



**Mutea v M'ituru & 2 others (Miscellaneous Civil Application
E017 of 2022) [2022] KEHC 10777 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 10777 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS CIVIL APPLICATION E017 OF 2022**

EM MURIITHI, J

JULY 28, 2022

BETWEEN

DAVID MUTEA APPLICANT

AND

PETER MIRITI M'ITURU 1ST RESPONDENT

CORPORAL MATHENGE 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

RULING

[1] Before the Court is a Notice of Motion under certificate of urgency dated 4/4/2022 by the applicant, David Mutea, brought under Order 12 Rule 7, Order 22 Rule 22 & Order 51 of the [Civil Procedure Rules](#), Sections 1A, 3, 3A & 63(e) of the [Civil Procedure Act](#), seeking relief as follows:

- i. Spent
- ii. The honourable court be pleased to grant leave to the firm of M/S Kaberia Arimba & Company Advocates of P.o Box 392-60200 MERU to come on record for the applicant herein David Mutea.
- iii. This honourable court be pleased to extend the time limited to filing of the Memorandum of Appeal herein.
- iv. Pending interpartes hearing of this application there be a temporary stay of execution of the judgment and decree issued in Tigania Pmcc No. 3 Of 2018 on September 17, 2019 and any subsequent orders thereof upon such terms as are just for the interest of justice.



- v. Pending the hearing and determination of the intended Appeal there be a stay of execution of the judgment/decreed delivered/issued in Tigania Pmcc No. 3 of 2018 on September 17, 2019.
- vi. The costs of this application be provided for.

- [2] The grounds upon which the application is made are set out in the body of the application and supporting affidavit of the applicant sworn on 4/4/2022. He avers that the intended appeal arises from the judgment and decree of the Honourable Paul M. Wechuli (SRM) in Tigania Civil suit No. 3/18 delivered on 17/9/2019. He instructed the law firm of M/S Kiogora Mugambi & Company Advocates to act for him in the said suit. The said advocates endeavored to handle the matter and it was his sincere belief that they would diligently handle the same to finality. All along he knew that he was diligently represented only to learn that the case had finalized and judgment delivered against him on September 17, 2019. Once again his said advocates M/S Kiogora Mugambi & Company Advocates promised to take appropriate action, however he has since learnt that the same is due for execution any time, consequential thereof he has instructed the current advocates for further action. All along he has been in the belief that the said advocates filed an appeal until when he was served with a notice to show cause on 17/3/2022. His intended appeal is arguable and has very high chances of success. The fault and delay to file the appeal on time was not deliberate but due to his then advocates who did not file the same on time hence, he has appointed his present advocates to act for him.
- [3] The 1st respondent, Peter Miriti M'Ituru, opposed the application through his replying affidavit sworn on 13/4/2022. He avers that he filed Tigania PMCC No.3 of 2018 on 10/1/2018. Upon service with summons to enter appearance, the applicant entered appearance through the firm of Kiogora Mugambi & Company Advocates. The matter was listed for hearing on 11/6/2018 but the applicant and his counsel failed to attend court on the said date despite being aware, and the matter proceeded *ex parte*. The trial court on 17/9/2019 entered judgment in his favour. Thereafter, he served the applicant and his counsel with notice of entry of judgment as required by the law. Despite being aware of the judgment, the applicant did not make any effort to have it set aside till 7/10/2021 when he filed an application dated 7/10/2021 seeking to set aside the judgment, which was dismissed by the trial court on December 14, 2021. After the said dismissal, the applicant did not take any further step till 5/4/2022 when he filed this application after he was served with a notice to show cause why he should not be committed to civil jail in execution. The applicant has not given any sufficient cause as to why he had to wait for 2 years and 7 months to move the court for extension of time to file an appeal. The application is an afterthought meant to delay the conclusion of this matter. He avers that his evidence before the trial court was not challenged and the court was therefore satisfied that he had proved his case on a balance of probabilities. The intended appeal is therefore bereft of any merit and litigation must be brought to an end by dismissing it.

Determination

- [4] The singular issue for determination is whether the orders sought should be granted.
- [5] In order to succeed in his application for extension of time to appeal out of time, the applicant must prove to the satisfaction of the court that the delay is not inordinate, reasons for delay must be plausible, that the appeal is arguable and that the respondents will not be unduly prejudiced if the order is granted. See [*Nicholas Kiptoo Korir Arap Salt v Independent Electoral & Boundaries Commission & 7 others*](#) (2014) eKLR.
- [6] It is clear that the applicant filed an application dated 7/10/2021 seeking similar orders as the ones sought in the instant application. Although the 1st respondent contends that the said application was



dismissed by the trial court on December 14, 2021, this court cannot ascertain the same as the said ruling has not been exhibited, and therefore the court will proceed to determine the instant application purely on its merits.

- [7] This court notes the delay from the date of the impugned judgment on 17/9/2019 to 4/4/2022 when the application was filed. The delay is attributed to the mistake of the applicant's former counsel. The delay in filing the application, albeit being manifestly inordinate and inexcusable, the reason for the same has been attributed to the inaction of the applicant's former counsel. It is trite that an advocate's mistake should not be visited upon an innocent litigant, but it is not enough for the applicant to heap the blame entirely on his advocate. The applicant must demonstrate that he took tangible steps and exercised due diligence in following up on his case. This court respectfully agrees with *Phillip Chemwolo & another v Augustine Kubede* [1982-88] KLR 103 where it was stated thus:- "Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit."
- [8] On the arguability or otherwise of the intended appeal, this court notes that the grounds of appeal raised in the draft memorandum of appeal cannot be said to be frivolous, and for that reason, leave is hereby granted to the applicant to appeal out of time and the draft memorandum of appeal exhibited in his supporting affidavit is deemed as duly filed upon payment of court fees.

Stay of execution

- [9] The conditions to be met before stay is granted are provided by Order 42 Rule 6 (2) of the *Civil Procedure Rules* as follows: "No order for stay of execution shall be made under subrule (1) unless- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."
- [10] The applicant seems to have completely abandoned the prayer for stay as he does not say anything about it in his supporting affidavit. There is no demonstration of what substantial loss the applicant will suffer if stay is not granted. However, in the interest of justice, this court will grant the applicant stay on conditions to be set herein below.

Leave to come on record

- [11] The provisions of Order 9 Rule 9 of the *Civil Procedure Rules* make it mandatory that for any change of Advocates after judgment has been entered to be effected, there must be an order of the court upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate. In order not to impede the applicant's right to be represented by an Advocate of his choice, this court hereby grants the leave sought.

Orders

- [12] Accordingly, for the reasons set out above, the court makes the following orders:
- a. Leave of court is granted to the firm of M/S Kaberia Arimba & Company Advocates of P.O Box 392-60200 Meru to come on record for the applicant herein David Mutea.
 - b. The period of time limited to filing of the Memorandum of Appeal herein is extended on condition that the applicant to file and serve the Memorandum of Appeal is filed within Fourteen (14) days, and the Record of Appeal within 60 days from today.



- c. There shall be a stay of execution of the judgment and decree appealed from on condition that the entire decretal sum of Ksh.173,000 shall be deposited into an interest earning account in the joint names of the advocates for the parties within 14 days from today.
- d. In the event of default of any of the aforementioned conditions, the stay hereby granted shall lapse and be of no effect.

Order accordingly.

DATED AND DELIVERED THIS 28TH DAY OF JULY 2022.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Omari, Advocate for the petitioner/applicant.

Mr. Nkunja, Advocate for the Respondents.

