



**King'oo & another v Mutua (suing as the son and personal representative of the estate of SAMUEL MUTUA MWANIA (DECEASED).) (Miscellaneous Application E215 of 2021) [2022] KEHC 13079 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13079 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
MISCELLANEOUS APPLICATION E215 OF 2021  
MM KASANGO, J  
SEPTEMBER 22, 2022**

**BETWEEN**

**ANCENT MUASA KING'OO ..... 1<sup>ST</sup> APPLICANT**

**EDWARD MIRITI CHABARI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**DOMINIC MUTISYA MUTUA ..... RESPONDENT**

**SUING AS THE SON AND PERSONAL REPRESENTATIVE OF THE ESTATE OF SAMUEL MUTUA MWANIA (DECEASED).**

*(Being an application for extension of time to lodge an appeal out of time against the judgment of Thika Chief Magistrates Court (Hon. MW Wanjala, SRM) in Civil Case No. 400 of 2019 on 22nd July, 2021)*

**RULING**

1. The appellants have moved this court by a notice of motion application dated October 5, 2021. It is an application for leave to file an appeal out of time and stay of execution of the trial court's judgment.
2. The application is supported by an affidavit of Kelvin Ngure a deputy claim's manager of Direct Assurance Company Limited, the insurer of the appellants. By that affidavit, he deponed that the appellants were represented by the law firm of Kairu & McCourt Advocates during the trial; that he was informed by the advocates on record that judgment was entered against the appellants on July 22, 2021; and the appellants were dissatisfied with that judgment and thereafter, instructed the law



firm Kimondo Gachoka & Company Advocates to take over from the previous advocates. He further depones:-

“That I am duly informed by our advocates that the time within which the judgment dated July 22, 2021 can be appealed by statute has since lapsed.

That I am duly informed by our advocates that the applicants and/or their counsel were not aware of the date of delivery of judgment as the respondent and/or his advocate never served the judgment notice upon the applicant.

That I am duly informed that the applicant’s advocate only became aware of the judgment they were served with the letter demanding payment of judgment ...”

3. The application is opposed by the respondents who filed grounds of opposition. Those grounds of opposition term the application as frivolous, incompetent and vexatious; that the trial court’s judgment was entered 3 months before the present application was filed and the respondents termed the application as an afterthought.

### **Discussion And Determination**

4. The Supreme Court has had occasion to give guiding principle in application for extension of time which principles were discussed in another Supreme Court case namely, *Mombasa County Government v Kenya Ferry Services & Another* [2019] eKLR. This is what the Supreme Court stated:-

“25. Concerning extension of time, this court has already set the guiding principles in the Nick Salat case as follows:-

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant.

“... we derive the following as the underlying principles that a court should consider in exercising such discretion:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the court;
2. A party who seeks extension of time has the burden of laying a basis, to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;
4. Where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the court;
5. Whether there will be any prejudice suffered by the respondents, if extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time” [emphasis supplied]



5. The appellants bore the burden of laying the basis for seeking extension to the satisfaction of the court. The explanation given by the appellants has left a lot of gaps. The appellants begin by stating they were representing by Kairu & McCourt Advocates during the trial. They decided to change their advocates after judgment of the trial court. That on them being aggrieved by the judgment, they instructed the law firm of Kimondo Gachoka to take over the matter.
6. The above deposition means that the appellants were aware of the terms of the trial court judgment by the time they instructed the new advocates Kimondo Gachoka Advocates. The gap which I referred to is that the appellants failed to state when they instructed their new advocate, because from the deposition of the appellants the time they instructed their new advocates they were aggrieved with the trial court's judgment. There is therefore no explanation of the cause of delay in filing the present appeal.
7. The appellants further contradicted themselves by first saying they were aggrieved by the trial court's judgment and therefore instructed their advocates to file an appeal and with the same breath stated that they were unaware of the date of judgment. The appellants it would seem after the judgment was delivered went to sleep. They then approach this court as though they have a right to get extension to file the appeal out of time. I am inclined to accept what the respondents stated in their opposition to the application: that the appellant moved to this court to frustrate the execution proceeding they had undertaken. The application fails to meet the threshold set by the Supreme Court.
8. On my perusal of the draft memorandum, I noticed the proposed appeal is against a different case other than the one the subject of the application. The memorandum shows the proposed appeal is against Thika Chief Magistrate's Court Civil Case No 173 of 2019. In the present application the appellants seek stay of execution in respect of Thika Chief Magistrate's Court Civil Case No 400 of 2019. There is definitely disconnect between the application and the draft memorandum of appeal.
9. The application does fail.

### **Disposition**

10. The notice of motion dated October 5, 2021 is dismissed with costs. The interim stay of execution is hereby vacated.
11. This file shall henceforth be closed.

**RULING DATED AND DELIVERED AT KIAMBU THIS 22ND DAY OF SEPTEMBER, 2022.**

**MARY KASANGO**

**JUDGE**

**Coram:**

Court Assistant : Mourice

For applicant : - N/A

For Respondent : - Miss Babo HB Mutunga

RULING delivered virtually.

**MARY KASANGO**

**JUDGE**

