



National Social Security Fund Board of Trustees v Munyili (Civil Appeal E1086 of 2024) [2025] KEHC 1643 (KLR) (Civ) (19 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1643 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1086 OF 2024

LP KASSAN, J

FEBRUARY 19, 2025

BETWEEN

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES .. APPELLANT

AND

JAMES MUTHAMA MUNYILI RESPONDENT

RULING

1. Before this court is a Notice of Motion dated 19.09.2024 brought under Order 42 Rule 6, Order 51 Rules 1 & 5 of the Civil Procedure Rules, Article 159 (2) (d) Constitution of Kenya, Sections 3, 3A, 79G and 95 of the Civil Procedure Act, Section 58 (3) of the National Social Security Fund Act and all enabling provisions of the law wherein the Applicant seeks orders to wit:
 - a. Spent
 - b. Spent
 - c. Spent
 - d. Spent
 - e. That this Honourable Court be pleased to admit the Appellant/Applicant's appeal against the ex-parte judgment delivered by Hon. Kagoni E. M., PM in Civil Suit No. 8057 of 2019 on 22nd November 2022 out of time.
 - f. That consequent to the grant of prayer 5 above, the Honourable Court be pleased to order stay of execution of the ex-parte judgment delivered by Hon. Kagoni E.M., PM in determination of the Appellant/Applicant's appeal and set aside the warrants of attachment and sale issued to Icon Auctioneers on 23rd March 2023 and the proclamation notice dated 29th March 2023.



- g. That the costs of this application do abide the outcome of the appeal.
2. The said application is premised on the grounds on its face and further supported by the affidavit sworn by the General Manager for the Applicant. The Applicant's case is that judgment was delivered in civil suit no. 8057 of 2019 awarding the Respondent Kshs 172,595.41/= with interest at court rates from 15th September 2017 until payment in full. The matter had proceeded in the absence of the Applicant in disregard to its right to a fair trial under Article 50 of *the Constitution*. That the Applicant was not served with the judgment notice nor with the notice of entry of judgment. That the Applicant only came to know of the matter when auctioneers visited its offices to proclaim and attach warrants pursuant to warrants of attachment and sale dated 23.03.2023. An application dated 03.04.2023 was filed seeking to set aside the said warrants of attachment and the ex-parte judgment delivered on 22nd November 2022. A ruling was delivered on 16.08.2024 dismissing the said Application.
 3. Aggrieved, the Applicant filed this appeal as the judgment was delivered by a court lacking jurisdiction pursuant to section 53 of the *National Social Security Fund Act*. Since the time for filing the appeal had lapsed necessitating the filing of this application. That the court had unfettered and wide discretion to admit the appeal filed out of time. That the delay was occasioned by the fact that the applicant was not aware of the matter and its subsequent orders. That upon being made aware, the first action was filing of the Application to set aside the ex-parte proceedings but the same was dismissed and a change of advocates occasioned further delay. That the delay is justified and not inordinate. That the appeal has high chances of success as the matter before the trial court fell under the jurisdiction of the Retirements Benefits Appeals Tribunal. That the Respondent would not suffer prejudice. That the purported proclamation and attachment of the Applicant's was illegal as its assets are protected from attachment under section 58 (3) of the *National Social Security Fund Act*.
 4. The Respondent filed its Grounds of Opposition dated 14.10.2024. The grounds relied upon are that the Memorandum of Appeal and Application are fatally defective, frivolous, vexatious, unmerited and an abuse of the court process. The same were defective ab initio having been filed out of time as the judgment was delivered on 22nd November 2022 over 22 months. The Advocate for the Applicant was a stranger and improperly on record having not been allowed to enter appearance after judgment as provided under Section 9 Rule 9 of the Civil Procedure Rules, 2010. That the Memorandum of Appeal raises fresh issues that were never raised at trial, in the defence or even the application for review/setting aside. That the Appeal and Application herein offends the provisions of Order 45 of the Civil Procedure Rules having already opted to review/set aside the judgment had exhausted that remedy and were barred in law from filing an Appeal against the said judgment. The court cannot usurp its power to abrogate the ruling dated 16.08.2024 without having been properly moved. That the Application herein was res judicata having filed a similar matter in the primary suit. That the court cannot grant that which has not been asked for, that there was no prayer for leave to extend/enlarge time. The Respondent prayed the application be dismissed with costs.
 1. The application was canvassed by way of written submissions.

Applicant's submissions

6. The Applicant submitted on the opposition raised by the Respondent's grounds of opposition. First, that the advocate was not properly on record and ought to have sought leave of the court to enter an appearance. They submitted that the same was misplaced as an appeal to an appellate court was not a continuation of the proceedings in the lower court. A party was at liberty to seek an advocate without filing a notice of change of advocates. Further, that the courts have held that a non-adherence with the provisions of Order 9 Rule 9 did not make proceedings a nullity and did not occasion



- any prejudice to an opposing party. That on appeal the proceedings were new, separate and distinct from the proceedings of the trial court. The Applicant relied on the authorities, Stanley Mugambi-vs-Anthony Mugambi (2005) eKLR, Ngeno-vs-Mosonik (ELCA E001 of 2022) KEELC 13573 (KLR) (13 October 2022) (Ruling), Tobias M. Wafubwa-vs-Ben Butali (2017) eKLR, Rose A. Ochanda & Ano.-vs-Richard Wafula Makokha t/a R M Wafula & Co. Advocates (2022) eKLR,
7. Second, that the application and intended appeal raises new issues not raised in the primary suit. The Applicant submitted that the issue of jurisdiction was an exception to the rule and can be raised at any stage of the proceedings. See Southern Star Sacco Limited-vs-Vanancio Ntwiga (2021) eKLR.
 8. Third, that the Application dated 03.04.2023 did not seek review orders but to set aside judgment and quash the proceedings of 01.09.2022. therefore, this ground was misplaced and without basis.
 9. Fourth, on seeking admission of the appeal out of time, the Applicant submitted that section 79G of the *Civil Procedure Act* envisages that a substantive appeal be filed first and an application seeking orders for the admission of the appeal out of time be made in that appeal. That the Respondent's contention that leave should have first been sought before filing the memorandum of appeal was misplaced and without basis. Relying on the case of Evans Kiptoo-vs-Reinhard Omwoyo Omwoyo (2021). That the court had unfettered discretion to extend the time for filing an appeal out of time as held in the case of Paul Musili Wambua-vs-Attroney General & 2 Others (2015) eKLR. The ex-parte judgment was delivered on 22nd November 2022 wherein the matter proceeded in the absence of the Applicant in disregard of Article 50 of *the Constitution*. That the judgment notice nor notice of entry of judgment were never served upon the Applicant the subject of the proclamation and attachment on 23.03.2023. The Applicant acted with speed in filing an application dated 03.04.2023 seeking to set aside the warrants of attachment, proclamation notice and ex-parte judgment delivered on 22nd November 2022. As such the delay in filing the appeal was justified and not inordinate. Further, it took time to transfer the matter from the matter from the previous advocates. That the Application herein was filed 34 days after the ruling delivered on 16.08.2024 and as such the reason for delay was satisfactorily explained.
 10. Fifth, the appeal had chances of success. The subject matter of the dispute fell under the jurisdiction of the Retirements Benefits Appeals Tribunal and not the trial court. That under Article 48 of *the Constitution*, the Applicant's right to access justice was guaranteed and should not be restrained as held in the case of Stecol Corporation Limited-vs-Susan Awuor Mudemb (2021) eKLR.
 11. Sixth, the Applicant submitted that a stay of execution be granted pending the hearing and determination of the appeal. The court had jurisdiction under Order 42 Rule 6 of the *Civil Procedure Act* to entertain an application for stay of execution whether or not the same had already been heard by the lower court and dismissed- Patrick Kalaya Kulamba & Ano.-vs-Philip Kamosu & Roda Ndanu Philip (Deceased) (2016) eKLR. That the court had the discretion to grant orders of stay as in the case of Rose A. Ochanda supra. That if stay is not granted the Applicant will suffer substantial loss as execution will proceed and it will render the appeal a nugatory as the Respondent will not be in a position to refund if the appeal is allowed. That the auctioneers under the instructions of the Respondent had already attached and proclaimed the Applicant's assets despite the same being protected from attachment under section 58 of the *National Social Security Fund Act*. That the Applicant was ready and willingly to abide by any terms and conditions regarding security for the due performance of the decree as the Honourable Court may deem fit. The Applicant submitted that the Application before the court was merited and the same be allowed.



