



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**MISCELLANEOUS CIVIL CASE NO 99 OF 2020**

**ROBERT KAMANJA.....APPLICANT**

**VERSUS**

**MARY WAIRIMU GAKERE.....RESPONDENT**

**R U L I N G**

1. Before me is a notice of application dated 3<sup>rd</sup> July 2020. It is filed **Robert Kamanja** (the Applicant). The Application seeks the following prayers:

(a) *THAT this Honourable court do deem the Notice of Motion filed on 23<sup>rd</sup> June, 2020, to be duly withdrawn.*

(b) *THAT this Honourable court do set aside the ruling delivered on 14<sup>th</sup> May, 2020 and grants the Applicant temporary stay of execution pending the hearing and determination of this application.*

(c) *THAT this Honourable court do grant leave to the firm of Khaminwa & Khaminwa Advocates to come on record for the Applicant.*

(d) *THIS Honourable court do grant leave to lodge an Appeal out of time against the decision of G. Omodho delivered in Thika Magistrate Court in Civil Case No. 1280/2015.*

(e) *THAT upon the grant of leave to Appeal out of time, the memorandum of Appeal be deemed to be duly filed.*

(f) *THAT this Honourable court do grant the Applicant stay of execution pending the hearing and determination of this Appeal.*

2. The Respondent to the application is **Mary Wairimu Gakere**.

**BACKGROUND**

3. It is common ground that the Applicant and the Respondent had a case before the Thika Chief Magistrate court (the trial court) being Civil Case No. 1280 of 2015. The trial court entered judgment on 19<sup>th</sup> February 2019 favour the Respondent in that case. It would seem that the Applicant was aggrieved by that judgment. The Applicant filed more than one application before the trial court. The last one was dismissed by the trial court on 14<sup>th</sup> May 2020.

**ANALYSIS AND DETERMINATION**

4. The Applicant by his affidavit I support of the application before this court partly seems to seek this court to set aside the dismissal of his application for stay of execution, dismissed by the trial court on 14<sup>th</sup> May 2020, and also seeks stay of the trial court's judgment delivered on 19<sup>th</sup> February 2019.

5. Section 79 G of the Civil Procedure Act Cap 21 provides:

*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.*

6. From that Section it becomes clear that an appeal from the Magistrate's court should be filed in the High Court within 30 days of delivery of the order or the judgment appealed from. The judgment which the Applicant wishes to appeal against, although he has not yet filed the appeal, was delivered on 9<sup>th</sup> February 2019. The present application was filed in July 2020. More than 30 days have elapsed since the trial court delivered its judgment. Indeed, the Applicant did not approach this court until after one year five months after the trial court delivered its judgment. The Applicant owed this court an explanation why it delayed in approaching it. The Applicant stated that he delayed in filing the appeal because the trial court delayed in supplying the typed proceedings. The Applicant waited for six months, after the trial court's judgment, to write to the trial court to request for the proceeding. No explanation is given, at all, for that delay of six months. The Court of Appeal in the case **County Government of Mombasa -v- Kooba Kenya Limited (2019) eKLR** considered the grounds which should be borne when an application for extension of time to file a notice of Appeal in the Court of Appeal. It is useful to consider what was stated in this case. The court stated:

*“In Karyn Zaharya & Another vrs. Shalom Levi. C. Appl. No. 80 of 2018, Koome, JA stated:*

*“Some of the considerations to be borne in mind while dealing with an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity*

7. The Applicant failed to explain the delay of approaching this court.

8. The Respondent opposed the application on the ground that the Applicant filed other applications, before the trial court, seeking stay of execution of the decree and that these applications were filed whenever the Respondent moved to execute the decree. The Respondent is of the view that the Applicant's action is only intended to prolong the conclusion of the matter.

9. Although the court finds that the Applicant failed to explain the delay in approaching this court there is however more fundamental errors in the Applicant's application.

