



**Kihara v Omari & 3 others (Miscellaneous Civil Application  
E42 of 2021) [2022] KEHC 10977 (KLR) (5 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 10977 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
MISCELLANEOUS CIVIL APPLICATION E42 OF 2021  
MM KASANGO, J  
AUGUST 5, 2022**

**BETWEEN**

**JOSEPH NYAGAH KIHARA ..... APPLICANT**

**AND**

**RUKIA OSIR OMARI ..... 1<sup>ST</sup> RESPONDENT**

**NYACHIEO OBINAH ..... 2<sup>ND</sup> RESPONDENT**

**DAVID KIMANI KARANJA ..... 3<sup>RD</sup> RESPONDENT**

**JAMES KARANJA MWAURA ..... 4<sup>TH</sup> RESPONDENT**

*(Application for leave to file an appeal out of time and stay of execution of the decree and judgment of the Chief Magistrates' Court at Thika (Hon E. Riany, SRM) in Civil Suit No 590 of 2014 delivered on 3rd December 2020)*

**RULING**

1. Joseph Nyaagah Kihara, the applicant filed Notice of Motion application dated 17<sup>th</sup> February, 2021 for orders that:-Leave be granted to file an appeal out of time.The memorandum be deemed as duly filed and served.There be stay of execution of the trial court's judgment pending the hearing and determination of the appeal.
2. The application is opposed by the four respondents through the affidavit of Rukia Osir Omari the 1<sup>st</sup> respondent.



## Analysis

3. Section 79G of the *Civil Procedure Act* requires an appeal from the subordinate court be filed within 30 days of the date of judgment or order. That Section is in following terms:-

“79G. 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.” (underlining mine)

4. Although the court has discretion to extend time to admit an appeal out of time such a discretion is exercised within principles of law. This indeed, is what was stated in the case of *Paul Njage Njeru v Kariya K. Mugambi* (2021) eKLR as follows:-

“8. The discretion to extend time must be exercised within the established principles of the law and the factors to be considered when determining an application seeking leave to appeal out of time were discussed by the Court of Appeal in *Omar Shurie V Marian Rasbe Yafar* (Civil Application No. 107 of 2020) being: -

- i) the length of the delay
- ii) the reason for the delay
- iii) the chances of the appeal succeeding if the application is granted
- iv) the degree of prejudice to the respondent if the application is granted”

5. The length of delay in filing the appeal by the applicant was over two months. That in my view was inordinate delay. It needed to be explained.

6. The reason for delay in filing the appeal is captured in the following paragraphs of the applicant’s affidavit.

“That I am informed by our Advocates on record which information. I verily believe to be true that the Advocate namely Lawrence Jaoko who has since left the firm owing to an oversight failed to attend to the court on 3/12/2020 when the matter herein was slated for judgment.

That due to the non-attendance on the part of the advocate namely Lawrence Jaoko instructed by Masire & Mogusu Advocates on record for the applicant the terms of the judgment were not known to my advocates on record and as such they delayed in advising my insurer to wit UAP Insurance Company on the delivery of judgment on time to enable it the intended appeal within the stipulated time as the judgment in Thika CMCC No. 590 of 2014 which was delivered on 3<sup>rd</sup> December 2020 and my advocates became aware of the said judgment when they were served with the letter dated 5<sup>th</sup> January, 2021 by the 1<sup>st</sup>



respondent's advocates advising that judgment in Thika CMCC 590 of 2014 was delivered on 3<sup>rd</sup> December, 2020.

7. The first paragraph above without any supporting document states that an advocate called Lawrence Jaoko failed to attend the judgment of the trial court on 3<sup>rd</sup> December, 2020. The second paragraph above certainly does not make it clear whether Lawrence Jaoko was an employed associate of the Law Firm of Masire & Mogusu Advocates or he simply was holding their brief. On the whole, the two paragraphs above fail to state why, if indeed Lawrence Jaoko did not attend the judgment other advocates of that Law Firm of Masire & Mogusu did not attend or at least follow up to inquire the outcome of that judgment. The reason given for delaying to file the appeal is devoid of merit.
8. The applicant referred in the affidavit in support of the application to a draft memorandum of appeal, but there is no such document attached to the said affidavit in the court file. There is therefore no way of determining whether the proposed appeal has any chance of success.
9. The application for leave to appeal out of time and for stay of execution pending the appeal will, in my view prejudice the respondents who successfully obtained judgment. This is because the applicant in seeking leave to appeal out of time and stay of execution did not intimate that the respondents would be unable to refund the trial court's judgment out of the proposed appeal was successful. There is therefore no basis presented by the applicant why, there should be stay of execution of the trial court's decree.
10. I am also of the view that in order for the court to exercise its discretion in allowing an appeal to be admitted out of time as provided under Section 79G of the *Civil Procedure Act*, there must be of necessity, an appeal already filed and on record. It is such existing appeal that the court acts upon to permit a party to have it admitted out of time. A careful consideration of Section 79G reveals that the court is granted discretion to admit an appeal filed out of time.
11. In view of that discretion I cite with approval the holding of Justice Emukule in the case of *Gerald M'limbine v Joseph Kangangi* (2008) eKLR:-

“My understanding of the proviso to section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal, and at the same time seek the court's leave to have such an appeal admitted out of the statutory period of time. The proviso does not mean that an intending appellant first seeks the court's permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the court's process under section 79B which says:-

“Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree part of a decree or order appealed against he may notwithstanding section 79C, reject the appeal summarily”

It seems to me therefore that it is not open to the court to exercise its discretion under the proviso to section 79G of the *Civil Procedure Act* except upon the existence and perusal of the appeal to be “admitted” not to be “filed out of time.” Admission presupposes that the appeal has been filed and will be “admitted” for hearing after a judge has established under Section 79B that there is “sufficient” ground for interfering with the decree part of a decree or order appealed against.”



## **Disposal**

12. In the end, not only has the applicant failed to show sufficient cause for failing to file the appeal out of time, but the applicant's application is also misconceived in view of the statutory provision in Section 79G of the *Civil Procedure Act*.
13. The Notice of Motion dated 17<sup>th</sup> February, 2021 is dismissed with costs. The temporary stay of execution granted in respect to Thika CMCC No. 590 of 2014 is hereby vacated.
14. This file shall henceforth be closed.

**RULING DATED AND DELIVERED AT KIAMBU THIS 5<sup>TH</sup> DAY OF AUGUST, 2022.**

**MARY KASANGO**

**JUDGE**

Coram:

Court Assistant : Mourice

For the Applicant :- Nyamweya

For the Respondent:- N/A

**COURT**

Ruling delivered virtually.

**MARY KASANGO**

**JUDGE**

