



**Ibrahim & another v Ndegwa (Miscellaneous Civil Application
E013 of 2022) [2022] KEHC 15516 (KLR) (18 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15516 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
MISCELLANEOUS CIVIL APPLICATION E013 OF 2022
CM KARIUKI, J
NOVEMBER 18, 2022**

BETWEEN

BASHIR SHARIF IBRAHIM 1ST APPLICANT

KENNEDY MACHARIA 2ND APPLICANT

AND

JOSPHAT MUCHIRI NDEGWA RESPONDENT

RULING

1. There are two (2) applications for ruling, namely one dated May 20, 2022 seeking leave to appeal against the ruling of the trial court dated January 25, 2022 in CMCC 114 of 2016 Nyahururu and a second one dated June 6, 2022 seeking leave to appeal against the ruling delivered on January 25, 2022 and stay of execution of exparte. Judgment delivered on March 31, 2022 in CMCC 114/2016 Nyahururu.
2. The two applications were directed to be heard together as the prayers were replicated.
3. The parties were directed to canvass the same application via submissions, but only the applicant complied with the directions above.
4. It should be noted that there is nothing on record to show that the Respondent has filed or served the applicants with their response at the time of drafting this ruling. The applications, therefore, apparently remain unopposed.
5. However, the applicants have proceeded to file a supplementary affidavit dated September 30, 2022, and the submissions herein are either way.

APPLICANT CASE AND SUBMISSIONS.

6. The applicant avers that the respondent filed a suit against the / applicants in Nyahururu CMCC 114 of 2016 seeking general damages, special damages, and costs arising from a road traffic accident



- that occurred on September 23, 2014. Interlocutory Judgment was entered against the Applicants for failure to enter appearance and file a statement of defence within time.
7. The Applicants herein filed an application dated February 26, 2018 through their previous advocates, M/S Kairu McCourt & Co Advocates seeking to set aside that Interlocutory Judgment. The court delivered a ruling on May 24, 2018, allowing the application, and ordered the matter to proceed for a fresh hearing as a defended case.
 8. The court ordered the parties to fix a date for compliance at the registry. It should be noted that the firm of Lawrence Mwangi, Mwangi & Co Advocates had been communicating with the firm of Kairu McCourt & Co advocates for purposes of inviting them to the registry for purposes of fixing a date before the court and even acknowledged the re-exam exercise being done upon request.
 9. The applicants filed a notice of the change on June 30, 2020 and served the firm of Edward Kinuthia & co, whom they learned was on record for the plaintiff now. The applicants knowing that they were now properly on record by the defence already on record filed on February 26, 2018, the applicants went ahead to file their compliance documents on February 21, 2020.
 10. A date was eventually fixed a mention for a pre-trial on February 25, 2020 when the Applicants' counsel was present, and the court issued a date for hearing on April 28, 2020 in the absence of the plaintiff.
 11. On February 25, 2020, the trial court was unfortunately not sitting, and no further directions were issued. The defendants filed a notice of the change on June 30, 2020 and served the firm of Edward Kinuthia & Co, whom they learned was on record for the plaintiff now. The applicants have also learned that Edward Kinuthia & co, c/o Munyao-Kayugira & co Advocates is now on record for the plaintiff.
 12. The file somehow became inactive, probably due to the COVID Pandemic, then suddenly popped up in court on November 23, 2021 for mention. This court further mentioned the Suo motto to enable the court to peruse the file.
 13. The firm of Kimondo Gachoka & Co Advocates mistakenly decided it to be safe to file another defence dated January 18, 2022 together with a supplementary list of documents attaching the defendants'/ applicants' doctors' medical report without seeking leave of the court.
 14. The firm of Kimondo Gachoka & Co Advocates honestly knew that the firm of Kairu McCourt had already filed the defence on February 26, 2018.
 15. On January 25, 2022, after perusing the court file, the court, on its motion, directed that interlocutory judgment entered against the applicants to revert and the matter to proceed to formal proof.
 16. The applicants learned that the previous counsel was under the assumption that the ruling delivered on May 24, 2018 had allowed the defence filed on February 26, 2018 as deemed duly to be properly on record.
 17. The applicants, being aggrieved by the court orders of January 25, 2022 in Nyahururu CMCC 114 of 2016 directing that interlocutory judgment entered against the applicants herein to revert filed an application dated March 18, 2022 seeking to set aside to review, vary, extend and/or enlarge the time for compliance with the court order of May 24, 2018 allowing the matter herein to proceed as defended.
 18. Despite the applicant's application being dated March 18, 2022 and being on record pending prosecution on record and the applicants advocate pointing it out to the court in Nyahururu CMCC 114 of 2016, it proceeded for a formal proof hearing on May 17, 2022.



