Wainaina & another v Mbugua (Miscellaneous Civil Application E363 of 2021) [2022] KEHC 15751 (KLR) (Civ) (24 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15751 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

MISCELLANEOUS CIVIL APPLICATION E363 OF 2021

CW MEOLI, J

NOVEMBER 24, 2022

BETWEEN

MUKONO WAINAINA .... 1ST APPLICANT

NELSON MUGUKU .... 2ND APPLICANT

AND

EDWARD NDEGWA MBUGUA .... RESPONDENT

RULING

1. The motion dated 27.07.2021 was brought by Mukono Wainaina and Nelson Muguku (hereafter the 1st and 2nd Applicant/Applicants) seeking leave to appeal out of time against the judgment in Nairobi Milimani CMCC No. 4662 of 2011 as consolidated with Nairobi Milimani CMCC No. 5494 of 2012 and an order to stay execution of the judgment and decree in the said suit pending hearing and determination of the Applicants' intended appeal. The motion is expressed to be brought *inter alia* under Section 3A, 79G & 95 of the *Civil Procedure Act* (CPA) and Order 42 Rule 6(1) of the *Civil Procedure Rules* (CPR).

2. The grounds on the face of the motion are amplified in the supporting affidavits sworn by Susan W. Murage and Betty Isoe counsel on record for the Applicants and the legal officer at ICEA Lion General Insurance, respectively. The latter company is described as the insurer of motor vehicle KAC 956M in respect of which the suits were filed in the lower court. The gist of counsel's affidavit is that judgment therein had been scheduled to be delivered within the Covid-19 pandemic lockdown period during which access to the court was limited and that counsel awaited notification of judgment from the court to no avail. That upon subsequently learning of the judgment entered in favor of Edward Ndegwa Mbugua (hereafter the Respondent) she immediately notified her instructing client who being aggrieved, had instructed that an appeal be filed.

3. She goes on to depose that by that date, time within which to file an appeal had lapsed even though the Applicants have a good appeal with a high chance of success. That delay in filing the appeal was not deliberate and the Applicants will suffer loss if the Respondent proceeds with execution of the decree. She asserts that the Respondent will not be prejudiced as the Applicants are willing to provide security for due performance of the decree if so directed.

4. Betty Isoe on her part deposes to have been informed by counsel that judgment was delivered on 30.04.2020 without notice to parties and that counsel upon learning of the fact on 25.06.2021 had proceeded to obtain a copy of the judgment. That the insurer had instructed counsel to appeal the judgment and that delay in filing the appeal was not due to any fault on the part of the Applicants. She asserts that the Applicants have an arguable appeal with high chance of success and therefore the court ought to exercise its discretion to in their favour

5. She proceeds to state that the Respondent has taken out a decree and may move to execute at any time which action will render the intended appeal nugatory, occasioning the Respondent irreparable loss and damage. That there is an apprehension that if the decretal sum is paid out to the Respondent, he would not be able to make a refund if the intended appeal were eventually to succeed. She reiterates that the Respondent will not be prejudiced if the orders sought are granted as the Applicants are willing to furnish security pending hearing and determination of the intended appeal.

6. The Respondent opposes the motion through a replying affidavit dated 21.10.2021. He views the motion as an afterthought intended to delay the matter and deny him the enjoyment of the fruits of his judgment. He contends that the delay in bringing the application is inordinate and prejudicial as he sustained grievous injuries that disabled him and rendered him unable to fend for his family for the past eleven years. He asserts that contrary to her assertion, counsel for the Applicants was aware of the delivery of the judgment.

7. He points out that none of the deponents to the supporting affidavits have given indication of the date when they became aware of the judgment and or when they received the impugned judgment. He equally states that the Applicants' intended appeal does not raise any arguable grounds. That leave ought not to be granted at his expense as he suffered immensely as a result of the accident. Alternatively, he contends that the Applicants having expressed willingness to provide security for the decretal sum ought to be ordered to deposit the entire decretal sum in a joint account as condition for stay of execution. He concludes by reiterating that the Applicants have not evinced an intent to prosecute the appeal as they have not applied for proceedings and therefore the motion ought to be disallowed.

