



Iyego Rwathia Company Limited v Njoroge (Miscellaneous Civil Application E690 of 2024) [2025] KEHC 5200 (KLR) (Civ) (3 April 2025) (Ruling)

Neutral citation: [2025] KEHC 5200 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E690 OF 2024
SN MUTUKU, J
APRIL 3, 2025**

BETWEEN

IYEGO RWATHIA COMPANY LIMITED APPLICANT

AND

LUCY MWERU NJOROGE RESPONDENT

RULING

The Application

1. The Applicant herein has moved this Court through a Notice of Motion dated 25th July 2024 seeking the following orders:
 - i. Spent.
 - ii. Spent.
 - iii. That this Honourable Court be pleased to grant the Applicant Leave to appeal out of time against the judgment delivered on 31st May 2022 by Hon. A. N. Ogonda (PM) in Civil Suit No 8841 of 2018 and to extend time for filing the appeal.
 - iv. That ending the hearing and determination of this Application inter partes this Honourable Court be pleased to issue an order staying the execution of the Judgment in MCCC No 8841 delivered on 31st May 2022, the resulting decree, warrants and all other proceedings and/or any other consequential orders emanating from the said Judgment.
 - v. That ending the hearing and determination of the Appeal inter partes this Honourable Court be pleased to issue an order staying the execution of the Judgment in MCCC No 8841 delivered



on 31st May 2022, the resulting decree, warrants and all other proceedings and/or any other consequential orders emanating from the said Judgment.

- vi. That costs of and occasioned by this Application be provided for.
 - vii. That such other or further orders as may be made to meet the ends of justice and to safeguard and protect the interest of the Applicant and the dignity of this Honourable Court.
2. The Application is supported by grounds advanced on the face of it, the Supporting Affidavit and the Supplementary Affidavit sworn by Jonh Migwi Mwangi on 25th July 2024.
 3. The Applicant claims that the trial Court delivered judgment on 31st May 2024 awarding the Respondent Kshs 6,040,349.99 plus interest and costs of the suit without notifying the parties; that the Applicant only became aware of the judgment when execution proceedings commenced against its client on 1st July 2023; that pursuit of a copy of the said judgment was unsuccessful because the court file was missing and that the Applicant was only able to get the typed copy of the judgment on 18th July 2024 after which it was able to instruct its counsel to appeal against the said judgment.
 4. The Applicant claims to have an arguable and meritorious appeal with high chances of success, which appeal will be rendered nugatory should this Honourable Court fail to grant the orders sought by the Applicant. It is claimed that this application has been made without unreasonable delay and that on prejudice will be occasioned to the Respondent should the application be allowed.

Replying Affidavit

5. The Application is opposed through the Replying Affidavit of Lucy Waweru Njoroge, the Respondent. The Respondent has denied the contents of the Replying Affidavit of the Applicant and stated that the copy of the judgment attached to the Application and marked JMM-1 is not a true copy of the judgment delivered on 31st May 2022 for reasons that the attached copy refers to interest of the sum awarded to run from the date of that judgment instead of from the date of filing the suit.
6. The Respondent accused the Applicant of being guilty of laches. She has stated that the Applicant's previous counsel was aware that judgment was scheduled to be delivered on 13th May 2022 but made no effort to pursue a copy of the same; that it has not been demonstrated that numerous follow-ups were made at the Registry; that the Applicant and his former advocates were aware of the judgment as demonstrated by a letter dated 26th October 2023 attached to the Replying Affidavit.
7. The Respondent accused counsel for the Applicant of being improperly before the court for failure to comply with Order 9 (9) of the Civil Procedure Rules; that without a Memorandum of Appeal this court is not able to determine whether the Appeal is arguable or not; that the Applicant has not demonstrated justifiable reasons for the delay in filing the appeal, chances of the appeal succeeding if the application is granted and the degree of prejudice to the Respondent.
8. The Respondent urged that the Application be dismissed with costs.

Supplementary Affidavit

9. The Applicant filed a Supplementary Affidavit sworn on 19th February 2025 in which it is deposed that the copy of the judgment marked 'JMM-1' was obtained from the Applicant's former counsel and that there is no reason to believe that there is anything wrong with it. It is stated that judgment was set to be delivered on 13th May 2022 but was not delivered on that day but on 31st May 2022 in the absence of parties.



