



REPUBLIC OF KENYA



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**Gitari v Mwangi (Miscellaneous Application 96 of 2022)
[2022] KEHC 13149 (KLR) (26 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13149 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS APPLICATION 96 OF 2022
GV ODUNGA, J
SEPTEMBER 26, 2022**

BETWEEN

PATRICK MUGAMBI GITARI PLAINTIFF

AND

PAUL KAMOTHO MWANGI DEFENDANT

(Being an application for Stay of Execution and Leave to file Memorandum of Appeal out of time in an intended Appeal of the Ruling delivered on 17th February 2022 by Hon Bernard Kasavuli (PM) in Chief Magistrate's Civil Suit No. E229 of 2021, Mavoko in respect of an application for setting aside of Ex-parte Default Judgment entered on 18th June 2021 and grant of leave to defend suit)

RULING

1. By a Motion dated on 12th July, 2022, the applicants herein seek orders:
 1. That this application be certified urgent and service of the same upon the respondent be dispensed with in the first instance due to reason of urgency.
 2. That this Honourable Court be pleased to grant leave to the Law Firm of Messrs Kabuthia Kamau & Ass. Advocates to come on record for the Applicant.
 3. That this Honourable Court be pleased to grant leave and/or allow the Applicant to file a Memorandum and record of appeal out of time.
 4. That this Honourable Court be pleased to issue a temporary stay of execution of the proclamation of attachment of movable goods issued against the Applicant and all consequential orders issued therewith pursuant to the ex-parte Default Judgment issued in Chief Magistrate's Civil Suit No. E229 of 2021, Mavoko pending the hearing and determination of the Applicant's intended appeal.



5. That costs of this application be provided for.
2. The application was supported by an affidavit sworn by the Applicant, Patrick Mugambi Gitari, on 12th July, 2022.
3. According to him, the Lower Court made a ruling on 17th February 2022, dismissing his application dated 4th October 2021 seeking for the setting aside of the Ex-parte default judgment entered against him. Being dissatisfied with that decision the Applicant instructed his former firm of Advocates to seek a stay of execution pending appeal and lodge an appeal. However, the former firm of Advocates failed to lodge the appeal in spite of assuring him that the appeal had been filed.
4. On 4th July 2022, was however surprised and shocked when his motor vehicle was confiscated by auctioneers and he was issued with a Notification of Sale of Movable Goods by Betabase Auctioneers. Upon perusal of the court file he found out that his former advocates failed to lodge the Memorandum of Appeal within the prescribed period. It was then that he sensed some mistrust with his said advocates for misleading and misinforming him and instructed the firm of Messrs Kabuthia Kamau & Ass. Advocates, to act hastily and file Memorandum of Appeal.
5. Based on legal advice, the Applicant averred that the mistakes/omissions of Counsel should not be visited upon an innocent litigant. Should the orders not be granted, he averred that he stands to suffer irreparable damage. On the other hand, the Respondent will suffer no prejudice if the orders sought herein are granted.
6. It was therefore his case that it is only fair and in the wider interests of justice that the orders sought be granted since he has a viable/meritorious appeal with reasonable chances of success.
7. In opposition to the application, the Respondent, Paul Kamothe Mwangi, swore a replying affidavit in which he averred that the applicant is trying to delay execution proceedings of the lower court.
8. According to him, the Applicant has not given a reasonable explanation for the inordinate delay in filing the appeal and this application is an afterthought only meant to deny him enjoyment of fruits of the lower court decision. It was his view that no plausible explanation was given as to why the Applicant has taken over One hundred and Twenty (120) days to file this application to seek to file an appeal out of time.
9. In the Respondent's opinion, the intended appeal is not an arguable one and ought to have been filed 14 days from the date of the lower court decision. He deposed that the Applicant was represented by the firm of Mwanzia Kyule & Associates Advocates in the lower court who were not been served with this application contrary to Order 9 rule 9 and Rule 10 of the *Civil Procedure Rules* or the advocates should file consent between the outgoing and the incoming advocate which has not been done. It was averred that under the said provisions, it is clear that the question of change of Advocates should be determined first which cannot be done as the previous advocates is not aware of the current application for he did not appear in court to show his knowledge of the existence of this Application.
10. It was disclosed that the proclaimed motor vehicle has already been sold and the proceeds have not settled the decretal amount awarded by the lower court. In his view, the Applicants prayer for stay of execution of the lower courts judgment is a way of denying him the fruits of the judgment.
11. It was therefore the Respondent's case that the Application as drawn is entirely incurably defective, misconceived, frivolous, vexatious and incompetent and ought to be dismissed and struck out in limine with costs to the Respondent.



12. In his submissions the Applicant reiterated the depositions in the supporting affidavit and relied on *Leo Sila Mutiso vs. Rose Hell En Wangari Mwangi C.* App Nai 255/97 (UR), for the principles guiding extension of time to file an appeal. According to the applicant, it is clear that the Applicant showed significant interest in his case even though he was being represented by an advocate. He made numerous personal follow-ups both in the advocate's office and in the court registry to determine the status of his case. It is this vigilance and vigor that allowed him to discover missteps and omissions by the former advocates. Regretfully, the advocate was able to mislead the Applicant who is a mere civil servant and is not knowledgeable in legal matters.
13. It was therefore submitted that the mistake of counsel should not be visited on the innocent litigant and the decision of the Court of Appeal in *Kenya Industrial Estates Limited vs Samuel Sand & Another* (2008) eKLR was cited in support thereof. According to the Applicant, the length of the delay in filing this application is not excessive or inordinate and the Court was invited to adopt the Court of Appeal reasoning in *Edith Gichugu Koine vs. Stephen Njagi Thoitthi* [2014] eKLR.
14. According to the Applicant, the intended appeal is meritorious, raises weighty issues and has an overwhelming chance of success based on the attached draft Memorandum of Appeal which highlights numerous grounds of appeal and arguable points. For instance, it was submitted, the learned magistrate erred in law in fact by shifting the burden of proof to the Appellant instead of the Respondent. The Court was therefore urged to adopt the Supreme Court's reasoning in *Chris Munga N. Bichage vs. Richard Nyagaka Tongi & 2 Others* [2013] eKLR, where the court found that in law it is not necessary that there be more than a certain number of arguable issues for the court to find that the appeal filed or the intended appeal is arguable and that one arguable point suffices for that finding.
15. As regards prejudice, it was submitted that the respondent will not suffer any prejudice if the application is allowed since the respondent has already proclaimed and taken possession of one of the Applicant's Motor vehicles. In any case, the respondent has not indicated any prejudices he is likely to experience.

