



**Moughal v Mwai (Miscellaneous Application E035 of 2021)  
[2022] KEHC 10583 (KLR) (26 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 10583 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
MISCELLANEOUS APPLICATION E035 OF 2021  
SN MUTUKU, J  
APRIL 26, 2022**

**BETWEEN**

**HADIYAH SHAHID MOUGHAL ..... APPLICANT**

**AND**

**JOSEPH MWAI ..... RESPONDENT**

**RULING**

1. Hadiyah Shaid Moughal, the Applicant, filed two simultaneous applications under Certificate of Urgency. There is the Chamber Summons and a Notice of Motion both dated August 17, 2021. The Chamber Summons dated August 17, 2021 seeks to have the Notice of Motion of the same date heard during the Court Vacation. The substantive application is the Notice of Motion. It seeks the following orders:
  - a. That this application be certified urgent and service be dispensed with in the first instance.
  - b. That this Honourable Court be pleased to hear and determine the Applicant's Miscellaneous Application dated August 17, 2021 filed herewith while on vacation as under the High Court (Practice & Procedure Vacation Rules).
  - c. That this Honourable Court be pleased to grant leave to the Applicant to file an appeal out of time being an Appeal from the ex-parte judgment delivered on 11<sup>th</sup> September, 2019 in Civil Suit 390 of 2016 by Hon M. Kasera at the chief Magistrate Court at Kajiado.
  - d. That the cost of this application be paid by the Respondent.
2. The grounds in support of the Notice of Motion can be summarized as follows that the Respondent filed civil suit No. 390 of 2016 against the Applicant and obtained an ex parte judgment on 11<sup>th</sup> September 2019 following her failure to enter appearance for reasons that she was never served with summons. The decree was issued on 19<sup>th</sup> February 2021. It is her case that there is also a proclamation



notice dated 29<sup>th</sup> April, 2021, a warrant of attachment and warrant of sale with the same date for execution against the Applicant; that among the properties listed for proclamation was motor vehicle KBK 988N which was recently registered in the Applicant's name and was the suit vehicle in Civil Case 390 of 2016.

3. The Applicant avers that the accident was a minor one where she scratched the Respondent's car at Ongata Rongai, which damage was assessed at the scene by a mechanic at Kshs. 3500; that the Respondent took the Applicant's insurance details while at the scene of the Accident. She avers that the Respondent has attached the wrong vehicle KBM 560J.
4. It is her case that she intends to file an appeal and that the intended appeal has high probability of success; that she stands to suffer irreparable loss if the orders sought are not granted. She urged the court to grant her leave to file an appeal out of time against the judgment delivered on 11<sup>th</sup> September, 2019.
5. The Respondent filed grounds of opposition to the Notice of Motion on 27<sup>th</sup> August, 2021 in which he argues that the Applicant has not made a proper application to set aside or vary the *ex parte* judgment as per order 10 rule 11 of the Civil Procedure Rules and that the proper application should have been made at the subordinate court; that in exercise of its appellate jurisdiction the High Court lacks jurisdiction to interfere with *ex parte* judgment in default of appearance or defence where service of summons is disputed; that there are no sufficient grounds for enlargement of time to file appeal as per order 50 of the civil procedure rules and that security for costs has not been provided for.
6. On 27<sup>th</sup> August, 2021 the Applicant filed a further affidavit in response to the grounds of opposition. She deposed that the law on setting aside judgments is vague; that the wording that "court may" under the *Civil Procedure Act* can mean either subordinate or High Court; that the judgment being referred to herein was a final judgment and was not one obtained under Order 10; that the High Court has a supervisory power over subordinate courts and the same cannot be curtailed to defeat justice; that the *Civil Procedure Act* provides for appeals from an original decree passed *ex parte* which arose from an *ex parte* judgment.
7. She further deposed that the dispute of service of summons is a matter of law and fact, a matter where an appeal may lie; that it is only this Honourable court that has discretion to determine whether the facts provided offer sufficient grounds for leave to appeal out of time; that this application is to seek leave to file an appeal out of time and not one for stay and hence there is no requirement to furnish security for costs is required.

### Submissions

8. The matter was canvassed through written submissions. The Applicant filed her submissions dated 18<sup>th</sup> October 2021 where she submitted on two issues: whether this Honourable court should grant the Applicant leave to file an appeal out of time and whether this Honourable Court has the jurisdiction to interfere with the decision of the subordinate court in granting *ex parte* judgment in default of appearance where service of summons is disputed.
9. On the first issue the Applicant cited Article 50(1) of *the Constitution* on the right of everyone to fair hearing. She argued that the respondent/plaintiff in Civil Case 390 of 2016 was heard *ex parte*; that she was not served with the summons or the Plaint and therefore did not enter appearance and she therefore did not defend the suit; that the *ex parte* judgment was entered against her and a decree issued; that being dissatisfied she exercised her right to appeal as she was also entitled to be heard but the time for appeal had lapsed.



