

