8. The motion was canvassed by way of written submissions. Counsel for the Applicants in urging the prayer for leave to file the intended appeal out of time anchored her submissions on the provisions of Section 79G & 95 of the *Civil Procedure Act* and Order 50 Rule 6 of the Civil Procedure Rules. She also cited the decisions in *Paul Musili Wambua v Attorney General & 2 Others* [2015] eKLR, *Athuman Nusura Juma v Afwa Mohamed Ramadhan* [2016] eKLR and *Joseph Schmaderer v Serah Njeri Ngene* [2021] eKLR and contended that judgment was delivered without notice and that delay in filing the appeal is neither inordinate nor due to omission by the Applicants. She emphasized the fact that the parties had executed a consent that the judgment be delivered electronically and in the absence of notice, it was near impossible to ascertain the date and court in which court the judgment would be delivered.

9. Concerning the prayer seeking stay of execution pending appeal, counsel called to aid the decisions in *Butt v Rent Restriction Tribunal* [1982] KLR 417 as cited in *David Omwenga v John Teleiyo* [2010] eKLR to argue that the intended appeal is arguable and with high chances of success. Regarding substantial loss, it was contended that the Respondent's income was unknown, and he may be unable

to refund the decretal sum if paid out. Citing *Lawrence Musyoka Ndambuki & Another v Daniel Kato Ndambuki* [2019] eKLR counsel reiterated the Applicants' willingness to provide security for due performance of the decree. The court was urged to allow the motion.

10. Counsel for the Respondent cited the provisions of Order 22 Rule 22(1) and 42 of the *Civil Procedure Rules* to assert that the Applicants had not met the conditions for an order to stay execution. Principally that such stay cannot issue in the absence of an appeal.

11. Responding to the Applicants' submissions concerning leave to file an appeal out of time, counsel relied on the provision of Order 79G of the *Civil Procedure Act*. Equally, he cited the decisions in *Alibhai Musajee v Shariff Mohmed Al Bet-* Civil Appeal No. 283 of 1998 and *First American Bank of Kenya Ltd v Gulab P. Shah & 2 Others* Nairobi (Milimani) HCCC No. 2255 of 2000 [2002] 1 EA 65. It was his contention that the intended appeal is an afterthought and brought for the sole purpose of denying the Respondent the enjoyment of the fruits of successful litigation. He asserts that the Applicants are feigning ignorance concerning delivery of the judgment because they were duly informed by counsel for the Respondent that the same would be delivered virtually. Counsel citing *Itute Ngui & Anor v Isumail Mwakavi Mwendwa* Nai. Civil Appln. No. 166 of 1997 asserted that if the Applicants were to be allowed to file the intended appeal, the Respondent shall be prejudiced by delay in receiving compensation for his injuries and that the intended appeal lacks merit. Counsel urged that the motion be dismissed with costs to the Respondent.

12. The Court has considered the rival affidavit material and submissions made in respect of the motion. As rightly argued by the Respondent, the prayer for stay of execution pending hearing and determination of the Applicants' intended appeal appears unsustainable in the circumstances of this case. It is evident on a plain reading of Order 42 Rule 6(1) of the *CPR* that an order to stay execution pending appeal presupposes the existence of an appeal and the filing of an appeal is a condition precedent to the exercise of this court's appellate jurisdiction under Order 42 Rule 6 (1) of the *Civil Procedure Rules*. Although the provision does not expressly say so, this can be inferred from the rule. Further, an analogy can be drawn from Order 42 Rule 6 (4) of the *Civil Procedure Rules* that states that an appeal is deemed filed in the Court of Appeal when the notice of appeal has been given.

13. Equally, Order 42 Rule 6 (6) of the *Civil Procedure Rules states*:

> " Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with." (Emphasis added).

