



**Mwaganu v Kamau & another (Miscellaneous Civil Application
E059 of 2021) [2022] KEHC 12659 (KLR) (29 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12659 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
MISCELLANEOUS CIVIL APPLICATION E059 OF 2021
K KIMONDO, J
AUGUST 29, 2022**

BETWEEN

LAWRENCE MBUGUA MWAGANU APPLICANT

AND

BEATRICE MUTHONI KAMAU & ANOTHER RESPONDENT

*(Intended appeal is against the judgment delivered on September 22,
2021 in Murang'a Chief Magistrates Civil Suit No 201 of 2017)*

RULING

1. The applicant's prayers are two-pronged: Firstly, for a temporary stay of execution of the decree pending the hearing and determination of this application; and, secondly, that the time for filing of the appeal be enlarged.
2. The notice of motion is dated November 4, 2021. The intended appeal is against the judgment delivered on September 22, 2021 in Murang'a Chief Magistrates Civil Suit No 201 of 2017. The decree is for damages arising out of a fatal road accident.
3. The essence of the motion is that unless leave is granted, the appeal will be lost. There are two depositions sworn by John Ngechu, learned counsel for the applicant. The first is dated November 4, 2021 and the supplementary one was sworn on December 10, 2021.
4. The deponent concedes that the matter was listed for judgment on the above date. However, he called a Ms Wamuyu from the respondent's law firm who in turn gave him a mobile phone number of their court clerk or agent, a Ms Maureen. The latter told him at about 2:22 p.m. that the judgment would be delivered on notice.



5. He was thus surprised to receive a letter on November 1, 2021 from the respondent's counsel demanding payment of the decretal sum. The following day, he obtained a copy of the judgment from the court which indicated that it was delivered in the absence of the parties.
6. The motion is opposed through a replying affidavit of Beatrice Muthoni Kamau sworn on December 3, 2021. In a nutshell, the respondents blame the applicant squarely for failing to attend court for the judgment or making any meaningful follow-up on the matter. The deponent further avers that there has been undue delay and that the intended appeal is hopeless.
7. The applicant filed written submissions on December 14, 2021 and a rejoinder on January 18, 2022. The respondents' submissions were lodged on December 16, 2021.
8. On July 19, 2022, I heard further arguments from learned counsel for all the parties.
9. I will commence with the prayer for extension of time. The legal parameters are well settled: This court has wide and unfettered discretion to extend time. The discretion must however be exercised judiciously. Some of the factors to be considered include the length of delay, the reasons for the delay, the nature of the intended appeal and whether the respondent will suffer prejudice if the court extends the time. See *Leo Sila Mutiso v Rose Mwangi*, Court of Appeal, Nairobi, Civil Application 251 of 1997 (unreported), *Nicholas Salat v IEBC & 7 others*, Supreme Court, Application 16 of 2014 [2014] eKLR.
10. I agree with the respondents that there was ill-explained delay between the delivery of the decree on September 22, 2021 and the 4th of November 2021 when this motion was presented. But if the applicant's word is to be taken, he only became aware of the decree on November 1, 2021 when he received the letter demanding payment.
11. But that has to be weighed against other facts. Counsel for the applicant may have communicated with Ms Wamuyu and Ms Maureen from the respondents' law firm. Doubt is removed by the mobile screenshots marked JMN3. Whereas the applicant may have been misled by Ms Maureen, the truth is that a judgment notice was issued; and, the cause list for September 22, 2021 (annexture JMN2) listed the matter for judgment.
12. There is also the curious matter of a letter authored by the applicant's law firm to their client stating that they "attended court on September 22, 2021 when the trial court indicated that the judgment would be delivered by email". The simple truth is that the applicant's counsel did not attend to the judgment. I am thus not impressed by the scapegoating.
13. So can justice still be done without jeopardizing the intended appeal? The annexed draft memorandum of appeal challenges the quantum of damages and specifically that the learned trial magistrate erred by making a global award of Kshs 6,000,000. There is an arguable appeal on whether the lower court applied the correct principles in assessing the damages for lost years. I must emphasize however that this does not mean that the intended appeal will succeed.
14. Secondly, I am inclined to pay heed to the overriding objective to do justice to the parties. See generally article 159 of the *Constitution*. See also *Harit Sheth v Shamas Charania*, Court of Appeal at Nairobi, Civil Application No 68 of 2008 [2010] eKLR.
15. I will reluctantly exercise my discretion under section 79G of the *Civil Procedure Act* and extend the time for filing of the appeal. The memorandum of appeal must now be filed and served within 14 days of today's date. However, owing to the conduct of the applicant and the delays that I have highlighted, the leave shall be conditional upon the applicant paying the respondents thrown away costs of Kshs 30,000 within 14 days of today's date. In default, the leave shall abate automatically.



16. Regarding the prayer for stay of execution, it was sought purely as a temporary relief “pending the hearing and determination of this application”. There is no further prayer for any relief pending the hearing of the intended appeal. The application having been heard interparties and now determined, that prayer is plainly redundant.
17. My final orders are thus as follows:
- a. That leave be and is hereby granted to the applicant to lodge an appeal out of time. The memorandum of appeal must be filed and served within 14 days of today’s date.
 - b. That the leave is conditional upon the applicant paying the respondents thrown away costs of Kshs 30,000 within 14 days of today’s date.
 - c. That in default of any of the conditions in (a) and (b) above, the leave shall automatically lapse and execution shall issue.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG’A THIS 29TH DAY OF AUGUST 2022.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Mr. Kibe holding brief for Mrs. Githae for the applicant instructed by C. W. Githae & Company Advocates.

Ms. Boore holding brief for for Ms. Wambui for the respondents instructed by Maina Rugoi & Company Advocates.

Ms. Susan Waiganjo, Court Assistant.

