



REPUBLIC OF KENYA



KENYA LAW
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**Mwandoto v Wamaria (Miscellaneous Application E030 of 2022)
[2025] KEHC 1816 (KLR) (7 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1816 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
MISCELLANEOUS APPLICATION E030 OF 2022
AN ONGERI, J
FEBRUARY 7, 2025**

BETWEEN

DANSON MWANDOTO APPLICANT

AND

KENNEDY WAMBUA WAMARIA RESPONDENT

RULING

1. The application coming for consideration in this Ruling is the one dated 7th November 2023 brought under Order 51 Rule 1, Order 42 Rule 6, Section 79G, Section 95, Order 50 Rule 6, Section 1A, 1B and 3A of the *Civil Procedure Act* Cap. 21 Laws of Kenya seeking the following prayers:-
 - i. That this application be certified as urgent and service be dispensed with in the first instance.
 - ii. That this Honorable court be pleased to issue an order staying the proceedings and execution of Judgment in Voi Civil Suit No. 119 of 2007 pending hearing and determination of this application.
 - iii. That this Honorable court be pleased to issue an order staying the proceedings and execution of Judgment in Voi Civil Case No. 119 of 2007 pending hearing and determination of the Intended Appeal.
 - iv. That this Honorable court be pleased to extend time and grant the applicant leave to appeal out of time.
 - v. That the draft Memorandum of Appeal annexed herewith be deemed as duly filed.
 - vi. That this Honorable court be pleased to issue any other order it deems fit to meet the ends of justice.
 - vii. Costs of this application be provided for.



2. The application is based on the following grounds:-
 - i. That the trial court on 28th April 2022 delivered a Judgment in favor of the Applicant by dismissing the Applicant's suit with costs.
 - ii. That the Applicant showed interest of appealing by requesting and paying for certified copies of proceedings and judgment.
 - iii. That despite the Applicant showing interest in appealing against the Judgment, the Respondent filed Party and Party Bill of Costs.
 - iv. That the court then kept on entertaining the Party and Party Bill of Costs while the Applicant was waiting to be supplied with the proceedings.
 - v. That the Applicant raised an objection and the court on 27th October 2022 gave directions that will proceed with the taxation.
 - vi. That the court on 27th October 2022 gave a hearing date for the Respondent's Party and Party Bill of Costs to be on 14th November 2022.
 - vii. That the Respondent's intentions can be clearly seen is to execute the Judgment of the trial court despite knowing that the Applicant had intention of appealing.
 - viii. That if the orders sought are not granted then the Intended Appeal will be rendered nugatory.
 - ix. That it will be in the wider interest of justice and fairness this application be allowed.
 - x. That the Respondent will suffer no harm if this application is allowed.
3. The application is supported by the affidavit of the Applicant Danson Mwandoto in which he retaliated the grounds stated above.
4. The Respondent opposed the application by filing a Replying Affidavit dated 14th November 2022 in which they stated that there is no appeal in which a stay should be granted.
5. Further, that there is no decree since the Appellant's case was dismissed.
6. The Respondent also stated in the Replying Affidavit that the Appellant is only avoiding paying costs and not challenging the judgment of the trial court.
7. Finally, that the Respondent would be able to refund the costs in the event the appeal succeeds.
8. The parties filed written submissions as follows:- the applicant submitted that the delay in filing was occasioned by the fact that the lower court file was active with stay and taxation or assessment of costs of proceedings. the applicant has clearly shown his intention to appeal as the letter requesting for copies of judgement and proceedings was issued within time. The applicant argued that under provision of Section 1A and 1B of the Civil Procedure and Article 159 of *the Constitution* the court should tilt towards substantive justice by allowing the application herein.
9. The applicant further submitted that the respondent will not suffer any prejudice if the application is allowed. The respondent has not sworn any affidavit to show what prejudice it may suffer. The applicant contended that the intended appeal is arguable and should be allowed to ventilate the same.
10. On the orders for stay the applicant submitted that if the orders of the lower court are executed the applicant would suffer substantial loss and damage. The respondent's means are unknown to the



applicant and the money paid out or assets attached will be out of reach of the applicant. If the matter in the lower court proceeds it would render this appeal nugatory.

11. The respondent alternatively submitted that the applicant has not demonstrated or proved what substantial loss he is likely to suffer if the orders herein are not granted. The respondent further argued that the applicant has never paid security to the court.
12. It was the respondent's contention that the applicant has not provided sufficient explanation as to why there was delay in filing the application herein and therefore the application herein should fail for lack of merit.
13. The issues for determination in this application are as follows:-
 - i. Whether stay of execution pending appeal should be granted.
 - ii. Whether the Applicant should be granted leave to appeal out of time.
14. On the issue as to whether stay of execution should be granted pending appeal, there is no dispute that the Applicant's case was dismissed and therefore there is nothing to stay.
15. On the issue of stay of costs, the same would be paid whether or not the appeal succeeds. However, the same should be deposited in court awaiting the determination of the appeal.
16. On the issue of leave to appeal out of time, the legal provision for leave is to appeal out of time in Section 79 G of the CPA which states as follows:-

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.
17. I find that the court has discretion to grant the same. There are certain factors to be considered as follows:-
 - i) The period of delay;
 - ii) The reason for the delay;
 - iii) The arguability of the appeal;
 - iv) The degree of prejudice which could be suffered by the Respondent if the extension is granted;
 - v) The importance of compliance with time limits to the particular litigation or issue; and
 - vi) The effect if any on the administration of justice or public interest if any is involved.
18. In the case of Paul Musili Wambua vs Attorney General & 2 Others [2015] eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-

“it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general the matters which a court takes into account in deciding



whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

19. I find that the Applicant has explained the reason for failure to apply within the stipulated time. The reasons are plausible. There is no dispute that this case proceeded to taxation of costs.
20. It is in the interest of justice to allow the Applicant to exercise his right of appeal.
21. I allow the application for leave on the following conditions:-
 - i. That the Applicant pays the costs of the application assessed at Kshs. 10,000/= within 30 days of this date.
 - ii. That the appeal is filed within 30 days of this date.
 - iii. That the costs of the dismissed suit be deposited in court within 30 days of this date.

DATED, SIGNED AND DELIVERED THIS 7TH DAY OF FEBRUARY 2025 IN OPEN COURT AT VOL.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Maina

Mr. Kioko holding brief for Mr. Jengo for the Applicant

Ms. Isika for the Respondent

