



REPUBLIC OF KENYA



KENYA LAW
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**MED v AAD (Matrimonial Cause E002 of 2020)
[2025] KEHC 7247 (KLR) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 7247 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
MATRIMONIAL CAUSE E002 OF 2020
A. ONG'INJO, J
FEBRUARY 20, 2025**

BETWEEN

MED APPLICANT

AND

AAD RESPONDENT

RULING

1. By way of an amended Notice of motion application dated 27th September 2023, brought pursuant to the provisions of Section 3A, 79G and 95 of the Civil Procedure Act, Order 50 and Order 43 rule 5 of the Civil Procedure Rules and Article 159 of the Constitution and Section 59 of the Interpretation and General Provisions Act, the Applicant sought the following orders against the Respondent;
 - i. That the Court be pleased to extend time and grant leave to the Applicant to appeal against the Court orders dated 28th June 2022 dismissing the Applicants Preliminary objection.
 - ii. That the Court be pleased to stay all the proceedings pending the hearing and the determination of the Applicants intended appeal
 - iii. That the cost of the application be provided for.
2. The application is premised on the grounds on its face and supported by the affidavit of MD, the Applicant herein. In the grounds in support of the application, he states that Applicant only came to know that the ruling had been delivered on 28th June 2022 on the 23rd September 2022 when he discovered that the notice of delivery of the ruling was sent to the wrong email.
3. That being dissatisfied with the ruling he immediately filed a Notice of appeal which intended appeal would be rendered nugatory unless a stay is granted, the Applicant has a strong and arguable appeal and there is need to extend time to allow the him to appeal outside the 14 days.



4. In response to the application, the Respondent filed a replying affidavit dated 12th February 2024 sworn by AAD, the Respondent herein. In her deposition, she states that Order 51 rule 4 of the Civil Procedure Rules provides that every notice of motion shall state in general terms the grounds of the application and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served. No supporting affidavit has been annexed thereto and without which the same must fail.
5. She avers that grounds 2 and 3 of the amended motion seeks to rely on matters of fact which can only be substantiated by way of documentary evidence in order to discharge the burden of proof required under Sections 107, 108 and 109 of the Evidence Act.
6. The Respondent deposed that the Applicant's failure to prove that the Honourable court's ruling was sent to a wrong email disentitles him from benefiting the discretionary powers of this court to extend time. Seeking for stay of all proceedings pending the hearing and determination of an intended appeal at the Court of appeal is presumptuous because a notice of appeal being a cornerstone of the appellate process, an appeal to the court of appeal is deemed to have been initiated upon filing of a valid notice of appeal within 14 days from the date of the decision. There is no proof that was done. The Applicant will still be required under rule 75 (4) of the Court of appeal rules to seek extension of the statutory 14 days to file a notice of appeal at the Court of Appeal. Staying proceedings at this point when an application can go either way is presumptuous and injurious to her as it shall prolong the discord and tension between the Applicant and herself.
7. The Respondents contends that the application is incompetent, frivolous, vexatious and an abuse of the court process and the same should be dismissed with costs.

Applicant's submissions

8. The Applicant submitted that Article 50 of the Constitution 2010 provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. The order arising from dismissal is an order which the applicant has no automatic right of appeal except with leave of the Court as it does not fall under Section 75 of the Civil Procedure Act. Order 43 rule 2, 3 and 4 states that;
 - i. An appeal shall lie with the leave of the court from any other order made under these Rules.
 - ii. An application for leave to appeal under section 75 of the Act shall in the first Instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.
 - iii. Save where otherwise expressly provided in this rule, "order" includes both an order granting the relief applied for and an order refusing such relief."
9. The Applicant submitted that she requires the leave of the Court of appeal to the Court of Appeal. The requirement is couched in mandatory terms. The Applicant cited the case of Serephen Nyanani Menge vs Rispah Ontase (2018) eKLR, Mutungi J stated as follows;

"Where leave to appeal is a pre-requisite before an appeal can be lodged, failure to seek and obtain the leave is fatal and consequently no competent appeal can be lodged against such an order."



