



Chebocho & 2 others v Cheptoo & another ((Suing as Administrators of the Estate of Justine Kiprop Cheptoo (Deceased)) (Miscellaneous Civil Application E260 of 2021) [2022] KEHC 11611 (KLR) (Civ) (19 May 2022) (Ruling)

Neutral citation: [2022] KEHC 11611 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

MISCELLANEOUS CIVIL APPLICATION E260 OF 2021

CW MEOLI, J

MAY 19, 2022

BETWEEN

JOSEPH ARAP CHEBOCHO 1ST APPLICANT

OUTREACH SACCO 2ND APPLICANT

FRANCIS WAWERU MACHARIA 3RD APPLICANT

AND

ZIPPORAH CHEPTOO 1ST RESPONDENT

WILLIAM CHELAGAT CHEPTOO & ZIPPORAH CHEPTOO (SUING AS ADMINISTRATORS OF THE ESTATE OF JUSTINE KIPROP CHEPTOO (DECEASED)) 2ND RESPONDENT

(SUING AS ADMINISTRATORS OF THE ESTATE OF JUSTINE KIPROP CHEPTOO (DECEASED))

RULING

1. The motion dated 28th May 2021 by Joseph Arap Chebocho, Outreach Sacco & Francis Waweru Macharia (hereafter the 1st, 2nd & 3rd Applicant/Applicants) seeks enlargement of time and leave to the Applicants to lodge an appeal out of time against the judgment and decree entered against the Applicants in Nairobi Milimani CMCC No. 7454 of 2019 and secondly, an order to stay execution of the said judgment pending hearing and determination of the intended appeal. The motion is expressed to be brought inter alia under section 79G and 95 of the *Civil Procedure Act* (CPA), and Order 42 Rule 4, 6 & 7 of the *Civil Procedure Rules* (CPR). On grounds, among others that, being dissatisfied with the judgment and decree of the lower court delivered on 16th April 2021 in favour of William Chelagat



- Cheptoo and Zipporah Cheptoo (hereafter 1st and 2nd Respondent/Respondents), the Applicants desire to lodge an appeal but the period within which to appeal has lapsed.
2. The motion is supported by the affidavit of Janerose Nanjira, counsel having conduct of the matter on behalf of the Applicants. The gist of her depositions is that judgment in Nairobi Milimani CMCC No. 7454 of 2019 was entered on 16th April 2021 in favour of the Respondents; that there was delay in accessing a typed copy of the judgment and by the time counsel obtained the same, the statutory period within which to lodge an appeal had already lapsed; and that the intended appeal is arguable and raises pertinent points of law and fact and has overwhelming chances of success. She contended that delay is not so inordinate as to be inexcusable and that the Respondents will not suffer any prejudice or any damage that cannot be compensated by way of costs. Counsel further deposed that the Applicants stand to suffer prejudice and substantial loss, if execution is not stayed, as they will be unable to recover the decretal sum if paid over to the Respondents. In conclusion she expresses the Applicants' willingness to furnish such reasonable security in the form of a bank guarantee.
 3. The motion is opposed through the replying affidavit jointly deposed by the Respondents. They assert that the motion was made with the intent of delaying payment of the decretal sum thus denying them the enjoyment of the fruits of their judgment. That the Applicants have not satisfied the legal requirements for the grant stay of execution and especially substantial loss. The deponents further contend that the Applicants should be compelled to provide some form of security.
 4. The motion was canvassed through written submissions. As regards the factors to be considered in an application for extension of time to file an appeal, the Applicants' counsel anchored her submissions on the decision in *Mwangi v Kenya Airways Ltd* [2003] KLR. On the explanation for 21-day delay, she cited the decision in *Amal Hauliers Limited v Abdulnasir Abukar Hassan* [2017] eKLR to assert that it was not inordinate in the circumstance. Calling to aid *Athuman Nusura Juma v Afwa Mohamed Ramadban*, CA No. 277 of 2015 and *Julius Kamau Kitbaka Nyaga & 2 Others*, CA No. 14 of 2013 counsel submitted that the draft memorandum of appeal raises arguable issues with a high chance of success. She reiterated that the Applicants are apprehensive that if stay is denied, any monies paid out in execution may not be recovered if the appeal succeeds, thus rendering the appeal nugatory.
 5. Counsel for the Respondents on his part equally anchored his submissions on the decision in *Mwangi v Kenya Airways Ltd* [2003] KLR on factors to be considered in an application for leave to appeal out of time. Placing reliance on the decisions in *Monica Malel & Anor v R*, Eldoret Civil Appl. No. 246 of 2008, *Kenya Red Cross Society v Mbondo Ketheke Mwanja* [2019] eKLR and *M/s Portreitz Maternity v James Karanga Kabia*, Civil Appeal No. 63 of 1997 he submitted. that the Applicants have not satisfactorily explained their delay. Concerning the prayer for stay of execution pending the intended appeal counsel cited Civil Appeal No. E121 of 2021, *Shoko Molu Beka & Anor v Augustine Gwaro Mokamba* to assert that the Applicants have not demonstrated likelihood of substantial loss. He urged that the interests of the parties be balanced through a requirement for provision of security.
 6. The Court has considered the rival affidavit material and submissions made in respect of the motion. Starting with the prayer seeking stay of execution pending the intended appeal, it is evident on a plain reading of Order 42 Rule 6(1) of the *CPR* that an order to stay execution pending appeal presupposes the existence of an appeal. The filing of an appeal is a condition precedent to the exercise of this court's appellate jurisdiction under Order 42 Rule 6 (1) of the *Civil Procedure Rules*. Although the provision does not expressly say so, this can be inferred from the rule. Further, an analogy can be drawn from Order 42 Rule 6 (4) of the *Civil Procedure Rules* which states that an appeal is deemed filed in the