10. On the issue of failure to comply with Order 9(9) of the *Civil Procedure Rules*, the Applicant relied on *Tobias M. Wafubwa v Ben Butali* [2017] KECA 142 (KLR) to the effect that where failure to comply with Order 9 (9) of the *Civil Procedure Rules* did not undermine the jurisdiction of the court, or affect the core of the disputed in question, or prejudice either of the parties in any way as to lead to miscarriage of justice, then Article 159 of the *Constitution* and the overriding principles could come to the aid of the court to dispense substantive justice through just, efficient and timely disposal of proceedings.
11. It was stated that failure to annex the Memorandum of Appeal is not fatal to the Application. The Applicant relied on *Nicholas Kiptoo Korir Arap Salat v IEBC and 7 others* [2014] eKLR on the principles to be considered in exercising the discretion for leave to file an appeal out of time.

Submissions

12. The Application was canvassed through oral submissions on 27th February 2025. Mr. Gikonyo for the Applicant reiterated the grounds advanced in the Application, the Supporting Affidavit and the Supplementary Affidavit and submitted that the proviso to section 79G of the *Civil Procedure Act* allows for extension of time to file an appeal where sufficient cause has been shown. He submitted that whether the delay is inordinate or not will depend on each case.
13. Counsel for the Applicant submitted that the Applicant has tendered satisfactory explanation why the appeal was not filed within time to the effect that the judgment was delivered in the absence of parties and that the delay was a bona fide mistake which ought to be pardoned. It was submitted that the Respondent will not be prejudiced because the Applicant has deposited security.
14. The Respondent submitted through her counsel Ms Kosgey that the Replying Affidavit by the Applicant was filed out of time and ought to be disregarded by the Court. Counsel submitted that although judgment was delivered in the absence of the parties, they ought to have used diligence and follow up on the matter; that the Applicant has not attached any correspondence demonstrating the efforts made to follow up on the matter and that the court file was not missing as alleged. It was submitted that the Respondent will be prejudiced.

Determination

15. I have considered the Application, the Supporting Affidavit and the Supplementary Affidavit as well as the Replying Affidavit and parties' oral submissions.
16. Section 79G of the *Civil Procedure Rules* provides the time for filing appeals from subordinate courts to the High Court to be 30 days. The proviso to that section allows admission of an appeal 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 am guided by the underlying principles for extension of time identified by the Supreme Court in the *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* case, cited by both parties in this matter. These principles are 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. 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. Whether the application has been brought without undue delay, and
 - vii. Whether in certain cases, like election petitions, public interest should be consideration for extending time.
18. I have considered the reasons advanced by the Applicant explaining the delay in filing the Appeal withing time. I have also considered the submissions of parties and the authorities they have relied on. The delay in filing the Appeal has been explained. However, it is my belief that the case belongs to the party and the Applicant ought to have pursued this matter with their former advocate to find out the outcome of the judgment. To stay for two years without knowing the outcome of their case is rather too long.
19. To grant or not to grant the orders sought is discretionary on the part of the Court. The Court must determine, among other issues, whether the Respondent would be prejudiced by granting the orders sought. In this case, stay of execution was granted on condition that security be provided. The Applicant has deposited into Court Kshs 3,000,000 as security and for this reason, I am persuaded that the Respondent will not suffer prejudice.
20. I have also noted that there are two copies of judgment with different wording in respect to payment of costs. I will leave that to the parties to ventilate the issue.
21. Consequently, I will exercise my discretion in favour of the Applicant and grant the following prayers:
- i. Stay of execution is granted pending the hearing and determination of the Appeal.
 - ii. The Applicant is granted leave to file an Appeal out of time.
 - iii. A memorandum of Appeal and Record of Appeal shall be filed within 30 days of the date of this Ruling.
 - iv. This file, being Misc. Civil Application, is hereby closed. The Applicant shall file the Appeal in the Civil Appeals Division to be handled by the judges in that Division.
22. Orders shall be issued accordingly.

DATED, SIGNED AND DELIVERED THIS 3RD APRIL 2025.

S. N. MUTUKU

JUDGE

