Waithaka v Zulac Credit Limited (Miscellaneous Civil Case E017 of 2025) [2025] KEHC 7389 (KLR) (22 May 2025) (Ruling)

Neutral citation: [2025] KEHC 7389 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

MISCELLANEOUS CIVIL CASE E017 OF 2025

FN MUCHEMI, J

MAY 22, 2025

BETWEEN

JULIUS KARECHE WAITHAKA ..... APPLICANT

AND

ZULAC CREDIT LIMITED ..... RESPONDENT

RULING

Brief facts

1. The application dated 11th February 2025 seeks for orders of leave to file an appeal out of time against the judgment in Thika Small Claims Court SCCCOMM No. E1829 of 2023 delivered on 25th June 2024.

2. The respondent opposed the application and filed a Replying Affidavit dated 24th February 2025.

Applicant's Case

3. The applicant states that judgment in Thika SCCCOMM No. E1829 of 2023 was delivered on 25th June 2024 where the trial court entered judgment in favour of the respondent for a sum of Kshs. 260,000/-. Being aggrieved with the said judgment, the applicant is desirous to lodge an appeal against the said judgment but the statutory period within which to file an appeal already lapsed. The applicant attributes his failure to file the appeal on time on the ground that he fell out with his advocates Amanya & Co. Advocates who had failed and refused to file an appeal.

4. The applicant is apprehensive that the respondent will proceed to execute as the matter is scheduled for Notice to show cause. The applicant avers that he has an arguable appeal with a likelihood of success.

The Respondent's Case

5. The respondent states that judgment was delivered on 25th June 2024 in its favour for a sum of Kshs. 260,000/-. The respondent states that it extracted the decree and served the applicant's advocates on 9th July 2024. The respondent proceeded to file a Notice to show cause and served the applicant in person via WhatsApp and further his advocate on 27th August 2024. The Notice to show cause came up for hearing on 16th October 2024 whereby the applicant's advocate present in court prayed for more time to respond to the said notice to show cause. The respondent states that despite the applicant's advocate being in court on 16th October 2024 and the Notice to show cause hearing date for 7th January 2025 being issued in their presence, no response has been filed as of 7th January 2025.

6. The respondent avers that it has served the applicant personally and his advocates a reminder via WhatsApp. The respondent further states that neither did the applicant nor his advocates attend court on 7th January 2025.

7. The respondent states that it applied for warrants of arrest which were issued and in the company of Ruai police officers, it has severally visited the applicant's residence for the purposes of effecting the arrest whereupon the applicant learnt of its intentions to arrest him prompting him to file the current application. The respondent argues that the application is merely an afterthought meant to frustrate its efforts of executing as the application has been brought 8 months after judgment was rendered on 25th June 2024.

8. The respondent argues that the applicant has not given any sufficient reasons of his failure to appeal within the statutory timeline and neither has the applicant tendered any evidence of any effort taken by him in pursuing the matter upon the alleged fall out with his advocate. Furthermore, the applicant's allegations are lies as he has not tendered any evidence to support the grounds relied on in this application.

9. The respondent states that the advocate appeared in court after judgment on 16th October 2024 during the Notice to show cause hearing which is approximately 4 months after the judgment was rendered in June and was acting under the applicant's instructions. Furthermore, the said advocates did not file any application to cease acting.

10. The respondent states that the current application is overtaken by events as there are warrants of arrest orders in place.

11. The respondent further states that it stands to be prejudiced as the money lent to the applicant remains unpaid and being a lending institution, the nonpayment remains detrimental to its wellbeing, a situation that continues to grossly undermine its day to day operations. The respondent states that the applicant has not shown how execution of a lawfully obtained judgment is prejudicial to him or how he stands to suffer any loss.

12. The respondent avers that it stands to suffer irredeemable financial loss as it is expected to continue servicing its loan obligations to other entities and meet its employees needs yet its money continues to be unlawfully withheld by the applicant.

13. The respondent argues that the applicant has not provided evidence showing that he instructed his advocates to file an appeal and the advocate failed to act on the said instructions.

14. Parties put in submissions.

The Applicant's Submissions.

15. The applicant submits that the reasons for his delay in filing the appeal was due to failure by his advocates on record in the lower court to file an appeal on his behalf in time despite having instructed him to file the same immediately after judgment was delivered. The applicant further submits that his intended appeal has high chances of success.

The Respondent's Submissions.

16. The respondent submits that the applicant has taken approximately 8 months since judgment was rendered on 25th June 2024. Thus the time taken by the applicant before seeking leave is too long and unjustified as the applicant was all along actively involved in the matter through his advocate and personally through notices that were being served upon him.

17. The respondent refers to Section 38 of the *Small Claims Court Act* and submits that the intended appeal contains points of facts and therefore the intended appeal has no chances of success.

18. The respondent refers to Section 79G of the *Civil Procedure Act* and the cases of Diplack Kenya Limited vs William Muthama Kitonyi [2018] eKLR; Nicholas Kiptoo Korir arap salat vs IEBC & 7 Others [2014] eKLR and Paul Musili Wambua vs Attorney General & 2 Others [2015] eKLR and submits that the applicant has not shown good cause to warrant an extension of time within which to file his appeal. The applicant has faulted a fall out with his advocates on record for the delay caused in filing his appeal. the respondent argues that the applicant has not tendered any evidence to corroborate his averments. Furthermore, no notice to cease acting was served upon the claimant or filed by the said firm of advocates.

