



**Masara v Aloo (Miscellaneous Civil Application E146 of 2021)
[2022] KEHC 14215 (KLR) (25 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14215 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION E146 OF 2021
RE ABURILI, J
OCTOBER 25, 2022**

BETWEEN

INNOCENT MASARA APPLICANT

AND

MAURICE ONYANGO ALOO RESPONDENT

RULING

1. The applicant's Notice of Motion is dated 3/11/2021. It seeks that the applicant be granted leave to file his appeal out of time and meanwhile pending the said intended appeal there be stay of execution of the lower court's judgment delivered on 20th September, 2021 by Hon. J. Wambilyanga in Kisumu Chief Magistrate's Court Civil Suit No. 37 of 2016.
2. The application is supported by the sworn affidavit of Innocent Masara the applicant herein on 3rd November, 2021 and further supported by the grounds on the face of it.
3. According to the applicant, following the delivery of judgment in the said matter on 20th September, 2021, a request for proceedings and judgment was filed on 22nd September, 2021 vide letter dated 20th September 2021 as annexed thereto. That although the trial magistrate granted 30 days stay of execution of decree pending the intended appeal, the said stay had since lapsed and that the applicant had instructed another law firm to lodge an appeal on his behalf but that the appeal was never lodged. That it is in the interest of justice that leave be granted and that the applicant is ready to give security for the due performance of the decree; that the application herein had been made timeously and that the respondent will not suffer any prejudice if the application is allowed, which prejudice cannot be compensated with costs.
4. Opposing the application, the Respondent filed a replying affidavit sworn by his advocate Mr. Dennis Odero Okoyo on 26th November, 2021 deposing in contention that the application is not deserving as the judgment in the lower court was delivered in the presence of both parties and their advocates



upon which 30 days stay was granted; that the applicant did not appeal within 14 days as provided for in law and that no reasons were given for the delay; that no evidence has been provided to show that the applicant instructed another advocate to file the appeal or that, that other advocate failed to do so; that the applicant had an advocate on record who should have advised him and that therefore this application is a delaying tactic, is misconceived, incompetent, devoid of merit and an abuse of the court process hence it should be dismissed.

5. The application was canvassed by way of written submissions. The applicant's submissions were filed on 21/3/2022 while the Respondent's submissions were filed on 29th March, 2022.

The Applicants Submissions

6. It was submitted for the applicant that the under Order 42 Rule 6 of the Civil Procedure Rules, as buttressed by the decision in Butt v Rent Restriction Tribunal [1982]KLR, it is in the discretion of the court to grant stay of execution which discretion is exercised in a way to prevent an appeal, if successful, should not be rendered nugatory. Further, Counsel for the applicant cited the conditions for grant of stay as espoused in Order 42 Rule 6 of the Civil Procedure Rules which conditions are commonplace to this court.
7. On whether to grant leave to appeal out of time, Counsel for the applicant relied on Section 79G of the Civil Procedure Act and the principles or factors to be taken into account in applications for leave to appeal out of time as set out in the case of Edith Gichungu Koine v Stephen Njagi Thoiti [[2014]eKLR being- the period of delay, the degree of prejudice to the respondent if the application is granted and whether the matter raises issues of public interest. Further reliance was placed on Kamlesh Patni v DPP and 3 others [2015]e KLR where the Court of Appeal stated inter alia that courts exist to do justice hence their decisions must be redolent of fairness and reflect the best interests of the people whom the law was intended to serve. The applicant's counsel also cited Article 50 (1) of the Constitution which guarantees every person the right to have any dispute which can be resolved by application of the law decided in a fair and public hearing before a court or independent and impartial tribunal.
8. It was further submitted that the applicant was ready and willing to provide security for the due performance of decree as stipulated in Order 42 Rule (6) (2)(b) of the Civil Procedure Rules. He relied on two decisions to that effect. On costs, counsel relied on section 27 of the Civil Procedure Act and urged this court to order that costs be in the course.

The Respondent's Submissions

9. Opposing the application, the Respondent's counsel submitted that the prayer for stay of execution of decree was not available to the applicant because the judgment which dismissed the suit was a negative judgment capable of being stayed. He relied on this court's decision in Jubilee Insurance Company Limited v Judith Akoth Warinda [2021]e KLR and urged this court to decline the prayer for stay.
10. On whether leave should be granted to the applicant to appeal out of time, the respondent's counsel cited section 79G of the Civil Procedure Act and relied on the Supreme Court decision in County Executive of Kisumu v County Government of Kisumu [2017]e KLR which laid down the conditions necessary for the grant of leave to appeal out of time. Counsel argued that the delay in filing the appeal had not been explained and that the allegation that the applicant instructed another firm to file the appeal on his behalf was not supported at all hence this court should not tolerate his indolence. Relying on Donald O. Raballa v Judicial Service Commission, [2018] e KLR Counsel argued that statutory timelines must be met and where there is delay, such delay must be sufficiently explained unlike in this



case where no explanation had been given for the delay. The Supreme Court decision in Nicholas Salat was also cited.

11. On costs, counsel for the respondent urged the court to award the respondent costs which follow the event.

DETERMINATION

12. I have considered the application for stay of execution pending appeal and for leave to appeal out of time together with the opposition thereto and the submissions for and against the prayers sought. The main issues for determination flow from the two main prayers. The first issue is whether stay of execution is merited. As correctly submitted by the respondent's counsel, a negative decree is incapable of being stayed.

