Boiywo v Sacco & 2 others (Miscellaneous Application E001 of 2025) [2025] KEHC 10405 (KLR) (18 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10405 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISCELLANEOUS APPLICATION E001 OF 2025

JRA WANANDA, J

JULY 18, 2025

BETWEEN

LABAN BOIYWO ..... APPLICANT

AND

BORESHA SACCO ..... 1ST RESPONDENT

EDWIN SIMBA (MANAGER BORESHA SACCO) ..... 2ND RESPONDENT

JOEL WESONGA ..... 3RD RESPONDENT

RULING

1. The matter before Court is the Applicant's Notice of Motion dated 6/02/2025, filed through Messrs Boiywo & Co. Advocates, basically seeking leave to file an appeal out of time to challenge the Judgment delivered by the Co-operatives Tribunal sitting at Eldoret in CTCC No. 189 of 2021 on 30/05/2024, by which Judgment the Applicant's said suit was dismissed. The Applicant also seeks an order of stay of execution of the Judgment pending hearing and determination of the intended Appeal.

2. The Application is supported by the Affidavit sworn by the Applicant, in which he deponed that he became aware of the Judgment long after it had been rendered as his then Advocate abdicated his duty of informing him in time. He deponed that he has an arguable Appeal that has high chances of success as demonstrated in the draft Memorandum of Appeal exhibited. He urged that unless stay of execution is granted, his intended Appeal will be rendered nugatory, and he will suffer irreparable loss. He urged further that the orders will not occasion any prejudice to the Respondents that cannot be compensated.

3. In opposition to the Application, the Respondents, through Messrs Emmanuel Kipkurui & Co. Advocates, filed the Replying Affidavit sworn on 3/03/2025 by one Purity Chetalam, who described herself as the 1st Respondent's Legal Officer. She deponed that after the Applicant's suit was dismissed as aforesaid, the Respondents' Advocates filed a Bill of Costs and served the same upon the Applicant's Advocates together with a Taxation Notice sometime in July 2024, and after Taxation, they also served

the Certificate of Costs upon the same Advocates sometime in October-November 2024. She deponed that the Respondents were therefore surprised when they were served with the instant Application seeking leave to appeal out of time on allegations that the Applicant was unaware of any developments in the matter and deflecting blame to his Advocate. She deponed further that the Application is defective by reason of the failure by the current Advocate to seek leave to come on record after Judgment, or to obtain consent from the outgoing Advocate, as required under the provisions of Order 9 Rule 9 of the Civil Procedure Rules.

4. She urged further that the Application is unfounded because the Applicant's suit was dismissed and as such, the Application is seeking a "negative order" which is untenable. She then pointed out that the Applicant took an inordinate time of over 9 months before filing the Application and has not advanced any substantive reasons for the delay as well as what concrete steps he took to establish if any Judgment had been delivered. In what then sounded more like Submissions made through an Affidavit, she urged that extension of time within which to appeal is not an automatic right of any party but rather, it is a discretionary power of the Court that must be exercised judiciously, and not capriciously, that it is also an equitable remedy and that therefore any Applicant seeking equitable reliefs must approach the Court with clean hands, must also do equity, and must not be guilty of laches or indolence, rather must be vigilant. She further deponed that a cursory glance at the draft Memorandum of Appeal reveals that the Applicant does not have an arguable Appeal, let alone one that has chances of success but rather, it is meant to waste precious judicial time. In conclusion, she prayed that in the unlikely event that the Application is allowed, then as a condition thereof, the Applicant ought to be ordered to pay the costs assessed by the Tribunal.

Written Submissions.

5. The parties then both filed unnecessarily very lengthy respective Submissions in which they basically simply repeated and reiterated the matters already contained in their respective Affidavits, save that they cited several authorities. The Applicant's is dated 26/02/2025 while the Respondent's is dated 6/03/2025. Due to the duplicity and repetition, I do not deem it necessary to recite and recount the same.

Determination.

6. The issue for determination is "whether the Applicant should be granted leave to appeal out of time, and whether an order for stay of execution pending the intended appeal should be issued".