19. The respondent argues that while it is true that mistakes of an advocate should not be visited on a litigant, suits belong to the parties and not their advocates. Thus where a litigant has instructed an advocate in a matter, he or she has an obligation to follow up on instructions given to ensure that they were executed and executed in good time. To support its contentions, the respondent relies on the cases of Habo agencies Limited vs Wilfred Odhiambo Musingo (2015) eKLR and Bi-Mach Engineers Limited vs James Kahoro Mwangi (2011) eKLR. The respondent argues that the applicant has not satisfactorily explained the delay in filing the appeal, no credible explanation has been offered as the applicant has not demonstrated any communication breakdown with his advocate, that the fallout genuinely prevented the appeal from being filed on time, that he acted promptly once he became aware of the delay or consequences and the applicant did not explain how and when the fallout happened; attempts to communicate with or replace his advocate; when they became aware of any missed deadline and why wasn't the delay due to their own negligence.

The Law

Whether the court should exercise its discretion to grant the applicant leave to file his appeal out of time;

20. Section 79G of the *Civil Procedure Act* states:-

> 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 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.

21. It is clear from the wording of section 79G of the *Civil Procedure Act* that before the court considers extension of time, the applicant must satisfy the court that that he has good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of Diplack Kenya Limited vs William Muthama Kitonyi [2018]eKLR an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.

22. The Supreme Court in the case of Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that:-

> " The underlying principles a court should consider in exercise of such discretion should include:-
>
> a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
>
> b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
>
> c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
>
> d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
>
> e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
>
> f. Whether the application has been brought without undue delay.

23. Similarly 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."

24. Applying the above principles to the present case, the judgment herein was delivered on 25th June 2024 and the applicant filed the current application on 11th February 2025. This is approximately eight (8) months outside the time limited for filing an appeal. The applicant has attributed the delay in filing his appeal to a fall out between him and his advocates.

25. On perusal of the record, judgment was delivered on 25th June 2024 by posting it on the e-filing portal. The respondent extracted a decree and served the same upon the applicant's advocates via email. The respondent thereafter filed a Notice to show cause application and served the applicant in person via WhatsApp and his advocates on 27th August 2024. To prove service the respondent filed an Affidavit of

Service dated 27th August 2024. The Notice to show cause was slated for hearing on 16th October 2024. On the material day, the applicant's advocate attended court and prayed for more time to respond to the notice to show cause which the trial court granted and scheduled a new hearing date for 7th January 2025. By this time, the applicant had not filed the memorandum of appeal despite him being aware of the judgment and the timelines of filing an appeal. The advocates of the applicant were still on record during the hearing of the Notice to show cause on 07/01/2024 contrary to averments of the applicant herein. I am further not persuaded by the applicant that he instructed his advocates to file an appeal immediately after judgment was delivered and that they refused to do so because he was personally served with the notice to show cause application. Upon service of the Notice to show cause, if indeed he had instructed his advocates to lodge an appeal, he would have been prompted to follow up on why they had not filed the appeal since he was served with the notice to show cause application.

26. The record shows that neither the applicant nor his advocates attended court for the hearing of the notice to show cause on 7th January 2025 despite being given a chance to respond and the respondent sending them several reminders. It is only upon the respondent obtaining warrants of arrest did the applicant file the current application. It is therefore very clear that the applicant was not desirous of lodging an appeal within the stipulated timelines and went to sleep.

27. Further, whereas it is true that mistakes of an advocate should not be visited on a litigant, it is also true that suits belong to the parties not their advocates. Thus where a litigant has instructed an advocate in a matter, he or she has an obligation to follow up on instructions given to ensure that they were executed and executed in good time. This principle was enunciated in the Court of Appeal in Habo Agencies Limited vs Wilfred Odhiambo Musingo (2015) eKLR where the court stated:-

> It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.

28. Similarly in Bi-Mach Engineers Limited vs James Kahoro Mwangi (2011) eKLR, the court reiterated the duty of an applicant to follow up on instructions given to an advocate and expressed itself as follows:-

> The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up on the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy.

29. The applicant has not produced any proof of what steps he took after instructing his advocates to lodge an appeal. The applicant only states that he instructed his advocates to lodge an appeal and the said advocates failed to do so. Thus it is evident that the applicant slept on his rights of appeal and only woke up in reaction to execution of the decree. In my considered view, that the applicant has not given any plausible reasons for the delay in filing the appeal.

30. I have perused the intended Memorandum of Appeal and the judgment of the trial court and evidently, the appeal does not raise pertinent issues of law as required by Section 38 of the Small Claims Act. For that reason, the intended appeal has no chances of success.

31. The applicant has, therefore, failed to meet the test of extension of time to appeal.

32. Accordingly, the application dated 11th February 2025 lacks merit and is hereby dismissed with costs to the respondent.

33. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 22ND DAY OF MAY 2025.

F. MUCHEMI

JUDGE