10. Firstly, the Applicant seeks an order that the Law firm of Khaminwa & Khaminwa be permitted to come on record. It is clear that when judgment was entered by the trial court the Applicant had an advocate acting for him. It is not clear who that advocate was because the Applicant did not disclose it. The prayer for the firm of Khaminwa & Khaminwa to come on record is premised on an Order 9 Rule 9 of the Civil Procedure Rules (the Rules). That Rule provides:

*“When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—*

*(a) Upon an application with notice to all the parties; or*

*(b) upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be. (emphasis mine)*

11. It is clear from the above rule the Applicant should have served his former advocate with the present application as can be seen in Order 9 Rule 9 (a) of the Rules. That former advocate of the Applicant, whose identity was not revealed by the Applicant, was not served and accordingly leave cannot be granted to the firm of Khaminwa & Khaminwa advocates to act for the Applicant in the absence of such service.

12. The other error of the Applicant is that Section 79G of Cap 21 requires an appeal be filed and if it is filed leave be sought to admit the appeal out of time. See the case **James Njai Githui -v- Equity Bank Limited (2020) e KLR**.

*“17. Coming back to the law, it is clear that no appeal has been filed. The applicant intends to file an appeal. That scenario is not foreseen by **Section 79G** of the **Civil Procedure Act**. The proviso foresees a situation where an appellant has filed an appeal, then seeks to have it admitted out of time by an application seeking extension of time and explaining the reasons for delay. Hence I find the words of Emukule J in the **Gerald Limbine** case above necessary.*

*“My understanding of the proviso to section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal, and at the same time seek the court's leave to have such an appeal admitted out of the statutory period of time. The proviso does not mean that an intending appellant first seeks the court's permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the court's process under section 79B which says:*

*‘Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree part of a decree or order appealed against he may notwithstanding section 79C, reject the appeal summarily’*

*It seems to me therefore that it is not open to the court to exercise its discretion under the proviso to section 79G of the Civil*

***Procedure Act except upon the existence and perusal of the appeal to be “admitted” not to be “filed out of time.” Admission presupposes that the appeal has been filed and will be “admitted” for hearing after a judge has established under Section 79B that there is “sufficient” ground for interfering with the decree part of a decree or order appealed against.”***

*18. I need not belabor the point as this decision is in line with numerous other decisions of this court on the requisite process when filing an appeal out of time. See APA Insurance Limited v Michael Kinyanjui Muturi [2016] eKLR where the judge observed*

*This court as correctly submitted by Mr Ochieng, has had on many occasions to decide on the same issue and has plainly, overtly and authoritatively pronounced itself that an appeal which is filed out of time can be validated by an application for leave to validate the appeal and that is what the proviso to Section 79G of the Civil Procedure Act stipulates. The decisions by Honourable H.M. Okwengu J ( as she then was) in **HCC 322/2008 Michael Kinyanjui Mbuthia V John Kamau Nganga**; Honourable R.V.P. Wendoh J in **Richard Ngetich & another V Francis Vozena Kidiga HCCA 75/2012** ; and Honourable Mary Kasango J in **Asma Ali Mohamed V Fatime Mwinyi Juma HCCA 75/2014 (Mombasa)** among others all positive attestations to that pronouncement and so far there is no contrary decision from the Court of Appeal on that line of interpretation of Section 79G of the Civil Procedure Act Proviso.”*

**13.** The application by Notice of Motion dated 3<sup>rd</sup> July 2020 is as a consequence of the above holding incompetent. It is incompetent because there is no appeal before court. stay of execution cannot also be granted because as it is clearly stated under Order 42 Rule 6 of the Rules stay of execution can only be granted pending an appeal. Here there is no appeal pending.

**14.** On the whole the application dated 3<sup>rd</sup> July 2020 is misconceived and incompetent and it I dismissed with costs to the Respondent.

**SIGNED AT KIAMBU AND DELIVERED VIRTUALLY THIS 18<sup>TH</sup> DAY OF DECEMBER 2020.**

**MARY KASANGO**

**JUDGE**

18<sup>th</sup> December 2020

Before Justice Mary Kasango

C/A - Kevin

For the Applicant – Miss Shumila holding brief for Dr. Khaminwa

For the Respondent - Mr. Gikenye holding brief for Mr. Tumu

**COURT**

Ruling virtually delivered in their presence.

**MARY KASANGO**

**JUDGE**