Determination

16. I have considered the application, the supporting affidavit, the grounds of opposition and the submissions filed as well as the authorities relied upon.
17. Section 79G of the *Civil Procedure Act* provides that:

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.
18. It is clear therefore that the decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion and just like any other exercise of discretion This being an exercise of judicial discretion, like any other judicial discretion must on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. One of those judicial principles expressly provided for in the above provision is that the applicant must satisfy the Court that he has a good cause for doing so, since as



was held in *Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others* [1964] EA 633, there is no difference between the words “sufficient cause” and “good cause”. It was therefore held in *Daphne Parry vs. Murray Alexander Carson* [1963] EA 546 that though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.

19. As to the principles to be considered in exercising the discretion whether or not to enlarge time in *First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others Nairobi (Milimani)* HCCC NO. 2255 of 2000 [2002] 1 EA 65 the Court set out the factors to be considered in deciding whether or not to grant such an application and these are (i). the explanation if any for the delay; (ii). the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; (iii). Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.
20. Similarly, in *Leo Sila Mutiso vs. Helen Wangari Mwangi* Civil Application No. Nai. 255 of 1997 [1999] 2 EA 231 the Court of Appeal set out the factors to be considered in deciding whether or not to grant such an application and these are first, the length of the delay; secondly the reason for the explanation if any for the delay; thirdly, (possibly), the chances of the appeal succeeding if the application is granted i.e. the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; and fourthly, the degree of prejudice to the respondent if the application is granted and whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.
21. In this case the Applicant contended that the delay in filing the appeal was due to a mistake of their counsel who was instructed to file the said appeal but did not do so within the prescribed time. It is clear that a mistake of counsel may, if genuine, be a basis for extension of time. As was held in *Shital Bimal Shah & 2 Others vs. Akiba Bank Limited* Civil Appeal (Application) No. 159 of 2005 [2006] 2 EA 323:

“An error of judgement on the part of a legal adviser may help build up sufficient reason under rule 4 to induce the court to exercise its discretion to extend time for the doing of any act under the Rules of the Court. Mistakes of counsel come in all shapes and sizes but some have been rejected by the Court such as total inaction by counsel disguised as a mistake. A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by a senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictate.”

22. In this case, it is contended that the decision sought to be appealed against was delivered on 17th February, 2022. The applicant had 30 days within which to file the appeal. Consequently, the appeal ought to have been filed somewhere around 18th March, 2022. This application was filed on 14th July, 2022, some 4 months later. In light of the reason given, being that of the inaction on the part of legal



counsel, though the delay is inordinate, it is excusable. I associate myself with the position adopted in *Edith Gichugu Koine vs. Stephen Njagi Thoithi* [2014] eKLR, where the Court stated that:

“I have taken into account that the period for delay is 2 months and 8 days. With great reluctance, noting that the applicant’s explanation for delay is not convincing, I find the delay is not inordinate taking into account that a Notice of Appeal had been filed. I emphasize the fact that the respondent did not indicate the nature of prejudice, if any that he stands to suffer if the present application is granted. I have considered the overriding objective principles that bind this Court and that the 2010 Constitution of Kenya requires this Court to administer justice without undue regard to technicalities... for these reasons, I hereby exercise my discretion in favour of granting leave to file a fresh Notice of Appeal and record of appeal out of time.”

23. I also adopt the position of Aburili, J in *Edward Kamau & Another vs. Hannah Mukui Gichuki & Another* [2015] eKLR that:

“The right of appeal, it has been held time and again, is a Constitutional right which is the cornerstone of the rule of law. To deny a party that right, would in essence be denying them access to justice which is guaranteed under Article 48 of *the Constitution* and also a denial of a right to a fair hearing guaranteed under Article 50 (1) of *the Constitution* which latter right cannot be limited under Article 25 of the said Constitution. In my view, it has not been shown that the intended appeal is frivolous or a sham and therefore it is only fair and just that the applicants be accorded an opportunity to ventilate their grievances where they are aggrieved by a decision of the lower court, to challenge it before a superior court.”

24. In the premises the application succeeds and the applicant is hereby granted leave to file their appeal out of time. The said memorandum of appeal to be filed and served within 10 days from the delivery of this ruling and in default thereof, this application shall stand dismissed with costs.

25. As regards stay sought in prayer 4 of the Motion, the same was not addressed hence there is no material on record on the basis of which it can be granted. Accordingly, I decline to grant the same.

26. The costs of the application are awarded to the respondent.

27. It is so ordered.

G V ODUNGA

JUDGE

RULING READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 26TH DAY OF SEPTEMBER, 2022

M W MUIGAI

JUDGE

Delivered the presence of:

