



REPUBLIC OF KENYA



**KENYA LAW**  
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**Waweru v Equity Bank (Kenya) Limited & another (Miscellaneous Application E011 of 2022) [2022] KEELC 12608 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12608 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
MISCELLANEOUS APPLICATION E011 OF 2022**

**JG KEMEI, J  
SEPTEMBER 22, 2022**

**BETWEEN**

**JOHN WAMBU WAWERU ..... APPLICANT**

**AND**

**EQUITY BANK (KENYA) LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**STANDARD COMMERCIAL AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

*(An application for extension of time to allow the Appellant to file Memorandum of Appeal out of time against the whole Ruling of PMCC NO 43 of 2017 ( Hon G. Onsarigo ) delivered on 14/10/2021)*

**RULING**

1. The applicant's application is dated February 14, 2022. It seeks *interalia* the orders for;
  - a. Leave to file an appeal out of time;
  - b. The respondents be restrained from the sale of the applicant's property land parcel No Karai/ Gikambura/5618 pending the hearing and determination of the application *intepartes*;
  - c. Stay of sale by public auction of the suit land on the February 16, 2022 against the ruling of the Court in CMCC No 43 of 2017 and all consequential orders pending the hearing and the determination of the intended appeal.
  - d. That the lower court file in CMCC No 43 of 2017 be brought to the High Court for the court to give sound directions that the matter be heard on merit.
  - e. Costs of the application.



2. The application is supported by the grounds annexed thereto and the supporting affidavit of the applicant sworn on the February 14, 2022. He states the ruling in the lower court was delivered on the October 14, 2021 without notice to his previous advocates. That he learnt of the said ruling through a neighbour who saw the advertisement of the sale of the suit land in the newspaper. Thereupon he instructed his new advocates on record who perused the record and found that the judgment in the lower court was delivered on the March 23, 2015.
3. That being aggrieved by the said ruling and he intended to lodge an appeal as seen in the draft Memorandum of Appeal annexed. That the reason why he did not file the appeal within the stipulated time was because he was not informed by his previous advocate of the delivery of the ruling. That the mistake of his lawyer should not be visited upon him who in his opinion is innocent in his pursuit of justice. That the respondents will not be prejudiced if the orders are granted.
4. The application is opposed by the respondents vide the Replying Affidavit filed by Kariuki Kingori the legal services manager for the 1<sup>st</sup> respondent. That the applicant filed suit in the lower court seeking to stop the sale of the suit land to recover the loan outstanding from him which facilities stood at over Kshs 10 Million. That the applicant had defaulted in the repayment of the loan hence the need for recoveries. The applicant failed severally to prosecute the suit in the lower court leading to its dismissal on the October 5, 2020. Aggrieved by the dismissal, the applicant filed two applications dated the June 14, 2021 and May 31, 2021 seeking orders of stay of execution and the setting aside of the dismissal orders respectively. The court on hearing the two applications dismissed the same on the October 14, 2021. The applicant's advocate was present in court on the material date and therefore he cannot be heard to say that his advocate was not notified of the ruling date.
5. Further it was the 1<sup>st</sup> respondent's case that the applicant has a history of being a delinquent litigant who has been indolent in prosecuting his case and his habitual refuge is in the axiom that the mistake of advocate cannot be visited on his client. That the applicant failed to appeal against the dismissal of the suit. He has not given any reason as to why he is deserving of the orders sought. No arguable appeal has been mounted by the applicant and urged the court to dismiss the application.
6. The 2<sup>nd</sup> respondent did not oppose the application.
7. Directions were taken on the July 21, 2022 where the applicant undertook to file written submissions. The 1<sup>st</sup> respondent informed the court through its lawyer that it will not be filing any submissions.
8. I observe that by the time of writing the ruling the applicant had not filed submissions and in that regard it would appear that the applicant abandoned the application. That said I will determine the application going by what is on record.
9. I have considered the application and I have these to say;
10. The applicant has not annexed a copy of the ruling for which he intends to appeal for the benefit of the court. Neither has he annexed an affidavit of his previous advocate indicating that the ruling was delivered in his absence. The applicant's advocate informed the court that the suit land was going to be sold by public auction on the February 16, 2022. The applicant has not filed any further affidavit to depone on the status of the property. This was important to assist the court evaluate the chances of appeal. Further the applicant has moved the court inordinately that is to say over one year after the delivery of the ruling.
11. Courts have time without number held that the suit belongs to the plaintiff and not the advocates and it behoves a litigant to follow up their case and ensure that it is being prosecuted timeously. This is the



gist of the overriding objectives of the court set out in the *Civil Procedure Act* which binds both the litigant and their counsel as to the expeditious disposal of cases.

12. This is a case where the applicant has not given reason for not filing the appeal on time. It is trite that it is the sufficiency of the explanation that opens the flow of discretion of the court as discretion must not be exercised in a vacuum.
13. For all these reasons, I find this application wanting in merit and dismiss it with costs to the 1<sup>st</sup> respondent.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 22ND DAY OF SEPTEMBER 2022 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Ndungu for applicant

Gichuki HB Mr Wangombe for 1st and 2nd respondents

Court Assistant – Phyllis Mwangi