10. It was submitted that the Applicant was not aware of the orders dismissing her preliminary objection and she only came to know that the ruling had been delivered on 28th June, 2022 on 23rd September 2022. She discovered that the notice of delivery of the ruling was sent to the wrong email.
11. The Applicant's rights are protected under Article 47(1) and (2) of *the Constitution* which states that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
12. The delay for in action has properly been explained. The Applicant relied on the case of Edith Gichungu Koine Vs Stephen Njagi Thoithi (2014) eKLR, where Odek JJA observed thus:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application Is granted, and whether the matter raises issues of public importance, amongst others.”
13. The applicant also cited the case of *Charles Karanja Kuru vs Charles Gitbinji Muigwa CA 71 of 2016* where the court held thus;

“Having expressed ourselves as herein above the other issues that falls for consideration is whether the appeal filed out of time on 24th October 2014 could be deemed as being properly on record. There is a plethora of authorities from the High court which interpret the proviso to Section 79G of the *Civil procedure Act* to mean that an appeal filed out of time can be admitted as being properly on record once extension of time is granted.”
14. Reliance was put on Gerald M'Limbine vs Joseph Kangangi (2009) eKLR, where Emukule J. stated that;

“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 leave of court to have an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the court's permission to admit a non-existent appeal out of stipulated period to do so would actually be an abuse of the court's process under Section 79G.”
15. The Applicant contends that a suit filed devoid of jurisdiction cannot be remedied. Without jurisdiction the court cannot confer jurisdiction to itself. The subordinate court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction. The Applicant relied on the case of Owners of Motor vessel “Lillian S” vs Caltex Oil (K) Limited 1989.
16. It was further submitted that this court has no jurisdiction since the judgment in the superior court of New Jersey, Chancery division Family Part Middlesex County, USA has not been adopted as a Judgment in Kenya under Section 4, 5 and 6 of the *Foreign Judgments (Reciprocal Enforcement) Act* CAP 43. The republic of Kenya does not have a reciprocal arrangement with USA and so a judgment from USA must be adopted by the Court first before it is effective. In the absence of a reciprocal enforcement arrangement, a foreign judgment is enforceable in Kenya as a claim in common law. The common law principles on enforcement of foreign judgments were elaborated in Adams & others vs Cape Industries PLC, (1990) CH. 433.



17. The Applicant also sought for stay of proceedings pending hearing and determination of the intended appeal. The question of whether or not to grant an order for stay of proceedings is a discretionary one which must be exercised judiciously. The Applicant cited the case of *Lucy Waithera Kimanga & 2 others vs John Waiganjo Gichuri (KLR)* where Gikonyo J. addressed the question of an order for stay of proceedings being an important consideration.
18. The Applicant contended that this aspect of being rendered nugatory must be hinged on the fact of whether or not the appeal is arguable appeal and not whether the appeal will be successful. The Court of appeal and Supreme Court has said that an arguable appeal only needed to raise a single bona fide point worthy of consideration and need not be one that must necessarily succeed as was held in *Co-operative Bank of Kenya vs Banking Insurance of Finance Union (Kenya) (2015) eKLR*.
19. The Applicant asked this court to grant leave to the applicant to appeal against the orders dated 28th June 2022 dismissing the applicant's preliminary objection and the court be pleased to stay the proceedings pending hearing and determination of the intended appeal.

Respondent's submissions

20. The Respondent in his submissions raise two issues for determination, namely;
 - i. whether or not the court should extend time and grant leave to the applicant to appeal against the order of 28th June, 2022 and
 - ii. whether or not proceedings herein should be stayed pending the hearing and determination of the intended appeal.
21. On the first issue, the Respondent submitted that the Applicant did not support the amended motion with evidence and omission that should collapse it. The consequences of failing to support an amended motion when it contains issues of fact were discussed in the case of *Skair Associates Architects & The Evangelical Lutheran Church of Kenya & Others (2015) eKLR* in which Kamau J found as follows: -

“Order 51 Rule 4 of the Civil Procedure Rules, 2010 provides as follows-

Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served.”
22. The Respondent urged that without affidavit evidence to demonstrate that the notice of delivery of the ruling was sent to a wrong email, the Applicant falls short of discharging the burden of proof prescribed by Sections 107, 108 and 109 of the *Evidence Act* thereby disentitling him from prayer 1 of the amended motion.
23. On the second issue, the Respondent submitted that a notice of appeal is a means through which an appeal to the Court of Appeal is commenced. It is a cornerstone of the appellate process and an appeal to the Court of Appeal is deemed to have been initiated upon filing a valid notice of appeal within 14 days from the date of the decision. The Applicant further submitted that by dint of Rule 77 (2) of the Court of Appeal Rules, 2022, the Applicant ought to have filed a notice of appeal within 14 days from 28th June 2022 which was not done. Seeking to stay proceedings when an application afore-stated can go either way is presumptuous and has a real potential of delaying the dispensation of this matrimonial cause. The Respondent asked the court to dismiss the application with costs.



Analysis and Determination

24. I have considered the amended notice of motion dated 27th September 2023, the response thereto, the rival submissions by both parties alongside the cited authorities. I find the following issues emerging for determination;
- i. Whether the Applicant has satisfied the conditions requisite for granting leave to file appeal out of time, if so?
 - ii. Whether the Applicant has made out a case for staying of proceedings pending hearing of the intended appeal?
25. On whether the Applicant has satisfied the conditions for granting leave to file appeal out of time, Section 79G of the *Civil Procedure Act* is guiding law on enlargement of time to file an appeal. The said Section provides the timelines for filing an appeal which is 30 days from the time the orders are issued. However, the section further grants this court discretion to admit an appeal out of time where there are satisfactory explanations on the delay. Such discretion should be exercised judiciously to serve justice. Section 79G of the 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 a good and sufficient cause for not filing the appeal in time.”
- Order 43 rule 3 of the Civil Procedure Rules provides that “an application for leave to appeal under Section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within 14 days from the date of such order.”
26. Again Rule 4 of the Court of Appeal Rules provides as follows;
- “The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”
27. The Supreme Court in the case of Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others [2014] eKLR laid down the principles that a court should consider in exercising discretion to extend the time as follows;
- i. 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;
 - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.



- iii. As to whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - vi. The application has been brought without undue delay;
 - vii. In certain cases, like election petitions, public interest should be a consideration for extending time.
28. The principles upon which this court exercises its discretion were echoed in the case of *Leo Sila Mutiso vs Hellen Wangari Mwangi* (1999) 2 EA 231 where the Court held that;
- “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 matters 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.”
29. In the case of *Omar Shurie vs Marian Rushe Yafar* (2020) eKLR, the court of Appeal while addressing an application seeking leave to file an appeal out of time held that the court must take into account the length of the delay, the reasons for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the Respondent if the application is granted.
30. According to the Applicant he only came to know that the ruling had been delivered on 28th June 2022 on the 23rd September 2022. The Applicant discovered that the notice of delivery of the ruling was sent to the wrong email. The Respondent contested and submitted that without affidavit evidence to demonstrate that the notice of delivery of the ruling was sent to a wrong email, the Applicant falls short of discharging the burden of proof prescribed by Sections 107, 108 and 109 of the *Evidence Act* thereby disentitling him from prayer 1 of the amended motion.
31. The reason for the delay according to the Applicant was that the ruling was sent to the wrong email and thus he did not receive it in good time. The Applicant did not attach any evidence in his amended application to buttress this argument. I find that the reason for the delay advanced by the applicant is not persuasive.
32. In the circumstances, the applicant has not given this court sufficient reason to enable it to exercise its discretion and extend time to file appeal out of time.
33. Having found the applicant is not deserving extension of time to file an appeal, it will just be an academic exercise to proceed determining the issue of stay of proceedings. The prayer for stay of proceedings therefore automatically fails.
34. Accordingly, the Applicant’s Notice of motion application dated 27th September 2023 lacks merit and it is hereby dismissed with costs to the Respondent. This court proceeds to make the following orders;
- i. The matter shall be mentioned on 27/ 3/ 2025 for further directions as to its hearing.
 - ii. Costs of this application shall be borne by the Applicant.



It is so ordered.

DELIVERED DATED AND SIGNED AT MIGORI THIS 20TH DAY OF FEBRUARY, 2025.

A. ONGINJO

JUDGE

