



**Njoroge v Wambua (Miscellaneous Civil Application E187 of 2021)
[2021] KEHC 339 (KLR) (16 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 339 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS CIVIL APPLICATION E187 OF 2021
MW MUIGAI, J
DECEMBER 16, 2021**

BETWEEN

JOHN NJOROGE APPLICANT

AND

MICHAEL KYALO WAMBUA RESPONDENT

RULING

Notice of motion dated 24th September, 2021

The Applicant filed the above stated application, the stay of execution was granted by the Court on 27th September 2021.

The remaining issues is;

1. The draft Memorandum of appeal annexed hereto be deemed as duly filed and served.

Respondents submissions in opposition to the application dated 24/09/2021

Prayer for stay:

2. That the Applicant prays for a stay of execution of the judgment delivered on 16/09/2020 in Machakos CMCC No. 763 of 2015 and all consequential orders thereto pending the hearing and determination of an intended appeal owing to the attachment levied on 22/05/2021.
3. On 27th September, 2021 Kemei J granted the Applicant an order of stay of execution of the judgment and decree in Machakos CMCC No. 763 of 2015 pending directions on 5/10/2021.
4. The Applicant submits that there is nothing to be stayed as the proclaimed goods were auctioned after another similar application for stay of execution dated 7/06/2021 was dismissed by Hon. Ondieki on 2/09/2021.

Prayer for leave to file an Appeal:



5. The said prayers seeking for leave to file an appeal out of time and that a draft memorandum of appeal annexed thereto be deemed as duly filed and served.
6. The only reason given is a pretentious reason that the applicant only learnt of the judgment of the lower Court in June 2021 since 16/09/2020.
7. That the Respondent herein has taken the liberty to give a history of the Lower Court case and most importantly is the fact that the Applicant herein was all through represented by Counsel and he cannot now turn around after one year since judgment was delivered to claim that he did not know of the judgment but he knew there was a case.
8. The Respondents further submit that a party to a suit has a right to choose an advocate and whatever the said advocate does for and on his behalf binds him.
9. The judgement of 16/09/2020 was delivered in the presence of the Applicants advocates and no appeal was filed in 30 days as required by the law.
10. Secondly, a demand for payment was made and no payment was received hence the matter rightly produced to execution.
11. The Applicant herein went into hiding after judgment and only woke up after auctioneers visited him.
12. In order to frustrate execution, he filed an application for stay of execution dated 7/06/2021 through a different Advocate J. A. Makau & Co. Advocates and the application was fully heard and was dismissed on 2/09/2021 and there is No appeal against the said dismissal.
13. The applicant herein has filed this application to act as an Appeal against the dismissal orders of the application dated 7/06/2021 and which is very wrong and an abuse of the court process for a party to file several applications on the same issue.
14. The Respondent submits that there is no good reason forwarded to this court to warrant prayer seeking leave to file an appeal and the application should be dismissed.

Prayer to set aside order No. B of the ruling delivered on 2/09/2021:

15. The Applicant herein asks this court to set aside Order No. B of the ruling delivered on 2/09/2021 by Hon. Ondieki and substitute it with an order allowing the application dated 7/06/2021.
16. The Respondent submits that No Appeal was filed against the orders of Hon. Ondieki of 2/09/2021 and this court has no jurisdiction to make such an order as prayed for because it is not sitting on Appeal.

Submissions on behalf of the Applicant

17. That the Applicant herein has never been a registered owner nor a beneficial owner of Motor vehicle registration Number KBZ 860P, the subject motor vehicle.
18. That the Applicant has never participated in the hearing of the trial suit as his advocates who were then on record as representing him as at the time of the trial never informed him of the hearing date and therefore the hearing proceeded without him testifying and producing his evidential documents which he had already handed over to his then Advocate.
19. That consequently, the Trial Court in Machakos CMCC No. 763 of 2015 entered judgment in favour of the Respondent on 16th September, 2020 for General and Special damages in the sum of Kshs. 503,500/- plus costs and interest.



20. That the Applicant only got to know of the afore-mentioned judgment having been entered against him sometimes in June, 2021.
21. That the time allowed to appeal under the relevant law has since lapsed but nevertheless this Honorable court has the power to enlarge such time.
22. That the Respondent herein has since served the Applicant proclamation notices from Betabase Auctioneers and he is fearful of execution.

Determination

23. The Court considered the application for enlarging time to file the appeal

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.”

In *Wachira Karani vs. Bildad Wachira [2016] eKLR* Mativo J. held that:

“Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause...” See *Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633* and *Daphne Parry vs. Murray Alexander Carson [1963] EA 546*

24. The principles to be considered in exercising the discretion whether or not to enlarge time are well set out in *First American Bank of Kenya Ltd vs. Gulab P Shab & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65* where the court stated the principles to be: -

- (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 favorable exercise of discretion in favour of the applicant.”

The Supreme Court of Kenya in the case of *County Executive of Kisumu vs County Government of Kisumu and 8 Others [2017] eKLR* held:-

“[23] It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the



Nicholas Salat’s case to which all the parties herein have relied upon. The Court delineated the following as:

“the under-lying principles that a Court should consider in exercise of 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 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 on 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 respondents if the 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.”
25. A party is guaranteed right of appeal under the law, however, the appeal ought to be filed and processed according to the law. The applicant by pleadings filed explained the events leading to delay in filing an appeal, he realized hearing and judgment were processed without notice or knowledge on his part until he realized during the execution stage. Whereas there was Counsel on record during the hearing before the Trial Court, it is possible the Applicant was not aware or informed as to the proceedings and /or outcome of the case.
- Hon. Maureen Odero J. in the case of *Bank of Africa Kenya Limited vs. Put Sarajevo General Engineering Co.Ltd & 2 others [2018] eKLR*, stated that:-
- “This plea that the mistakes of counsel ought not be visited upon the client is a common one and any advocate who fails to perform a duty due to his client will invariably seek relief on the basis that the mistakes or errors of the Advocate ought not to be visited upon the client.”
- Hon. Apaloo JA as he then was in Phillip Chemwolo & Another vs. Augustine Kubede [1982-88] KLR 103 at 1040 stated thus:-
- “Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit”.
26. The lack of communication and/or seeking instructions by Counsel who participated in the proceedings on behalf of the Applicant the Trial Court in Machakos CMCC No. 763 of 2015 entered judgment in favor of the Respondent on 16th September, 2020 the instant application was filed on 24th September 2021, a year later. The execution of the judgment was by Proclamation of 21st May 2021. The Court finds the Applicant’s explanation plausible and reasonable in the circumstances.

Disposition

1. The Application of 24th September 2021 is granted.



2. The Applicant to file the appeal within 14 days and serve the Respondent.

DELIVERED SIGNED & DATED IN OPEN COURT ON 16TH DECEMBER 2021 (VIRTUALLY)

M.W. MUIGAI

JUDGE