Court of Appeal when the notice of appeal has been given. Equally, Order 42 Rule 6 (6) of the [Civil Procedure Rules](#) states:

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.” (Emphasis added).

7. It would seem therefore that the invocation of the jurisdiction of this court under Order 42 Rule 6 (1) or 6 (6) of the [Civil Procedure Rules](#) must be preceded by the filing of an appeal, or compliance with the procedure for filing an appeal, in this case a memorandum of appeal (See Order 42 Rule 1 of the [Civil Procedure Rules](#)). Until the memorandum of appeal is filed, the court would be acting in vacuo by considering the Applicants prayer for stay of execution pending a non-existent appeal. The Court of Appeal in [Abubaker Mobamed Al-Amin v Firdaus Siwa Somo](#) [2018] eKLR while citing with approval the decision of the High Court in [Rosalindi Wanjiku Macharia v James Kiingati Kimani \(Suing as the Legal Representative of the Estate of Martin Muiruri \(Deceased\)\)](#) [2017] eKLR concurred and adopted the foregoing reasoning.
8. Earlier, the Court of Appeal in the case of [Equity Bank v Westlink MBO Limited](#) [2013] eKLR while commenting on Rule 5 (2) (b) of the [Court of Appeal Rules](#), whose wording is substantially similar to Order 42 Rule 6 (1) of the [Civil Procedure Rules](#), and on Order 42 Rule 6 (6) of [Civil Procedure Rules](#), left no room for doubt that an application for stay of execution pending appeal could only be entertained before it after the filing of an appeal or a Notice of Intended Appeal. (See also [Balozi Housing Co-operative Society Limited v Captain Francis E. K. Hinga](#) [2012] eKLR). Order 42 Rule 1;
 - “(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
 - (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.”
9. There is no provision for the filing of a notice of intended appeal in the High Court from a decision of the subordinate court. Order 42 Rule 1 of the [CPR](#) provides that an appeal to the High Court shall be in the form of a memorandum of appeal. In this case, an appeal is yet to be filed and there is therefore no basis upon which this court could exercise its appellate jurisdiction under the said provision in a miscellaneous matter. If the Applicant desired to seek an order to stay execution alongside the prayer for the late admission of their appeal, they ought to have first filed the memorandum of appeal in a proper appeal and the relevant application. In my considered view, the words that “an appeal may be admitted out of time” in Section 79G, appears to admit both retrospective and prospective applications. So that leave under the section may be sought before or after a memorandum of appeal is filed. However, it may be more prudent for a party who also seeks stay of execution in the same motion for leave to appeal out of time to have filed the memorandum of appeal in advance.
10. In the circumstances, the prayer seeking a stay of execution of the judgment and decree in Nairobi Milimani CMCC No. 7454 of 2019 pending hearing and determination of the intended appeal has no legal anchor and is consequently disallowed.
11. Turning now to the prayer seeking leave to appeal out of time, the power of the Court to enlarge time for filing an appeal out of time is expressly donated by Section 79G, as well as generally, by Section 95 of the [Civil Procedure Act](#). The deponent of the affidavits in support of the motion asserts that



delay in filing the appeal and motion was occasioned by the fact that the typed court judgment could only be obtained by her after the statutory period within which to lodge an appeal had lapsed. The Respondent countered the assertion by pointing out that there was no evidence to substantiate the Applicants' explanation.

12. Section 79G of the [Civil Procedure Act](#) 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.”

13. The principles governing leave to appeal out of time are settled. The successful applicant must demonstrate “good and sufficient cause” for not filing the appeal in time. In [Thuita Mwangi v Kenya Airways](#) [2003] e KLR, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in pari materia with Section 79G of the [Civil Procedure Act](#), reiterated its decision in [Mutiso v Mwangi](#) [1997] KLR 630 as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

14. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court's discretion in his favor.

15. The Supreme Court in the case of [Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others](#) [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The Court stated *inter alia* that:

“(T)he underlying principles a court should consider in exercise of such discretion include;

1. Extension of time is not a right of any 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 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.



7.”

See also *County Executive of Kisumu v County Government of Kisumu & 8 Others* [2017] eKLR.

16. The Respondents have not refuted the fact that the judgment of the lower court was delivered on 16th April 2021. The explanation given by the Applicants counsel may appear limp on the face it, as no evidence was tendered by way of substantiation. Nevertheless, as the present motion was presented to this court on 9th June 2021, the delay is approximately about one month which is not inordinate, despite failure by the Applicants’ counsel to disclose when she eventually obtained a copy of the judgment. That said it may be harsh to shut out a party from his right of appeal on account of the failures or laxity of his counsel that do not appear deliberate. The Respondent will not suffer prejudice that cannot be compensated through costs.
17. Concerning the arguability of the intended appeal, the Applicants have asserted that the appeal is meritorious with a high chance of success. Based on the language employed in *Mutiso v Mwangi* (supra) the requirement touching on the viability of the intended appeal, is neither mandatory nor stringently applied in an application of this nature. The draft memorandum of appeal attached to the Applicants’ affidavit discloses a challenge to quantum of damages and to my mind appears to raise issues serious enough to be worthy of the court’s consideration on appeal or that are prima facie arguable. The Court of Appeal in *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited* (2020) eKLR stated that such appeal:
- “ ... may not succeed as in law an arguable appeal need not succeed so long as it raises a bona fide issue for determination by the Court.”
18. In *Vishva’s case*, the Court emphasized the right of appeal in the following terms:
- “Turning to the request to allow the applicant to exercise his now undoubted constitutionally underpinned right of appeal, the position is.... crystalized in the case of *Richard Ncharpi Leiyagu v IEBC & 2 Others* (supra); *Mbaki & Others v Macharia & Another* [2005] 2EA 206; and the Tanzanian case of *Abbas Sherally & Another v Abdul Fazaiboy*, Civil Application No. 33 of 2003; for the holding *inter alia* that:
- (i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;
 - (ii) the right to be heard is a valued right; and
 - (iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice;...”
19. In the circumstances of this case, the court is persuaded that in order to give effect to the Applicants’ undisputed right of appeal, the prayer for leave to appeal out of time ought to be granted. Consequently, the motion dated 28th May 2021 is granted with costs to the Respondents in any event. The appeal is to be filed in 14 days of today’s date. Meanwhile, there will be an order to maintain the status quo for that period.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 19TH DAY OF MAY 2022



C.MEOLI

JUDGE

In the presence of:

For the Applicants: N/A

For the Respondents: N/A

C/A: Carol