Respondent's submissions

12. The Respondent submitted that first, in support of its grounds of opposition numbers s1, 2 and 4, the Memorandum of Appeal was filed without the leave of the court and the Application herein had no prayer for an extension of time to file the Memorandum of Appeal out of time. As such, it was fatally defective and should be dismissed.
13. Second, the issue of jurisdiction and provisions of Section 53 of the *National Social Security Fund Act*, the same was never raised in the primary suit. That the Applicant cannot ambush parties with new issues at this stage that were never ventilated in the primary suit hence cannot be deemed to be an error in law and fact as the issue never arose before the court for determination.
14. Third, there was no explanation of the inordinate delay of over two years in filing of the Appeal. That the claim the Applicant was unaware of the judgment is not valid as they were aware of the primary suit and had attempted to set aside the judgment. That the Applicant in failing to explain the delay and in bringing the application herein denies the Respondent the fruits of his judgment- Mombasa County Government-vs-Kenya Ferry Services & 2 Others (Application 29 of 2018) (2019) KESC 50 (KLR) (25 February 2019) (Ruling).
15. Fourth, that the Advocate for the Applicant was a stranger and improperly on record. That Under Order 9 Rule 9 of the *Civil Procedure Act*, the Advocate had no locus standi to file any pleadings in this matter noting the initial Advocate on record in the primary suit was the firm of M/S Muga & Muga Advocates. That no application for change of advocate or consent was filed to allow the firm of P.K. Mbabu & Company to come on record. The Respondent sought to distinguish the case of Ngeno Supra wherein the Advocate on record in the appeal did not seek any orders. That the Applicant ought not to be seeking interim reliefs in their application unlike in this case. That the Applicant shouldn't be allowed to approbate and reprobate to defeat the ends of justice when it suits them. That the Applicant should be allowed to rely on the primary suit when it suits them and when it does not they distance themselves- Behan & Okero Advocates-vs-National Bank of Kenya (2007) eKLR and Faud Mahmoud Mohamed-vs-Commercial Bank of Africa Limited (2007) eKLR.
16. Fifth, the Respondent submitted that the Application herein was res judicata that similar orders against the warrants of attachment under prayers 2,3, and 4 herein were made before the trial court. The same were dismissed and the Applicant has not filed for review of appeal against the ruling delivered on 16.08.2024. That the validity of the warrants of attachment being referred to had lapsed and therefore overtaken by events.
17. Sixth, that the application seeking leave to file an appeal out of time under section 79G of the *Civil Procedure Act* ought to be accompanied by a prayer to enlarge time. That the delay herein of two years was inordinate and unexplained. The Respondent prayed that the application be dismissed with costs.
18. I have considered the Application, the grounds of opposition and the submissions filed herein.
19. The issues for determination herein are;
 - i. Whether the Advocate for the Applicant is properly on record herein?
 - ii. Whether the Application herein is res judicata?
 - iii. Whether the Applicant can raise new issues of jurisdiction in the matter?
 - iv. Whether the Applicant herein should be granted leave to appeal out of time against the judgment in Nairobi CMCC No. 8057 of 2019?



- v. Whether a stay of execution should be granted against the judgment in Nairobi CMCC No. 8057 of 2019 pending the appeal?
- vi. Who should bear the costs?

Determination

20. First issue, whether the Advocate for the Applicant was properly on record in this matter. Order 9 Rule 9 of the Civil Procedure Rules 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.”

21. Further, Order 9 Rule 5 of the Civil Procedure Rules provides:

“A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

22. A reading under Rule 5 a party is at liberty to change his advocate on condition that a notice of change of advocate is filed in the court in which such cause or matter is proceeding (Underlined the court’s emphasis). The matter before the trial court i.e. the primary suit is entirely different from an appeal. In both instances express instructions to file the cause or an appeal are sought separately. Therefore, it is only when the Applicant in the primary suit seeking to change advocates was obligated to seek the leave of the court or file a consent. This throws away the Respondent’s argument that in the Ngeno case supra it was only if an advocate is not seeking interim reliefs. Oundo J. in that matter held:

“22. It is thus clear from the above authorities and/or holdings that save for an application for review, execution, stay of execution, or setting aside a judgment, an appeal to the appellate court after judgment has been filed is an independent suit that is not bound by the provisions of Order 9 Rule 9 of the Civil Procedure Rules. Consequently, I hold that the Memorandum of appeal dated the February 15, 2022 is competently before the court. I find that the issue of non-compliance with Order 9 Rule 9 as submitted by the applicant/respondent herein is without merit and proceed to dismiss the application dated the March 23, 2022 with costs.”