7. Before I proceed further, as aforesaid, the Respondents argue that the Application is fatally defective because it is, in breach of the provisions of Order 9 Rule 9 of the Civil Procedure Rules, filed after Judgment, by an Advocate who is not properly on record, not having been the Advocate who was on record in the suit before the Tribunal, and there being no consent signed by the previous Advocate. My short answer to this challenge is that it is clearly misconceived since the requirement of Order 9 Rule 9 is meant to apply where a new Advocate comes on record after Judgment in the same proceedings, suit or action, not an ancillary action, no matter how much related they might be. A separate Miscellaneous Application such as the present one, or even an Appeal, is a different "action" distinct from the initial suit from which it arises. Since these different "actions" are filed and canvassed in different and distinct Courts, a litigant can well have one Advocate acting for him in the primary suit, and after Judgment, instruct a separate Advocate to act for him in the Miscellaneous Application such as the present one, or in an Appeal despite these ancillary actions arising from the initial suit. Order 9 Rule 9 does not therefore apply in the scenario herein.

8. The above position has been affirmed in numerous authorities. There is for instance, the decision of R. Ngetich J, in the case of Peter Chere Kiiru v Charles Mulanda Manyelo [2019] eKLR, the decision of R. Sitati J, in the case of Stanley Mugambi & Another vs John Kiraithe [2005] eKLR, and also by the decision of S.M. Kibunja J, in the case of Ezekiel Kiprono Lamai v Lawrence Kibor Nganai [2020] eKLR. The Court of Appeal, too, held in the same manner in the case of Mary Nchekei Paul vs Francis Mundia Ruga [2019] eKLR, even though it was dealing with an Application under Rule 4 of the Court of Appeal Rules, which however is, for all intents and purposes, similar to Order 9 Rule 9 of the Civil Procedure Rules.

9. Back to the natter at hand, Section 79G of the *Civil Procedure Act* donates to this Court the power to allow a party to file an Appeal before it out of time. The Section provides 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 a good and sufficient cause for not filing the appeal in time." [Emphasis added]."

10. In the case of Edith Gichungu Koine Vs Stephen Njagi Thoithi [2014] eKLR, the Court of Appeal guided that in an application for extension of time, the Court ought to take into account several factors as observed by Odek JJA as follows:

> " Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others."

11. It is therefore the position that where the delay by a litigant is well explained and the matter sought to be appealed out of time raises triable issues or arguable points, the Court will be reluctant to punish such litigant by declining to grant him enlargement of time. On this point, I am guided by the decision in Kamlesh Mansukhalal Damki Patni Vs Director of Public Prosecution & 3 Others [2015] eKLR, in which the Court of Appeal, in declining to strike out a Notice of Appeal filed one day out of time, stated as follows:

> " 40. It must be realized that courts exist for the purpose of dispensing justice. Judicial officers derive their judicial power from the people, or as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of *the Constitution* which succinctly states that "judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution." Judicial officers are also state officers, and consequently, are enjoined by Article 10 of *the Constitution* to adhere to national values and principles of governance which require them whenever applying or interpreting *the Constitution* or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity, are upheld. For these reasons, decisions of the courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve. Such decisions may involve only parties inter se (and hence only parties' interests) and while others may transcend the interest of the litigants

and encompass public interest. In all these decisions, it is incumbent upon the court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice."

12. Similarly, in the case of Charles Karanja Kiiru – versus- Charles Githinji Muigwa [2017] eKLR, the Court of Appeal upheld the following statements made by the trial Judge (P.J. Otieno J) in the suit brought before it on appeal:

> " It suffices to comment that a court of law should be hesitant at closing the door to the corridors of justice prior to a litigant being heard on his complaint ....."

13. The Supreme Court, in the case of Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet [2018] eKLR, in respect to the issue of delay, guided as follows:

> " 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."

14. It is therefore clear that grant of leave to file an appeal out of time is a discretionary power and not a matter of course. The Applicant is therefore required to satisfactorily demonstrate to the Court that there was good cause why the Appeal was not filed in time. Such good cause must be demonstrated and established by the Applicant and it is not the Court's initiative to try to infer or imply such good cause. It is entirely the Applicant's duty to satisfy the Court.

