



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kariuki v Ogoti (Civil Appeal 123 of 2018)  
[2022] KEHC 13130 (KLR) (28 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13130 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL 123 OF 2018  
JN KAMAU, J  
SEPTEMBER 28, 2022**

**BETWEEN**

**DANIEL KARIUKI ..... APPELLANT**

**AND**

**D. N OGOTI ..... RESPONDENT**

*(Being an Appeal from the Judgment and Decree of Hon R. Ndombi  
(SRM) in Kisumu in Chief Magistrate's Court Case No 173 of 2015)*

**RULING**

**INTRODUCTION**

1. In his Notice of Motion dated May 20, 2021 and filed on May 24, 2021, the Appellant prayed for leave to file an appeal out of time arising out of the judgment of Cherere J that was delivered on September 23, 2020 in the matter herein. He also sought an order for stay of execution of the said judgment and/or the decree herein and all consequential orders arising pending the hearing and determination of this appeal.
2. His said application was supported by the affidavit of Meshack Mutai, a Senior State Counsel at the Attorney General's Office that was sworn on May 20, 2021. He averred that since time to file an appeal against the aforementioned judgment had lapsed, it was necessary to seek leave to extend the same. He was apprehensive that the Respondent would proceed to execute the judgment against him at any time.
3. He contended that the delay in making his application was not inordinate but inexcusable. He was emphatic that his intended appeal was meritorious and raised serious issues of law which required adjudication and determination by this court (sic). He added that he stood to suffer irreparable loss if the orders sought were not granted and thus urged this court to allow his present application as it was in the interests of justice to do so.



4. In opposition to the said application, the Respondent filed a Replying Affidavit that he swore on June 8, 2021. He averred that the present application was frivolous, defective, an abuse of the court process and that the same had failed to demonstrate that it had plausible chances of success. He added that there had been inordinate delay in filing the same and that the same did not meet the threshold for the granting of the orders that had been sought.
5. It was his contention that he was entitled to enjoy the fruits of his judgment and being a man of substance, in gainful employment by the Judiciary and a Chief Magistrate in Nairobi, he had the means to refund the decretal sum in the event that the Appellant's intended appeal succeeded. He thus urged this court to dismiss the said application with costs.
6. He nonetheless asserted that in the event this court was inclined to grant the orders that had been sought herein, then the stay ought to be conditional to safeguard his interest.
7. The Appellant's Written Submissions were dated June 22, 2021 and filed on June 23, 2021 while those of the Respondent erroneously titled "Appellant/ Applicant's Written Submissions" thus causing confusion herein, were July 5, 2021 and filed on July 6, 2021.
8. This Ruling is based on the said Written Submissions which both parties relied upon in their entirety.

### Legal Analysis

9. In support of his application, the Appellant placed reliance on the case of *First American Bank of Kenya Ltd vs Gulab P. Shab & 2 Others* Nairobi [2002] 1 EA 65, which the Respondent also relied upon, in which the court set out the principles to be considered when exercising the discretion whether or not to enlarge time for appeal. It stated that the court would consider where that was an explanation for the delay, if any, whether the matter was arguable and whether or not the Respondent could adequately be compensated by costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.
10. He argued that the delay in filing the appeal was not inordinate due to the fact that movement of persons was greatly hampered by the Covid-19 pandemic.
11. He submitted that the Learned Judge erred on several issues and that the particulars of defamation were not pleaded. In this respect, he relied on the case of *Kenya Tea Growers Association & Another vs Kenya Planters & Agricultural Workers Union* Civil Application Nairobi No 72 of 2001 wherein the court held that an applicant did not need to show that his or her appeal was likely to succeed but that it was enough for him or her to show that there was at least one issue upon which the court should pronounce its decision.
12. He pointed out that he was sued in his personal capacity and not in his capacity as a public officer and that the Attorney General should have been a party to the case at the Trial Court in line with the *Government Proceedings Act*. In this regard, he relied on the case of *Martha Karua vs Radio Africa Ltd t/a Kiss F.M Station & 2 Others* [2006] eKLR where it was held that in any case that a public officer was sued, the Attorney General was to be enjoined as a party.
13. He invoked Order 42 Rule 6(2) of the *Civil Procedure Rules* 2010 and argued that he stood to suffer substantial loss from the judgment of the court as he had been sued in his personal capacity and not as a public officer. He pointed out that he had been served with a Party and Party Bill of costs dated April 12, 2021 and a Taxation Notice dated April 16, 2021 and therefore stood to suffer irreparable loss if he was compelled to pay the said amount in individual capacity as his personal property would be attached.