13. In this case, the appellant had sued the respondent in the lower court for damages for alleged defamation of character which suit was dismissed with costs and which costs have not been assessed. That being the case, there is nothing to be stayed. It also follows that the orders made on 10/11/2021 for status quo to be maintained were in made in per curiam and in vain. Although both parties claim that the lower court granted 30 days stay of execution, there was no such stay granted. What is clear from my reading of the trial court record is that the learned trial magistrate granted the 30 days appeal which again was unnecessary as there is an automatic right of appeal of 30 days from date of judgment as stipulated in section 79G of the *Civil Procedure Act*. The section 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.”

14. In *Edith Gichungu Koine v Stephen Njagi Thoithi [2014]*eKLR, the Court of Appeal stated as follows on the guiding principles in applications for leave to appeal out of time:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

15. The Court of Appeal further stated that there is also a duty imposed on courts to ensure that the factors considered are consonant with the overriding objective of civil proceedings litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court.

16. On whether there was delay and the explanation given to the satisfaction of this court, I observe that the judgment in the lower court was delivered on 20th September, 2021. The applicant's counsel herein S.M.Onyango is the same counsel who represented the applicant plaintiff in the lower court and he wrote to court a letter dated 20th September 2021 asking for copies of typed proceedings and judgment. That letter was received on 22nd September 2021. There is a receipt for Kshs 1,000 paid for the said requested proceedings and judgment. The draft memorandum of appeal annexed is dated 29th October 2021. There is no evidence on record to show that any other advocate, apart from the advocate on record herein and in the lower court, was instructed to file the intended appeal. The appeal ought to



have been filed on or before 20th October 2021. The applicant's application for leave herein was filed on 8/11/2021. Again no explanation is given for that delay which is almost two months. The question therefore is whether the delay of nearly two months is inordinate and whether, despite the delay, it is excusable.

17. In *Mutiso v Mwangi* [1997] KLR 630 the Court stated as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that generally the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

18. The Supreme Court in the case of *Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The Court stated inter alia that:

“The underlying principles a court should consider in exercise of such discretion include;

1. Extension of time is not a right of any 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 for 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 a case- to-case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;
6. Whether the application has been brought without undue delay.
7.”

19. Further, while the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court's discretion in his favor. On the question of the exercise of judicial discretion, the Supreme Court observed in the case of *Telkom Kenya Limited v John Ochanda and 996 Others* [2015] eKLR that:

“In instances where there is delay in filing the notice of appeal, this Court has inherent jurisdiction to admit such appeal, provided sufficient explanation is proffered for the cause of delay. The design and objective of the Supreme Court Rules is to ensure accessibility, fairness and efficiency in relation to this Court. Parties should comply with the procedure, rather than look to the Court's discretion in curing the pleadings before it. This Court's position is that the circumstances of each case are to be evaluated, as a basis for arriving at a decision to intervene, in instances where full compliance with procedure has not taken place...



It is this Court's position of principle that prescriptions of procedure and form should not trump the primary object of dispensing substantive justice to the parties. However, the Court will consider the relevant circumstances surrounding a particular case and will conscientiously ascertain the best course.....”

20. Applying the above principles to this case, in my humble view, the delay of two months is not inordinate although the same is not explained to the satisfaction of this court. This court has discretion to grant leave to appeal out of time so as not to drive the applicant from the judgment seat, to ventilate his grievance where his claim for damages on alleged character assassination was dismissed by the trial court.
21. In *Ayuko v Nyambuteri* [2004] e KLR, Tunoi JA held that the delay of about two months cannot be said to be inordinate. The learned Judge of Appeal allowed the application for leave to appeal out of time and ordered the applicant to pay to the respondent the costs of the application which he assessed at Shs.20,000/= to be paid within 14 days thereof.
22. While placing reliance on the case of Nairobi HCCA 354 of 2015 APA Insurance Ltd v Michael Kinyanjui Muturi, the applicants submitted that no prejudice whatsoever stood to be suffered by the respondent as they were willing to give bank guarantee.
23. Therefore on what prejudice the Respondent will suffer if leave is granted to the applicant to file an appeal out of time, having found that the delay in filing this application is not inordinate, and as no such prejudice has been demonstrated to be suffered by the Respondent if leave is so granted to file an appeal out of time, I find that this is a proper case where the discretion of this court can be exercised to allow the appellant ventilate his grievances on appeal, to determine whether the suit below had any merit.
24. In the end, I find and hold that the application by the applicant herein succeeds partially. The prayer for stay of execution of decree pending appeal is denied and dismissed on account that there is no positive decree or order capable of being stayed.
25. The prayer for leave to appeal out of time is hereby allowed. The applicant shall file and serve a Memorandum of appeal within fourteen (14) Days of the date hereof and in default, the leave herein granted lapses. The memorandum of appeal shall be accompanied by this order granting leave to appeal out of time.
26. The Applicant shall pay to the Respondent the costs of this application which shall be in the intended appeal.
27. This file is hereby closed. I so order

DATED, SIGNED AND DELIVERED AT KISUMU THIS 25TH DAY OF OCTOBER, 2022

R.E. ABURILI

JUDGE