15. In this case, the impugned Judgment was delivered on 30/05/2024. The instant Applicant was then filed in this Court in March 2025, after about 9 months. The question now is whether the delay herein has been well explained.

16. In this case, the Respondent alleges that he only became aware of the Judgment he seeks to appeal against long after it had been rendered because his then Advocate failed to inform him of the same in time. He does not however disclose when he became aware of the Judgment. The Court is therefore not in a position to determine whether he moved fast enough after learning of the Judgment.

17. Further, as aforesaid, the Judgment was delivered on 30/05/2024. A copy of the Judgment has been exhibited and it indicates, on the face thereof, that it was delivered in the presence of the Advocates for both parties. For the Applicant, Advocate Chepkilot was present. The delay is obviously inordinate as it has not been satisfactorily explained, in fact, not explained at all. It has not been alleged that the Judgment date was not fixed upon close of the trial in the presence of the parties, or that the Applicant was not aware of the date of delivery thereof. The Applicant has not exhibited anything to demonstrate that he, if he did not attend before the Tribunal, made any efforts, whether to his Advocate or directly from the Tribunal, to inquire or find out whether the Judgment was indeed delivered as scheduled and if so, what the outcome was. The same having been his own suit, I would expect him to have taken a keen interest in obtaining such information. There is no evidence that he did so.

18. Waki, JA, sitting as a single Judge of the Court of Appeal in the case of Habo Agencies Limited vs. Wilfred Odhiambo Musingo (2015) eKLR, while dealing with a scenario similar to the one herein, stated as follows:

> " 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".

19. Similarly, the Court of Appeal, in the case of Noorlands Limited v Kenya Power & Lighting Company Limited [2021] eKLR, in striking out a Notice of Appeal on the ground of delay to prosecute the intended Appeal, held as follows:

> " 7. In the present case, however, quite apart from the fact that the advocates for the respondent, Kiarie Kariuki & Company advocate, have not themselves explained what transpired, the respondent itself appears to have made absolutely no effort to follow up with its advocates to establish the status of the matter for an inordinately long time. ....."

20. Further, P. Waki, JA, again sitting as a single Judge of the Court of Appeal in the case of Bi-Mach Engineers Limited vs. James Kahoro Mwangi [2011] eKLR, stated that:

> " 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 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. The client has a remedy against such an advocate..."

21. In view of the foregoing, and the Applicant being the one who filed the suit before the Tribunal, I am not satisfied that he has demonstrated that he was vigilant in following up on the Judgment made in his own suit. In the circumstances, I am not prepared to accept that he is blameless. He is, just like his then Advocate, assuming that indeed the Advocate did not keep him updated. I therefore decline to grant leave to appeal out of time.

22. In respect to the Application for stay of execution, even assuming that I had agreed to grant leave to appeal, the prayer for stay is untenable since the Applicant's suit having been simply dismissed at the Tribunal, "there is nothing to stay". The Applicant does not therefore seem to appreciate, as correctly argued by Mr. Chepkurui, Counsel for the Respondents, that the Judgment was simply a "negative order". I draw the Applicant's attention to, for instance, the Court of Appeal cases of Anyang Nyongo & 2 Others v Minister for Finance & Another [2007 eKLR, Kaushik Panchamatia & 3 Others v Prime Bank Limited & Another [2020]eKLR, and also the case Western College Farts and Applied Sciences vs. Oranga & Others [1976] KLR 63 for this reality.

23. As held in those cases, all the Judgment did was to refuse the prayers for grant of the orders sought in the Plaint. What then would be there to be stayed in the Judgment? No wonder the Applicant has not made any attempt to explain what exactly or which part of the Judgment he wants to be stayed.

Final Order.

24. In the end, the Applicant's Notice of Motion dated 6/02/2025 fails, and is accordingly dismissed with costs to the Respondents.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 18TH DAY OF JULY 2025

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WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Mr. Boiwo for the Applicant

Mr. Kipkurui for the Respondent

Court Assistant: Brian Kimathi