



REPUBLIC OF KENYA



**Sidwaka v Musungu (Civil Appeal E039 of 2024)
[2025] KEHC 3442 (KLR) (21 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3442 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E039 OF 2024
WM MUSYOKA, J
MARCH 21, 2025**

BETWEEN

CHARLES BWIBO SIDWAKA APPELLANT

AND

DENNIS BWIRE MUSUNGU RESPONDENT

*(An appeal arising from the ruling of Hon. EC Serem, Resident Magistrate,
RM, delivered on 5th August 2024, in Busia CMCCC No. E020 of 2022)*

JUDGMENT

1. The appeal herein arises from an interlocutory ruling that the trial court delivered on 5th August 2024, dismissing an application, dated 23rd May 2024.
2. The background is that the instant suit was initiated by the respondent on 28th January 2022, being a personal injury claim, arising from a road traffic accident. The appellant filed 2 defences, through different firms of Advocates, essentially denying the allegations made in the plaint, and alternatively attributing negligence on the respondent. Eventually one of the Advocates dropped out of the proceedings.
3. The matter was mentioned several times, before its hearing commenced in the earnest, on 8th April 2024, when 2 witnesses testified for the respondent, before the respondent closed his case.
4. At the close of the respondent's case, the appellant made an oral application, for adjournment, to enable him to file an investigation report and a report by a doctor. That application was opposed, on the basis that pre-trial had been done, and there was no intimation that the appellant desired to file other documents later. It was argued that no good reason was being advanced why the documents were not filed earlier, and, in any case, the appellant had skipped the pre-trial conference.



5. The trial court denied that request, in a ruling that was delivered that same day. The reasons given by the court were that the application was coming rather late in the day, as the respondent had closed his case, and that, although leave had been given, as far back as 30th January 2023, for filing the doctor's report, 14 months down the line, there had been no compliance. It was also stated that the appellant had intimated that the investigation report was dated 9th May 2022, which meant that the appellant had it at hand for 2 years, before making the application. It was noted that no good reasons were advanced for the delay in filing the documents. It was concluded that it would prejudice the respondent, if the documents were admitted, as that would amount to an ambush. Eventually, the trial court allowed the filing of the 2nd medical report, as the respondent did not appear opposed to it, but denied the request for the filing of the investigation report.
6. After the trial court denied that motion, the appellant filed an application, dated 23rd May 2024, seeking enlargement of time to file the application, grant of leave to appeal against the orders made in that ruling and stay of proceedings pending appeal.
7. The trial court ruled on that application on 5th August 2024, when it dismissed it. The court found that the said application, for enlargement of time to seek leave to appeal was being made 14 days outside the period allowed, by Order 43 rule 3 of the Civil Procedure Rules, and no reasons were advanced for the delay. On the prayer for stay of proceedings pending hearing and determination of the application, the court was of the view that that prayer did not make sense, as it also referred to the appeal. In the end, the trial court found that the prayer for stay was badly drafted, and that there was no basis for granting it.
8. The dismissal of the application dated 23rd May 2024, on 5th August 2024, is what prompted the filing of the appeal herein. The memorandum of appeal, dated 12th August 2024, was lodged herein on 13th August 2024. The grounds of appeal are that the court erred in finding that the application lacked merit, erred in dismissing the said application with costs, the court failed to uphold legal parameters on filing of lists of documents and lists of witnesses, the court failed to take into account the lists of documents that the appellant desired to file, the court erred in failing to stay proceedings of the matter before it, and the decision was not based on sound facts and evidence. The appellant would like the order of 5th August 2024 be substituted with an order allowing that application.
9. Directions, herein, were given on 20th January 2025, for canvassing of the appeal, by way of written submissions. Both sides have complied.
10. A significant portion of the written submissions by the appellant dwell on the ruling of 8th April 2024. The issues that I am invited to address are not based on that. It is argued that allowing the filing of the lists of documents would allow the court to arrive at a just decision, the documents desired to be filed include an investigator's report which would help the court determine liability, the court did not base its decision on evidence and facts. It is averred that the appellant did not have possession of the documents as at the time when the pre-trial conference was held, for there was a change of Advocates, and that that material was not in possession of the current Advocates in good time. The appellant denies sitting on the 2 reports and failing to file them in time. He cites *Interactive Gaming & Lotteries Limited v Flint East Africa Limited & 2 others* [2013] KEHC 4127 (KLR)(Odunga, J), on inherent jurisdiction to make orders to meet the ends of justice. Article 159(2)(d) of *the Constitution* and *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* [2013] KESC 6 (KLR) (Mutunga, CJ&P, Tunoi, Ojwang, Ibrahim, Wanjala & Ndungu, SCJJ) are also cited, on procedural technicalities.
11. The respondent submits that the Advocates for the appellant came on record on 23rd March 2022, and the hearing commenced on 24th October 202, which gave them adequate time to comply. The