10. She relied on section 79G of the *Civil Procedure Act* and order 50 rule 6 of the *Civil Procedure Rules* as well as the case of *Visbva Stone Suppliers Company Limited -v- RSR Stone* [2006] Limited [2020] eKLR where the court relied on the applicable principles of enlargement of time to file an appeal as restated in the case of *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others*.
11. It is her argument that she understands that the time to file the appeal has lapsed but beseeches this court to exercise its discretion and enlarge the time for her to file the appeal. She reiterated that the decretal sum in the decree is wholly unreasonable as the damages occasioned was greatly exaggerated. She also stated that she only discovered the existence of the suit at the close of August 2021 from an interested party whose property had been attached in the suit. She further stated that the delay was occasioned by the fact that she had no knowledge of the existence of the suit. She argued that no prejudice will be occasioned to the Respondent and that this application was filed immediately and without delay after she became aware of the existence of the suit.
12. On the second issue she argued that the definition of the word “court” under the *Civil Procedure Act* encompasses all courts, both subordinate and appellate court hence this court has jurisdiction. Further that judgment whether or not obtained ex-parte is the final determination of a suit made by a competent court, where the right to appeal may lie. She argued that under article 165 of *the Constitution* the High Court has original jurisdiction in criminal and civil matters and that the High Court has supervisory powers over all subordinate courts, granting it the capacity to interfere with decisions already made including granting leave to file an appeal out of time.
13. The respondent filed his submissions dated February 14, 2022. He raised three issues for determination: whether there are proper proceedings before this court to set aside or vary an exparte judgement; whether there are sufficient grounds for the court to enlarge time for purposes of filing an appeal out of time and whether the applicant has satisfied the conditions for grant of stay of execution pending appeal.
14. On the first issue the respondent argued that the exparte order was issued by the subordinate court in civil case 390 of 2016 and that the applicant should have applied to this court to set aside its default judgment as provided under order 10 rule 11 of the *Civil Procedure Rules*. He argued that the High Court lacks jurisdiction to interfere with exparte judgments or judgement in default of appearance or defence where service of summons is disputed.
15. On the second issue it is his argument that the applicant has failed to give sufficient reason for the delay in filing the appeal within the time required under section 79G of the *Civil Procedure Act* and that this application is an afterthought, an abuse of judicial process and that the respondent will suffer great prejudice if the orders are granted.
16. On the third issue the respondent argued that the applicant has not met the three requirements for an order of stay to be granted; that the application was not made within time; that there is no substantial loss on the part of the Applicant is no stay is granted and that the Applicant has not furnished security for costs. He cited *Trust Bank Limited -vs- Ajay Shab & 3 others* [2012] eKLR to support his arguments.

## Determination

17. From the outset, I wish to state that I understand the Applicant to be seeking enlargement of time to file an appeal. Her Notice of Motion under consideration is specific on that issue. I do not understand her to be seeking setting aside or varying the exparte judgment of the lower court or even stay of execution



in order for her to attract the requirement for providing security for costs. In determining this matter therefore I will confine myself to the prayers sought, which prayer mainly seeks leave to file an appeal out of time. The intended appeal seeks to challenge the *ex parte* judgment of the lower court delivered on 11<sup>th</sup> September 2019.

18. The applicable law for enlargement of time is Section 95 of the [Civil Procedure Act](#) and order 50 rule 6 of the Civil Procedure Rules. Section 95 provides that:

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

19. Order 50 rule 6 of the Civil Procedure Rules provides that:

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

20. In the *Vishva Stone Suppliers Company Limited -v- RSR Stone* case cited by the Applicant, the applicable principles for enlargement of time can be summarized as follows:

- i. “Extension of time is not a right of a party but an equitable remedy that is only available to a deserving party at the discretion of the court.
- ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
- iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.
- iv. Whether there is reasonable reasons for the delay, the delay should be explained to the satisfaction of the court.
- v. Whether there will be any prejudice suffered but the Respondent of the extension if the extension is granted.
- vi. Whether the application has been brought without undue delay; and
- vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

21. The discretion of this court to extend time to file an appeal out of time is exercisable upon the court being satisfied that the applicant has good and sufficient cause for not filing the appeal out of time. In *First American Bank of Kenya Ltd vs. Gulab P Shab & 2 Others* Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002]1 EA 65, the Court set out the factors to be considered in deciding whether or not to grant such an application:

- i. the explanation if any for the delay;



- ii. the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;
  - iii. Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favorable exercise of discretion in favour of the applicant.
22. I have considered the reasons for delay advanced by the Applicant. It was her contention that the 30 days period accorded for appeal have since lapsed and that the delay was occasioned by the fact that she had no idea of the existence of the suit in the subordinate court and further that she learned of the existence of the suit in towards the close of August 2021 from an interested party whose property had been attached. She further argued that she deserved to be heard on appeal as the decretal sum in the decree was wholly unreasonable as the same arose from exaggeration occasioned on the suit motor vehicle and that the outcome was only achieved as the suit was undefended. In addition, she argued that no prejudice will be occasioned on the Respondent since the dispute lodged in the said suit ought to have been determined on merit after hearing all the parties. She further argued that this Application was filed without delay after the Applicant became aware of the existence of the suit.
23. It is my considered view that the Applicant has satisfied the requirements for granting of extension of time to file the intended appeal out of time. She deserves the orders she is seeking. I will, and do hereby, grant prayer 3 of the Notice of Motion dated August 17, 2021. The Applicant shall file and serve the Record of Appeal within 30 days from the date of this ruling. Upon service, the respondent shall file and serve response within 14 days. This matter shall be mentioned on a date to be agreed upon in court on the day April 26, 2022.
24. Each party shall bear own costs of this application.
25. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 26TH DAY OF APRIL 2022.**

**S. N. MUTUKU**

**JUDGE**