14. In that respect, he relied on the case of *Visbram Ravji Halai vs Thornton & Turpin* [1990] KLR 365 where it was held that whereas the power of the Court of Appeal to grant a stay pending appeal was unfettered, the High Court's jurisdiction to do so under Order 41 (sic) Rule 6 of the *Civil Procedure Rules* was fettered by three (3) conditions namely, demonstration of a sufficient cause, satisfaction of a substantial loss, the furnishing of security and the fact that the application had to have been made without unreasonable delay.
15. On his part, the Respondent invoked Section 79G of the *Civil Procedure Act* and argued that an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal had to show that he or she had a good cause for doing so as was held in the case of *Feroz Begum Qureshi & Another vs Maganbhai Patel and others* [1964] EA 546.
16. He further referred this court to the case of *Daphne Parry vs Murray Alexander Carson* [1963] EA 546 where it was held that the provision for extension of time requiring "sufficient reason" should receive a liberal construction so as to advance substantial justice but that if an appellant had a good case on merits but was out of time and had no valid excuse for the delay, the court must guard itself from being swayed by sympathy and disallow an application for extension of time.
17. He also placed reliance on the case of *Dilpack Kenya Limited vs William Muthama Kitonyi* [2018] eKLR where the court held that appeals ought to be filed within the prescribed timelines with extension of time being given under very special circumstances.
18. He also referred to the case of *Chairman Kenya National Union of Teachers & Another vs Henry Inyangala & 2 Others* [2018] eKLR where the Court of Appeal held that a delay of one (1) year three (3) months was inordinate delay and thus dismissed the applicant's application seeking to file appeal out of time.
19. He submitted that the eight months (8) delay in filing the present application was inordinate and had not been explained at all and thus urged this court to dismiss the same.
20. In support of his argument that the Appellant had not met the threshold of being granted an order for stay of execution pending appeal, he cited the cases of *Fidelity Shield Insurance Co Ltd vs George Olola & 2 Others* [2017] eKLR, *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2002] eKLR and *Kenya Shell Limited vs Kibiru* [1986] KLR.
21. He pointed out that the Appellant herein had been sued in his personal capacity as the suit involved defamation against him and asked this court to consider the case of *Absalom Aora vs Turbo Transporters* [2013] eKLR where the court stated that the discretionary relief of stay of execution pending appeal was designed to balance the two competing rights of parties involved.
22. He submitted that the entire decretal sum ought to be deposited in an interest earning account in the joint names of the advocates on record within a stipulated time in default thereof, the Appellant's present application be deemed to be dismissed and he be at liberty to execute. He relied on Section 27 of the *Civil Procedure Act* and urged the court to order that costs be borne by the Appellant herein.
23. In addition to the cases that were cited by the parties herein, the guiding principles to be met in an application seeking leave of the court to file an appeal out of time/extension of time were laid out in the case of *Thuita Mwangi vs Kenya Airways Limited* [2003] eKLR and reaffirmed in the case of *Growth Africa (K) Limited & Another vs Charles Muange Milu* [2019] eKLR.
24. In exercising its discretion to allow an application seeking extension to file an appeal out of time, a court has to be satisfied that the omission to file the same within time was excusable. In other words, there must be a plausible explanation for the delay in filing the appeal.



25. Although this court found that the Appellant did not conduct himself diligently, such failure was not an entirely unexpected omission as the Covid-19 pandemic caused a lot of court activities in 2020 to stall. That could therefore be deemed to have been a plausible, excusable and satisfactory explanation for the delay in filing the appeal on time.
26. It was apparent from the court record that the decision the Appellant intended to appeal against was delivered on September 23, 2020. The present application was filed on May 24, 2021. Eight (8) months had since passed. As this court had found the reason for the delay that was advanced by the Appellant to have been excusable, this court thus came to the firm conclusion that the period of eight (8) months was not inordinate and/or unreasonable.
27. The court perused the draft Memorandum of Appeal that was annexed to present application but did not consider the merits or otherwise of the grounds of appeal that were set out therein as that was strictly under the purview of the Court of Appeal. All that the court was expected to do was to consider if an applicant had demonstrated that it has an arguable ground of appeal which in this case the Applicant herein demonstrated.
28. In considering whether or not to grant an order for extension to do any act, the court was also required to consider if the opposing side would suffer any prejudice if extension of time was granted. This court was not satisfied that the Respondent would suffer any prejudice if the Appellant exercised its constitutional right of appeal. If there was any prejudice, then he did not demonstrate the same.
29. Indeed, every party has a right to access any court or tribunal to have its dispute heard and determined in accordance with Article 50(1) of *the Constitution* of Kenya, 2010. Even where a party delays in doing an act, there is always a provision that would give it reprieve to seek justice. Notably, Order 50 Rule 6 of *Civil Procedure Rules*, 2010 empowers the court to enlarge the time to do a particular act.
30. Order 50 Rule 6 of *Civil Procedure Rules* stipulates as follows:-