investigation report was dated 9th May 2022 and ought to have been filed by the date leave was being sought to file it on 8th April 2024.

12. Hon. Serem, RM, made orders in 2 rulings, one delivered on 8th April 2024 and the other on 5th August 2024. The ruling of 8th April 2024 allowed the appellant 14 days to file a medical report and denied leave to file an investigation report. The ruling of 5th August 2024 dismissed an application that sought leave to appeal against the orders of 8th April 2024 and stay of proceedings.
13. The appeal herein is against the orders of 5th August 2024, which dismissed the application for leave to appeal and stay of proceedings, and not against the orders of 8th April 2024. Looking at the grounds of appeal, in the memorandum of appeal herein, and the arguments made in the written submissions by the appellant, it would be clear that the appellant is proceeding as if the appeal herein is against the orders of 8th April 2024.
14. The ruling of 5th August 2024 dismissed the application for leave to appeal out of time and for stay of proceedings. The ground for disallowing the prayer for leave to appeal out of time was that no reason or justification had been given for the delay in not seeking the leave to appeal within the time allowed in law. Regarding grant of stay of proceedings, the trial court was of the view that the prayer for it was poorly constructed, as it was not clear whether stay was sought pending the application or the intended appeal, and that, as the prayer for leave to appeal had been rejected, there was no foundation to grant stay.
15. The appeal herein should turn around the issues in paragraph 14 hereabove, that is whether the delay in filing the appeal was explained or justified, and whether, the grant of leave having been denied, there was foundation for grant of stay, nevertheless. The issue as to whether there was justification for what the appellant wanted to file, in the application he made orally on 8th April 2024, is not before me, for that should have been the subject of an appeal against the orders of 8th April 2024, for those orders were about the substance of those documents. The instant appeal is about being denied leave to appeal and stay of proceedings pending the contemplated appeal. That the appellant has not addressed.
16. There is discretion to extend time for seeking grant of leave to file appeal out of time. However, the exercise of that discretion is not automatic, for sufficient cause must be shown.
17. The principles for exercise of that discretion were laid in *Nicholas Kiptoo arap Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR (Ibrahim & Wanjala, SCJJ). The principles are that the extension of time is not a matter of right, for it is an equitable remedy, available only to a deserving party; a party seeking exercise of the discretion in its favour must endeavour to demonstrate that they deserve it; the discretion would be exercised on a case to case basis; where delay is alleged to be reasonable, then the reasonableness of the delay must be explained; it ought to be demonstrated that the other parties would not be prejudiced by the exercise of the discretion; and the application must be filed without undue delay.
18. The party seeking to benefit from that discretion must explain the delay, what made them not move the court within the timelines given. It would be the giving of a reasonable or plausible explanation which unlocks exercise of discretion.
19. Was any explanation given in the application, dated 23rd May 2024, for the delay to seek leave to appeal outside the given timelines? None was given. In the affidavit, sworn in support of that application, by Millian Aligula, the delay was acknowledged but not explained. It was not enough to merely acknowledge that time run out, for seeking leave to appeal, an explanation for the delay should have been given. The court needed to understand why the appellant could not seek leave to appeal within the given timelines, to assess whether discretion should be exercised in his favour. Discretion could not