19. The applicants herein proceeded to file a miscellaneous certificate application dated May 20, 2022, seeking a temporary stay of proceedings in Nyahururu CMC 114 of 2016, pending the hearing and determination of the application together with other orders.
20. Unfortunately, the prayer seeking a temporary stay of proceedings in Nyahururu CMCC 114 of 2016 was overtaken by events since the Judgment was delivered on May 31, 2022 before direction could be given in our miscellaneous certificate application dated May 20, 2022 herein, prompting the application herein dated June 6, 2022.
21. The Applicants are defending the suit on liability. Therefore, they are pleading with this Court to exercise its discretion in the interest of justice and allow the applicants to appeal out of time on the ruling of the court in Nyahururu CMCC 114 of 2016 & be allowed to proceed with its defence by deeming the defence filed on February 26, 2018 and January 19, 2022 as duly filed.
22. The defendants should not be condemned unheard due to the mistake of counsel. The inadvertent mistake and failure to file the defence on time were not deliberate since there has been activity in the file by counsel to oppose the suit.
23. The applications are supported by the supporting affidavit sworn by Sonia Aguko. In addition, the Supplementary affidavit dated September 30, 2022 was also sworn by Sonia Aguko.

ISSUES, ANALYSIS, AND THE DETERMINATION

24. After going through the documents on record, proceedings, and submissions, i find there are two issues for determination by this court, namely;
 - i) Whether this court should grant the applicants leave to appeal out of time in respect to the ruling delivered on January 25, 2022 in Nyahururu CMCC 114 of 2016 directing that interlocutory judgment entered against the applicants herein to revert.
 - ii) Whether this court should grant orders for a stay of execution of the *ex parte* judgment delivered on May 31, 2022 in Nyahururu CMCC 114 of 2016 pending the hearing and determination of the intended appeal.
 - iii) What is the order as costs?
25. Article 48 of the *Constitution* guarantees every person access to justice. In addition, under article 50(1) of the *Constitution*, every person has the right to have any dispute that the application of law can resolve decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. The ultimate goal and purpose of the justice system are to hear and determine disputes fully. Therefore, it follows that no person who has approached the court seeking an opportunity to ventilate their grievances fully should be locked out.
26. The principles to be considered in exercising the discretion whether or not to enlarge time were considered in the case of *First American Bank of Kenya Ltd v Gulab P Shah & 2 others* Nairobi (Milimani) HCCC NO 2255 of 2000 [2002] 1 EA 65.
27. 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 delay the course of justice.