14. It would seem therefore that the invocation of the jurisdiction of this court under Order 42 Rule 6 (1) or 6 (6) of the *Civil Procedure Rules* must be preceded by the filing of an appeal, or compliance with the procedure for filing an appeal, in this case a memorandum of appeal (See Order 42 Rule 1 of the *Civil Procedure Rules*). Until the memorandum of appeal is filed, the court may be acting in vacuo by considering the Applicants' prayer for stay of execution pending a non-existent appeal. The Court of Appeal in *Abubaker Mohamed Al-Amin v Firdaus Siwa Somo* [2018] eKLR while citing with approval the decision of the High Court in *Rosalindi Wanjiku Macharia v James Kiingati Kimani (Suing as the Legal Representative of the Estate of Martin Muiruri (Deceased))* [2017] eKLR approved the foregoing reasoning.

15. Earlier, the same court in the case of *Equity Bank v Westlink MBO Limited* [2013] eKLR while commenting on Rule 5 (2) (b) of the *Court of Appeal Rules*, whose wording is substantially similar to Order 42 Rule 6 (1) of the *Civil Procedure Rules*, and on Order 42 Rule 6 (6) of *Civil Procedure*

Rules, left no room for doubt that an application for stay of execution pending appeal could only be entertained before it after the filing of an appeal or a Notice of Intended Appeal. (See also *Balozi Housing Co-operative Society Limited v Captain Francis E. K. Hinga* [2012] eKLR).

16. Evidently, an appeal is yet to be filed herein and there is therefore no basis upon which this court could exercise its appellate jurisdiction as sought by the Applicants. If the Applicants desired to seek an order to stay execution alongside the prayer for the late admission of their appeal, they ought to have filed the memorandum of appeal in a proper appeal and the relevant application. In my considered view, the words that "an appeal may be admitted out of time" in Section 79G, appear to admit both retrospective and prospective applications. So that leave under the section may be sought before or after a memorandum of appeal is filed.

17. However, it may be more prudent for a party who also seeks stay of execution in the same motion for leave to appeal out of time to have filed the memorandum of appeal in advance. Consequently, the prayer seeking stay of execution of the judgment and decree in Nairobi Milimani CMCC No. 4662 of 2011 and Nairobi Milimani CMCC No. 5494 of 2012 pending hearing and determination of the intended appeal has no legal anchor and must fail.

18. Turning now to the prayer seeking leave to appeal out of time, the power of the Court to enlarge time for filing an appeal out of time is expressly donated by Section 79G, as well as generally, by Section 95 of the *Civil Procedure Act*. It is noteworthy that the Applicants herein did not swear their own affidavits in support of the motion, and the deponents of the affidavits in support of the motion were counsel apparently instructed by ICEA Lion General Insurance the insurers of the accident motor vehicle KAC 956M, and a legal officer in the said company. There was no explanation offered as to why the Applicants could not swear affidavits to support their application.

19. Be that as it may, 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."

20. As earlier noted herein the words that "an appeal may be admitted out of time" in Section 79G, appear to admit both retrospective and prospective applications. So that leave under the section may be sought before or after a memorandum of appeal is filed. Further the principles governing leave to appeal out of time are settled. The successful applicant must demonstrate "good and sufficient cause" for not filing the appeal in time.

21. In *Thuita Mwangi v Kenya Airways* [2003] eKLR, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules then in pari materia with Section 79G of the *Civil Procedure Act*, reiterated its decision in *Mutiso v Mwangi* [1997] KLR 630 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 general 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."

22. 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. It is to be borne in mind that rules of procedure are not irrelevant but are the handmaiden of justice that facilitate the right of access to justice in the terms of Article 48 of the *Constitution*...."

See also *Patrick Wanyonyi Khaemba V Teachers Service Commission & 2 Others* [2019] eKLR.

23. 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:

> "(T)he 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. ......"

See also *County Executive of Kisumu v County Government of Kisumu & 8 Others* [2017] eKLR.

24. It is not disputed that the judgment of the lower court was delivered on 30.04.2021. What is in contention is whether it was delivered without notice to parties. The Respondent has sworn that the Applicants' counsel had on 20.4.2020 executed a consent to having judgment delivered electronically on 24.04.2020 (see of annexure "EMN1") while the court had issued a notice dated 17.04.2020 (annexure "EMN2") informing the parties of the date of delivery of the judgment via the virtual platform.