23. I will not belabor on this issue as I associate myself wholly with the holding in the case Kenya Pipeline Company Limited-vs-Lucy Njoki Njuru (2014) eKLR. I find the firm of P.K. Mbabu & Company Advocates is properly on record for the Applicant herein.



24. Second issue, whether the application herein is res judicata? Section 7 of the [Civil Procedure Act](#) provides:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

25. This is a legal doctrine that prevents the same parties from litigation a case that has already been conclusively decided by a competent court. This is raised by the Respondent in its submissions in reference to prayer 2, 3 and 4 of the Application herein. The prayers seeking interim relief pending the hearing and determination of this Application. This Application was filed under a Certificate of Urgency and dealt with by the duty court on 23.09.2023 certifying the matter urgent and prayer 2 granted pending the hearing of this Application. As such, prayer 2 having been granted and prayer 3 and 4 not being granted have been overtaken as the Court is now dealing with the substantive issues of the Application. This issue has thus been rendered moot.

26. Third issue, whether new grounds can be raised in the appeal if they were not raised before the trial court? The issue of jurisdiction is a fundamental issue that goes to the competency of the court. If a court lacks jurisdiction, then any proceedings or decisions made by the court are a nullity. I will not go into the merits of the same save to add that issues jurisdiction can be raised at any stage and the same will be determined on its merits.

27. Fourth issue, whether to grant leave to file an appeal out of time? Section 79G of the [Civil Procedure Act](#) provides that the appeals from the subordinate court to the High Court must be filed within a period of 30 days from the date of the decree or order from which the appeal lies. It provides:

“Every appeal from a subordinate court to high court should be filed within a period of thirty days from the date of the decree or order appealed against, From such period any time the lower court may certify as having been requisite of a copy of the or order. Provided that an appeal may be admitted out of time if the appellant satisfied the court that he had good and sufficient cause for the filing of the appeal in time.”

28. The Respondent submitted that the Applicant has not made a specific prayer for extension of time to file the Memorandum of Appeal out of time. A look at this Application prayer 5 seeks:

“That this Honourable Court be pleased to admit the Appellant/Applicant’s appeal against the ex-parte judgment delivered by Hon. Kagoni E. M., PM in Civil Suit No. 8057 of 2019 on 22nd November 2022 out of time.”

29. It is therefore not true that the Applicant has not made an application seeking leave to appeal out of time. As such, the court is to consider the merits of the prayer to file an appeal out of time.

30. Section 79G above allows for the extension of time within which an appeal ought to be filed is a matter of judicial discretion. An applicant seeking enlargement of time to file an appeal must show that he has a good cause for doing so.

31. The court in exercise of its discretion is supposed to take into account the length of the 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 and whether the matter raises issues of public importance. (See Court of Appeal in Edith Gichungu Koine-vs-Stephen Njagi Thoithi (2014) Eklr.