- be exercised in his favour in the absence of an explanation as to why leave to appeal was being sought outside of the time allowed by the law.
20. It was merely deponed in that affidavit that “I know of my own knowledge that our counsel on record did not apply for leave of the court to appeal the ruling and orders made by this Honourable court on the 8th April 2024.” It should have been explained why the said Advocates did not act within the time allowed. No explanation was offered whatsoever. I am not persuaded that the trial court was wrong on principle.
 21. One gets the sense that it is on appeal that the appellant is placing before the appellate court the arguments that he ought to have placed before the trial court on 8th April 2024, and in the application, dated 23rd May 2024. There is this explanation that the material that he sought to file had been in the hands of his previous Advocates, and his new Advocates had just gained access around 8th April 2024, when the application for leave to file them was made.
 22. The notes of the trial court, of 8th April 2024, do not reflect that that information or material was shared with the trial court. No effort was made then to explain why the material was proposed to be filed so late in the day. The issue of those documents having been in possession of the previous Advocates of the appellant was not divulged, and the trial court did not have the benefit of it, to assist it exercise discretion on whether to allow it.
 23. Ms. Wesonga, who made the oral application, is recorded as saying:

“I pray for adjournment with leave to file an investigation report. We will be calling 3 w/s for defendant, the author of the investigation report and the doctor if counsel will have an issue with the report ... List of documents, defendant will produce any document with leave of court. Investigation report is not ready. We pray for leave. It is meant to help the court come up with just conclusion. Medical report dated 9.05.22 sorry in the investigation report.”
 24. I have very closely perused the application, dated 23rd May 2024. It says nothing, on the grounds on the face of it, and in the affidavit sworn in support, about the appellant having 2 sets of Advocates, in the matter, and explaining that the previous Advocates had been holding on to the documents in question, which had just been handed over. In determining the said application, the trial court did not have the benefit of the information that the appellant is now asking me to consume. That information ought to have been shared with the trial court, and not with the appellate court. It is mischievous of the appellant to do what he is now doing. In any case, such information should not be disclosed in written submissions, but in an affidavit.
 25. Parties should not litigate in small doses, where they dole out bits of information at the time of their own choosing, instead of divulging everything in their knowledge and possession, to assist the court arrive at an informed decision. Full disclosure is what good faith is about. Where good faith lacks, discretion would not be exercised favourably. Equity is about trust and good faith. The remedy, of extending time for a party to do something, or grant of leave to the party to do something, is equitable. The remedy would be available only where there is full disclosure, but not where half-baked information is shared with the court. The court only assists he who comes before it with clean hands.
 26. I see submissions pegged on Article 159(2)(d) of *the Constitution* and *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* [2013] KESC 6 (KLR) (Mutunga, CJ&P, Tunoi, Ojwang, Ibrahim, Wanjala & Ndungu, SCJJ), about eschewing technicalities of procedure. Article 159(2)(d) was not intended to sweep away rules of procedure and allow parties to move the court at their own pleasure, regardless of the timelines set in the relevant rules. Rules of procedure are still legal and constitutional, and so is the principle of equity that equity abhors indolence. To benefit from



Article 159(2)(d), good faith is still required, so that where a non-compliance with a technical rule of procedure happens, like omission to move the court within the prescribed timelines, some explanation would still be required. Whatever caused the delay should be explained. Was it excusable inadvertence, accident, mistake, negligence or forgetfulness? What was it?

27. The prayer for stay of proceedings was secondary or ancillary to that for extension of time to apply for leave to appeal out of time. Consideration of grant of stay could only follow upon leave being granted. Upon the decision, not to grant extension of time, being made, the prayer for stay lost its foundation. In short, the prayer for stay could not be granted upon dismissal of the prayer relating to leave to appeal, for it was a parasite, riding on the back of the prayer for leave.
28. Overall, there is no merit at all, in the appeal herein, and I hereby dismiss it with costs. The appeal herein is disposed of in those terms. The original trial court records shall be returned to the trial court. This appeal file shall be closed. Orders accordingly.

DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 21ST DAY OF MARCH 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Ms. Barbara Ngome, instructed by AKO Advocates LLP, Advocates for the appellant.

Ms. Winnie Anono, instructed by Mukisu & Company, Advocates for the respondent.