25. The court is alive to the fact that at the height of the Covid-19 pandemic, the judiciary leadership vide Gazette Notice No. 3137 of 2020 published "Practice directions for the protection of Judges, Judicial officers, Judiciary Staff, Other Court Users and the General Public from the risks associated with the Global Corona Virus Pandemic". At paragraph 14 & 15, the directions stated that: -

> " 14. Reservation of dates for delivery of judgments, rulings or orders.
>
> When the Court reserves the date for delivery of a judgement, ruling or order, it may also direct that the judgment, ruling or order shall be delivered by transmission to the parties or their advocates by email and the date when the judgment, ruling or order is transmitted shall be deemed to be the date of the delivery.
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> 15. Notice of the delivery of judgment, ruling or order: The Court shall notify parties or their advocates by email of the date reserved for the delivery of a judgment, ruling or order." (sic)

26. Clearly by the above undisputed annexures the parties herein agreed to delivery of the judgment electronically and a notice issued for delivery on 24.04.2020, although the judgment was eventually delivered on 30.04.2020. Therefore, it is plausible that the parties though aware of the initial date had no notice of the latter date of the virtual delivery and that the judgment delivered was not sent via email to the parties in accordance with their consent. What is surprising is that the counsel for the Applicants eschewed stating in her affidavit the date on which she learned that judgment had been delivered on 30.04.2020. Betty Isoe purported to supply that information in her own affidavit asserting that counsel learned about the judgment on 25.06.2021. This was an important matter to which counsel should have deposed expressly in her affidavit. The period of delay as well as explanation thereof is a key consideration in an application of this nature.

27. Even so, the instant application was filed one month after the date stated by Betty Isoe, bringing the cumulative delay herein to a period of 15 months. Neither counsel for the Applicants nor Betty Isoe attempt in their affidavits to explain efforts made in this period to follow up on the matter with the court. Yet it is a fact that although physical access to courts was limited due to the Covid-19 pandemic, by August 2020 the courts countrywide had commenced migration of court business to online and electronic platforms enabling the filing, processing, hearing of matters as well as correspondence with litigants and advocates. It appears that counsel, for the Applicants did not take advantage of these electronic means to access and enquire with the court on the position obtaining in the lower court matter for about 15 months. Thus, it is not enough for her to plead limited access to courts as she has done in her affidavit.

28. Moreover, cases ultimately belong to the parties and not to their advocates. In this case, the Applicants have not considered it necessary to swear an affidavit in support of the motion brought in their behalf, electing instead to remain in the shadows. The court cannot tell if they did anything by way of following up on their case with their lawyer for the period 15 months since judgment, or even whether they are desirous of filing an appeal to challenge the lower court judgment. The supporting affidavits on record

make no reference to the position of the Applicants concerning the application expressed to be brought in their name.

29. In my view, the delay herein is inordinate and has not been satisfactorily explained. A party seeking extension of time must not be seen to presume on the Court's discretion and the court agrees with the Respondent that the Applicants have not demonstrated "good and sufficient cause". Clearly, the Respondent stands to be prejudiced if the motion, apparently brought on behalf of the seemingly disinterested Applicants, is allowed. The Respondent's suits in the lower court were filed about 10 years ago and though the Applicants' constitutional right to be heard on appeal cannot be gainsaid, the right is not absolute and must be balanced against the Respondent's entitlement to have his case determined expeditiously. The Respondent ought not to be made to pay the price for the disclosed indolent and indifferent conduct on the part of the Applicants.

30. In the circumstances, the court is of the view that the justice of the matter lies in refusing the application before it. The motion dated 27.07.2021 is therefore dismissed with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 24TH DAY OF NOVEMBER, 2022.

C.MEOLI

JUDGE

In the presence of:

Mr. Ondieki for the Applicants

Mr. Kariru for the Respondent

C/A: Carol