32. In addition, Section 95 of the *Civil Procedure Act* grants to the court the “discretion, from time to time, to enlarge” any time fixed for the doing of any act under the Act. See also, Order 50 Rule 6 of the Civil Procedure Rules. Thus it is incumbent upon the Applicant to satisfy the court that it had good and sufficient cause for not filing the appeal in time, and is deserving of the court’s discretion. The Respondent submitted that the Applicant did not pray that the court enlarge time for the applicant to file an appeal out of time. Under Section 95 above the Act allows the court in its discretion to enlarge time. There is no specific provision that the same ought to be pleaded by a party. As such when the court is considering an application brought under Section 79G as is the case herein then Section 95 can be relied upon the court.
33. The judgment in the primary suit Nairobi CMCC No. 8057 of 2019, was delivered on 22.11.2022. The Applicant filed an application in the primary suit to set aside the judgment and the warrants of attachment in execution of the judgment which was dismissed vide a ruling delivered on 16.08.2024. Subsequently, this application was filed on 19.09.2024. To note, the applicant seeks leave to appeal out of time against the judgment delivered by Hon Kagoni E.M., PM on 22.11.2022. The delay is for 21 months and 28 days.
34. The reason for the delay given by the Applicant through Kellen Njue the General Manager and Corporation Secretary of the Applicant was that the suit proceeded in the absence of the Applicant contrary to Article 50 of *the Constitution*. The Applicant only came to know the matter had proceeded and judgment delivered on 23.03.2023 when the auctioneers came to proclaim and attach the Applicant’s assets. The Respondent on the other hand contends that it filed the primary suit and served the Applicant who entered appearance and filed its statement of defence. The Applicant being represented failed to attend the hearing and subsequently, the hearing proceeded in their absence and further, a mention date for submissions was served on them. That the court was satisfied with the service and gave the judgment date. In the case of Andrew Kiplagat Chemaringo-vs-Paul Kipkorir Kibet (2018) eKLR, the court held:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”
35. Herein the delay has not been satisfactorily explained by the Applicant. Having entered appearance, it was the Applicant’s duty through their counsel to follow up on their matter before the court. The Applicant has failed to explain what transpired leading up to the delivery of judgment.
36. As to whether the Respondent will suffer any prejudice, this has to be weighed against a party’s constitutional right to be heard (See Court of Appeal case Vishva Stone Suppliers Company Limited-vs-RSR Stone (2006) Limited (2020) eKLR.). The Applicant deposed that the Respondent will not suffer any prejudice if the orders of leave are granted. The Applicant has expressed his chances of appeal succeeding. The Respondent’s deposition as to the prejudice he will suffer cannot dislodge the clear prejudice the Applicant stands to suffer.
37. Where a party is aggrieved and wishes to pursue an appeal it would be fair to exercise discretion in his favour and especially where the delay in filing the appeal is not inordinate and the adverse party will not be prejudiced in any way. The discretion of the court must always be exercised judiciously. The



Applicant having expressed his intentions to be heard by this court on appeal, it is my considered view that he ought to be given an opportunity to pursue the appeal.

38. For the above reasons, the Applicant has satisfied the conditions for grant of leave to appeal out of time. The prayer in that respect (prayer (e)) as thus is merited and the same is hereby allowed. The appeal to be filed within 21 days from the date of this ruling.
39. The prayer for leave to file an appeal having been allowed, this court will then proceed to determine the fifth issue as to whether there ought to be stay of execution of the order, judgment of the trial court pending the hearing and determination of the appeal. The principles upon which the above prayer can be allowed are now well settled from the authorities from this court and from the superior courts.
40. Generally, a stay of execution is provided under Order 42 Rule 6 of the Civil Procedure Rules 2010 which provides:

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”
41. For orders of stay of execution to be granted, the Applicant must satisfy the conditions to wit that substantial loss may result to the Applicant unless the order is made; that the application has been made without undue delay; and that such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.
42. On the issue of delay, this court has already determined that the delay has not been explained. Despite this justice ought to still be done to both parties. The Applicant has expressed its willingness and ability to deposit security for due performance of the decree. As such, this condition is allowed.
43. I make the following orders:
 - a. That the appeal herein as filed is hereby admitted out of time and is deemed as duly filed and served within the statutory period.
 - b. That there shall be a stay of execution of the decree in Milimani CMCC 8057 of 2019 pending the hearing and determination of appeal herein.
 - c. That the decretal sum in Milimani CMCC 8057 of 2019 of Kshs 172,595.41/= be deposited in a joint interest earning account as opened and operated by the Advocates both parties until further orders of this court as to its disposal and pending the hearing of the appeal herein.
 - d. That the Appellant shall within 60 days from the date of this ruling compile, file and serve upon the Respondent a complete record of appeal.
 - e. The Deputy Registrar is directed to call for the submission of the lower court record for admission of this appeal to hearing expeditiously.
 - f. Costs follow the event, costs herein shall be to the Respondent assessed at Kshs 30,000/= to be paid before the appeal is heard and in default execution to issue for the recovery of the same. Deposit within 30 days from today.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19TH DAY OF FEBRUARY 2025.

L. P. KASSAN

JUDGE



In the presence of:-

Muo holding brief Mbaahi for Applicant

Omondi for Respondent

Carol – Court Assistant