- iii) Whether or not the respondent can adequately be compensated in costs for any prejudice that he may suffer due to a favorable exercise of discretion in favour of the applicant.
28. In the case herein, the applicants duly filed an application dated March 18, 2022 seeking to set aside to review, vary, extend and/or enlarge the time for compliance with the court order of May 24, 2018, allowing the matter herein to proceed as defended in Nyahururu CMCC 114 of 2016.
29. The said application was unfortunately ignored by the trial court in Nyahururu CMCC 114 of 2016 when it was duly brought to its attention. Accordingly, the matter was fixed for formal proof, and the ex-parte judgment was delivered on May 31, 2022.
30. The applicants have approached this court for an extension of time as stipulated in section 79G of the *Civil Procedure Act*, the proviso thereof. Accordingly, it is before the court seeking to be granted a chance to agitate its appeal challenging the lower court's ruling locking them out of participating in the hearing of suit filed against them.
31. There is no evidence that the applications are an afterthought or the same are intended to abuse the court process. Courts have, over time, excused parties where such delay is not inordinate as is in this case, and even in cases where there is an inordinate delay, depending on the circumstances of each case and reasons for the delay, courts have accorded parties an opportunity to be heard on appeal. Furthermore, there is no evidence to demonstrate what prejudice the Respondent will suffer if the applicant is granted an extension of time.
32. In *Kamlesh Mansukhalal Damki Patni v Director of Public Prosecution & 3 others* [2015] eKLR, the Court of Appeal held that:
- “It must be realized that courts exist for the purpose of dispensing justice. Judicial officers derive their judicial power from the people, or as we are to say in Kenya, from Wanjiku, by dint of article 159 (1) of the Constitution, which succinctly states that “judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.” Judicial officers are also state officers and, consequently, are enjoined by Article 10 of the Constitution to adhere to national values and principles of governance, which require them whenever applying or interpreting the Constitution or interpreting the law to ensure, among other things, that the rule of law, human dignity and human rights and equity, are upheld.
- For these reasons, decisions of the courts must be redolent of fairness and reflect the best interests of the people the law intends to serve. Such decisions may involve only parties interest (and hence only parties' interests), while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the court to exercise its judicial authority to ensure dispensation of justice. This is what lives up to the constitutional expectation and enhances public confidence in the justice system. Therefore, it suffices to comment that a court of law should be hesitant to close the door to the corridors of justice before a litigant is heard on his complaint.”
33. The appeal intended to be filed per the attached annexure in the supplementary affidavit dated September 30, 2022 has demonstrated that the appeal is arguable and not frivolous. A great injustice has been done to the applicants who have already appealed the judgment delivered on May 31, 2022. Accordingly, that memorandum of appeal has also been annexed to the supplementary affidavit dated September 30, 2022.



34. The respondent is likely to execute the judgment at any time if the orders allowing them to participate in Nyahururu CMCC 114 of 2016 are not granted.

35. In the case of *Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another* [2018] eKLR where the court stated that:

“Lastly, looking at the draft memorandum of appeal filed, I cannot say that the intended appeal is in-arguable. Of course, all the Applicants have to show at this stage is arguability — not a high probability of success. At this point, the applicant is not required to persuade the appellate court that the intended or filed appeal is highly likely to succeed. All one is required to demonstrate is the arguability of the appeal: a demonstration that the appellant has reasonable and conceivably persuasive grounds of either facts or law to overturn the original verdict. The applicants have easily met that standard. I believe that the applicant has discharged this burden. ”

36. The fact that the respondent has not responded to the applications herein shows that no prejudice other than the fact that he may have to wait longer has been demonstrated to this court, and an award of costs can compensate for the same. To support this submission, reliance is made on the case of *George Kianda & another v Judith Katumbi Kathenge & another* [2018] eKLR;

“the respondent has not stated that she cannot be adequately compensated in costs for any prejudice that she may suffer due to a favourable exercise of discretion in favour of the applicant. It has been said there is one panacea that heals every sore in litigation: costs. Seldom, if ever, do you come across an instance where a party has made a mistake that has put the other side to such advantage or that the application cannot cure that healing medicine. See *Waljee's (Uganda) Ltd v Ramji Punjabhai Bugerere Tea Estates Ltd* [1971] EA 188. ”

37. It is only fair and just that the applicants be given an opportunity to present their case and have a fair hearing before a decision is made against them by the court.

38. Thus, the court makes the orders;

(i) The two applications, namely; one dated May 20, 2022 seeking leave to appeal against the ruling of the trial court dated January 25, 2022 in CMCC 114 of 2016 Nyahururu and a second one dated 6th June 2022 seeking leave to appeal against the ruling delivered on January 25, 2022 and stay of execution of ex parte Judgment delivered on March 31, 2022 in CMCC 114/2016 Nyahururu are hereby granted as prayed, thus appeal be filed and served within seven days from dates herein

(ii) Costs in the main cause.

DATED, SIGNED, AND DELIVERED AT NYAHURURU ON THIS 18TH DAY OF NOVEMBER 2022

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CHARLES KARIUKI
JUDGE

