



Kioge v Kamau & another (Suing as the Legal Representatives of the Estate of the Late James Mwituria Kamau) (Miscellaneous Civil Application E116 of 2023) [2025] KEHC 3228 (KLR) (12 February 2025) (Ruling)

Neutral citation: [2025] KEHC 3228 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
MISCELLANEOUS CIVIL APPLICATION E116 OF 2023
CW GITHUA, J
FEBRUARY 12, 2025**

BETWEEN

KEFA WAWERU KIOGE APPLICANT

AND

MARY WANJIRU KAMAU 1ST RESPONDENT

JOSEPH KAMAU NG'ANG'A 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE
JAMES MWITURIA KAMAU**

RULING

1. In the Notice of Motion dated 27th November 2023, the applicant, Kefa Waweru Kioge, sought two substantive orders namely, leave to file his intended appeal out of time and secondly, orders of stay of execution of the trial court's judgement dated 12th October 2023 pending hearing and determination of his intended appeal.
2. The application is premised on the grounds stated on its face and the depositions made on 27th November 2023 by Mr. Kevin Kitavi, the legal officer of the applicant's insurer, MUA Insurance Company Ltd.
Briefly, the applicant avows that he is aggrieved by the trial court's judgement and he desires to challenge it on appeal but cannot do so since time limited by the law for filing appeals to the High Court has expired.
3. Regarding the reasons for failing to file his intended appeal within the time prescribed by the law, the applicant contended that this was caused by circumstances beyond his control. He claimed that although the trial court had indicated that judgement was to be delivered on notice, his advocates were



not issued with a notice for delivery of the judgement on 12th October 2023; that they only became aware of existence of the judgement when the respondents served them with a bill of costs; that upon inquiry in the court registry, they were supplied with a copy of the judgement.

4. Mr. Kitavi further explained that after obtaining a copy of the judgement, there were internal consultations regarding whether or not to file an appeal and there was delay in making the decision to lodge an appeal since at the time, the Head of the Legal Department at the insurance company was away on official leave.
5. In respect of the prayer for stay of execution, the applicant asserted that if stay was not granted, the respondents will proceed with execution since they have already served him with party/party costs; that if the prayer was not granted, he will suffer substantial loss and the intended appeal will be rendered nugatory.
6. The application was contested through grounds of opposition dated 27th February 2024 in which the respondents urged this court to find that the applicant had failed to establish good and sufficient cause for failure to file his intended appeal on time. The respondents further claimed that the application was frivolous and vexatious and ought to be dismissed with costs for want of merit.
7. The application was canvassed through written submissions which both parties duly filed and which I have carefully considered together with the supporting affidavit and the grounds of opposition filed by the respondents. Having done so, I wish to deal first with the applicant's prayer for grant of leave to file his intended appeal out of time since its determination will affect the outcome of the prayer for stay of execution of the trial court's judgement.
8. The law governing appeals from subordinate courts to the High Court is set out in Section 79 G of the *Civil Procedure Act* (CPA) . The law is that appeals to the High Court should be filed within 30 days from the date of the decree or order appealed against. The proviso to Section 79 G of the *CPA* however gives this court wide and unfettered discretion to either extend time within which to file an appeal or to admit an appeal filed out of time if it was satisfied that the applicant had established good and sufficient cause for failure to file the appeal on time.
9. That said, like all other judicial discretions, the discretion to enlarge time for filing of appeals must be exercised judiciously in accordance with established legal principles taking into account the parties' different interests. It should not be exercised arbitrarily or capriciously.

The court of Appeal in *Thuita Mwangi V Kenya Airways Ltd* [2003] eKLR gave guidelines on what factors the court should consider when exercising its discretion in applications such as the one before this court. The court expressed itself 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 in general, the matter which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted, and fourthly, the degree of prejudice to the respondent if the application is granted.”

10. In this case, the impugned judgement was delivered on 12th October 2023. This means that the statutory period within which the appeal ought to have been filed expired on or about 13th November 2023. The instant application was filed on 13th December 2023 about a month later. In my view, the delay of about one month cannot be said to be prolonged or inordinate and in any event, the delay has been sufficiently explained.



11. Weighing the rights and interests of the parties, I am of the view that the scales of justice tilts more in favour of the applicant because if his prayer for enlargement of time to file an appeal is dismissed, he will suffer grave prejudice since he will be shut out of the appeal process which may amount to a violation of his constitutional right to a fair hearing enshrined in Article 50 (1) of the *Constitution*.
12. If on the other hand the application was allowed, the respondents are not likely to suffer any prejudice which cannot be adequately compensated by an award of costs. It is instructive to note that the respondents did not claim either in their grounds of opposition or in their written submissions that they would suffer any prejudice if the application was allowed.
12. For all the foregoing reasons, I find merit in the applicant's prayer for grant of leave to file his intended appeal out of time. The same is allowed on terms that the intended appeal shall be filed and served within the next 14 days.
13. With regard to the prayer for orders of stay of execution pending the intended appeal, a reading of Order 42 Rule 6 of the *Civil Procedure Rules* which sets out the parameters within which orders of stay of execution should be issued shows clearly that the provision applies to existing as opposed to intended appeals.

However, the court in the exercise of its inherent powers to make any order that advances the cause of justice can, in appropriate cases, exercise its discretion and grant orders staying execution of the trial court's judgement pending the filing of an intended appeal if doing so was necessary in order to prevent a miscarriage of justice.
14. In this case, the applicant has not laid any basis upon which this court can exercise its aforesaid discretion since no evidence has been availed to demonstrate that execution was imminent. In any event, now that the applicant has been granted leave to file his intended appeal out of time, he can apply for stay orders in the appeal once it is filed.

In the premises, I decline to issue orders of stay of execution as sought in prayer 4 of the motion.
15. The upshot of this ruling is that the applicants motion dated 27th November 2023 partially succeeds to the extent that the applicant is granted leave to file and serve his intended appeal within the next 14 days. The prayer for stay of execution of the trial court's judgement is dismissed.
16. Costs follow the event and are at the discretion of the court. The costs of this application are awarded to the respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 12TH DAY OF FEBRUARY 2025.

HON. C. W. GITHUA

JUDGE

