



**Eyasu v Gitonga (Suing as Legal Representative of the Estate of Omar Mugambi) (Miscellaneous Civil Application E057 of 2023) [2022] KEHC 18122 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 18122 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
MISCELLANEOUS CIVIL APPLICATION E057 OF 2023  
TW CHERERE, J  
JULY 27, 2022**

**BETWEEN**

**TINDI JOSEPH EYASU ..... APPLICANT**

**AND**

**DORCAS MIRIKO GITONGA (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF OMAR MUGAMBI) ..... RESPONDENT**

**RULING**

1. The notice of motion dated June 12, 2023 arises from the judgment (copy not annexed) arose in Maua CMCC E250 of 2021 which both parties agree was delivered on October 31, 2022 in favour of the Respondent as against the Applicant for the sum of Kes 3,775,996/-
2. Applicant seeks leave to appeal out of time for stay of execution of the judgment herein and the motion is supported by an affidavit sworn by Tindi Joseph Eyasu (Applicant) on June 12, 2023.
3. The motion is premised on the grounds among others that Applicant did not know about the delivery of the judgment until when his insurer wrote a letter dated February 1, 2023 informing his advocate concerning the judgment.
4. Respondent opposed the application vide a replying affidavit sworn on July 6, 2023 filed on July 11, 2023 mainly on the ground that the Applicant has been indolent and having approached the court over 6 months since the judgment was delivered his application ought to be dismissed.

**Analysis and determination**

5. I have considered the notice of motion in the light of affidavits on record and I have deduced the following issues for determination:
  1. Whether Applicants have made out a case for leave to appeal out of time



2. Whether have made out a case for stay of execution of the judgment delivered on October 31, 2022
6. The impugned judgment was delivered on October 31, 2022 and the instant application was filed on June 21, 2023 about 8 months after delivery of the impugned judgment.
7. Under Section 79G of *Civil Procedure Act*, an appeal from a subordinate court to the high court should be filed within a period of 30 days from the date of the decree or order appealed against provided that an appeal shall 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. Having approached about 8 months after the impugned judgment was delivered, the onus is on the Applicant to demonstrate that the delay was reasonable, justified and that the Respondent will not suffer any prejudice if the order is not granted.
9. The principles that govern the exercise of discretion in an application for extension of time are well known. In *Githuaka v Nduriri* [2004] 2 KLR at page 68 and in the oft-cited case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* Civil Application No Nai 255 of 1997 [1999] 2 EA 231 which was a decision of the Court of Appeal in which the judge stated 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 in general, the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted”.
10. In *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR, the Court of Appeal stated that:
 

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”
11. Although the Applicant in this matter has stated that he became aware of the judgment when his insurer wrote a letter dated February 1, 2023 informing his advocate concerning the judgment, the said letter was not annexed. The foregoing notwithstanding, Applicant has neither denied that he was aware of the judgment date nor explained why neither him nor his advocate attended court on the judgment date.
12. From the foregoing, I find that the Applicant has not explained to the satisfaction of the court why no appeal was filed in time.
13. Concerning stay of execution, I have considered the provisions of Order 42 (6) of the Civil Procedure Rules. An order for stay of execution pending appeal is discretionary and requires the court to weigh the interests of both parties to ensure that no party suffers prejudice that cannot be compensated by damages. (See *RWW v EKW* [2019] eKLR that was cited with approval in *HGE v SM* [2020] eKLR).
14. I have considered whether Applicant has demonstrated that he likely to suffer substantial loss if stay of execution is not granted. Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. Respondent has not demonstrated that Respondent is not in a position to refund the decretal sum in the event that the appeal succeeds.



15. The foregoing notwithstanding, driving a party from the seat of justice without giving them a chance to ventilate their case is a draconian measure which should be exercised cautiously.
16. Consequently, I find that no prejudice will be occasioned if the orders sought are granted on the following terms:
  1. Applicant is granted leave to appeal the judgment in Maua Cmcc E250 of 2021 out of time
  2. The Applicant shall file and serve the appeal within 45 days from today's date
  3. There shall be a stay of execution of judgment in Maua Cmcc E250 of 2021 pending the hearing and determination of the intended appeal upon the Applicant depositing Kes. 1,000,000/- with the court as security for the due performance of the decree
  4. Mention on October 30, 2023 to confirm compliance and for further orders
  5. Costs shall abide the outcome of the intended appeal

**DATED AT MERU THIS 27<sup>th</sup> DAY OF JULY 2023**

**WAMAE. T. W. CHERERE**

**JUDGE**

**Appearance**

Court Assistant - Morris Kinoti

For Applicant - Mr Ngugi for Joe Ngugi & Co. Advocates LLP

For Respondent -Mr. Ngugi for Gikonyo Ngugi & Co Advocates