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise”.
31. Taking all the factors hereinabove into account, it was the considered view of this court that the Appellant ought to be given an opportunity to have his Appeal heard on merit as he would suffer great prejudice if he was denied an opportunity to fully present his Appeal to be heard on merit.
32. Turning to the order of stay of execution pending appeal, the present application was brought under Order 42 Rule 6 of the *Civil Procedure Rules* which empowers a court to stay execution of its own orders or an appeal court to stay orders of the decision which was intended to be appealed from.
33. Under the said Order 42 Rule 6 of the *Civil Procedure Rules*, an applicant had to demonstrate the following:-
  - a. That substantial loss may result unless the order is made.
  - b. That the application has been made without unreasonable delay.



- c. Such security as the court orders for the due performance of the decree has been given by the applicant.
34. The three (3) conditions for the grant of an order for stay of execution must be met simultaneously as they are conjunctive and not disjunctive.
35. Notably, both parties were in agreement on the conditions that an applicant had to meet before being granted an order for stay of execution pending appeal.
36. Even though the Respondent demonstrated that he was not a man of straw and would be able to refund the Appellant in the event the Appellant paid him the said amount and he was successful on appeal, this court found it prudent to order that the entire costs be deposited in a joint interest account in the joint names of advocates of both parties.
37. Notably, although the amount of the decretal sum may not have been colossal and the Respondent may very well be able to refund the monies to the Appellant if he was successful on appeal, the rigours of recovering the said amount could amount to substantial loss. This very court made a similar finding in the case of *Dr G. N. Muema t/a Mt. View Maternity & Nursing Home vs Miriam Maalim Bisbar & Another* [2018] eKLR. This court was therefore satisfied that the Appellant had demonstrated the first condition for the granting of an order for stay of execution.
38. This court had found and held that the Appellant demonstrated that he filed the present application without undue delay. He had thus satisfied the second condition for the granting of an order for stay of execution.
39. This court also had to be satisfied that the Appellant had provided security for the due performance of the decree so as to satisfy the third condition for being granted an order for stay of execution pending appeal.
40. As the decision the Appellant wished to appeal from was delivered by a court of equal and competent jurisdiction such as this one, this court would have been more inclined to have granted the Appellant a temporary stay of execution for a short period pending his filing of a formal application at the Court of Appeal under Rule 5(2)(b) of the *Court of Appeal Rules*, 2010.
41. However, as the Respondent herein was not principally opposed to the present application being allowed provided that the Appellant was directed to deposit the entire decretal sum in a joint interest earning account in the names of his advocate and those of the Appellant herein, this court found the same to have been sufficient security for the due performance of the decree herein by the Appellant herein.
42. Balancing the Appellant's right of being heard on appeal and the Respondent's right to enjoy his fruits of judgment, this court was persuaded that there was merit in granting an order for stay of execution of the decision of the Learned Judge so that the Appellant's Appeal could be heard on merit at the Court of Appeal.

### **Disposition**

43. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated May 20, 2021 and filed on May 24, 2021 was merited and the same be and is hereby allowed in terms of Prayer No (2), (3) and (4) therein on the following conditions:-



1. That the Appellant file and serve its Record of Appeal within sixty (60) days from the date of the date of this Ruling to give time for typing of proceedings failing which the Respondent will be at liberty to take such further action to safeguard his interests.
2. That there shall be a stay of execution of the Judgment of the High Court of Kenya at Kisumu Civil Appeal No 123 of 2018 *Daniel Kariuki vs D. N Ogoti* delivered by Cherere J on September 23, 2020 pending the hearing and determination of the Appellant's intended appeal on condition that the Appellant shall deposit in a joint interest earning account the sum of Kshs 1,500,000/= within sixty (60) days from the date of this Ruling.
3. For the avoidance of doubt, in the event the Appellant shall default on Paragraph 43(1), the conditional stay of execution shall automatically lapse.
4. Costs of the application herein will be in the cause.

44. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2022**

**J. KAMAU**

**JUDGE**

