



**Omondi Waweru & Company Advocates v Oddiaga (Civil Appeal
83 of 2022) [2024] KEHC 164 (KLR) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 164 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 83 OF 2022
M THANDE, J
JANUARY 19, 2024**

BETWEEN

OMONDI WAWERU & COMPANY ADVOCATES APPELLANT

AND

STEPHEN ODDIAGA RESPONDENT

RULING

1. In the application before the court dated 19.12.22, the applicant seeks leave to appeal out of time against the ruling, order and or decree dated 18.6.21 and that the memorandum of appeal dated 9.6.22 be deemed as timeously filed. The applicant also seeks stay of execution pending appeal.
2. The application is supported by the affidavit of M. N. Waweru, sworn on even date. The application is opposed by the Respondent through grounds of opposition dated 3.2.23.
3. I have considered the application and submissions by the parties and I find that the issue for consideration are whether the court should grant leave to appeal out of time and stay execution pending appeal.
4. The statutory period for filing an appeal in this court from a subordinate court is 30 days. This is stipulated in section 79G of the *Civil Procedure Act*, which provides:

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 good and sufficient cause for not filing the appeal in time.



5. A party who gets caught up and is unable to file an appeal within the stipulated period, may seek extension of time. The proviso to section 79G empowers the court to admit an appeal out of time, upon being satisfied that there is good and sufficient reason for the delay.
6. It is trite law that extension of time to file an appeal is an equitable remedy and not a right. An applicant seeking extension of time thus appeals to the discretion of the court.
7. In the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, the Supreme Court set out the guiding principles in an application for enlargement of time. The court restated the principles in the case of *Mombasa County Government v Kenya Ferry Services & another* [2019] eKLR as follows:

25. Concerning extension of time, this Court has already set the guiding principles in the *Nick Salat* Case as follows:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

1. 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;
2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;
4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. whether there will be any prejudice suffered by the respondents, if extension is granted;
6. whether the application has been brought without undue delay; and
7. whether in certain cases, like election petitions, public interest should be a consideration for extending time” [emphasis supplied]

8. In persuading the Court to exercise its discretion in his favour, the first hurdle the applicant must surmount, is to explain the 1 year delay in lodging the appeal from 18.6.21, when the ruling was delivered, to 9.6.22. The applicant must also explain the 1½ year delay in filing the present application 18.6.21 to 19.12.22.
9. The reasons proffered by the applicant for the delay is that he was unaware that the impugned ruling had been delivered and only became aware of the same when the Respondent filed a notice to show cause. The delay was thus not deliberate. The memorandum of appeal has since been filed and certified copies of the ruling and proceedings applied for. Further that the appeal is good, weighty and arguable with very high chances of success.



10. The Respondent contends that the inordinate delay of 12 months in filing the memorandum of appeal and the present application has not been explained. The application which is for extension of time has been filed 6 months after filing the memorandum of appeal and almost 18 months after the impugned ruling. The applicant has not been vigilant and the Court should not aid a party whose intention is to delay execution of a legitimate decree.
11. The reason the law stipulates timelines for doing certain acts in litigation, is to ensure that the rights of parties are determined fairly and expeditiously. Timelines also ensure certainty and predictability in the litigation process. As such, the right to appeal, which is available to all parties, is not open ended. The law has put timelines in place to put parties on guard so that they do not put their cases on hold inordinately, without fear of consequences. A decree holder whose legal rights have been settled in a decision which marks the end of a dispute, must be allowed to enjoy the fruits thereof, without unnecessary delay or hinderance.
12. The applicant has not explained to the Court why he was unaware of the ruling for in a matter in which he was involved. It is trite that a case belongs to a litigant who must be vigilant in following up on the same. In *Savings and Loans Limited vs. Susan Wanjiru Muritu* Nairobi (Milimani) HCCS No. 397 of 2002, Kimaru, J. (as he then was) expressed himself as follows:

A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgement that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant.
13. Notably, having filed his memorandum of appeal 1 year after the impugned ruling, he waited another 6 months to file the present application. The Court finds that there has been a prolonged delay of over 1½ years, and no sufficient reason for the delay has been proffered. It is inconceivable that the applicant was for a period of 1 year, unaware that the ruling in question had been delivered. The applicant has stated that he only became aware of the ruling when he was served with the notice to show cause. Accordingly, the unexplained delay is inexcusable and is indicative of an indolent litigant. The applicant has failed to surmount the first hurdle of explaining the inordinate delay in filing the appeal.
14. Taking into account the delay in filing the appeal and the present application, and further considering the unconvincing explanation tendered, by the applicant I am not satisfied that sufficient reasons have been advanced to enable me exercise my discretion in favour of the applicant. Indeed, to use the words of Kimaru, J., it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant. Having so found, there is no basis upon which an order of stay pending appeal, can be granted. The Court has no jurisdiction to grant an order of stay pending a non-existent appeal.
15. In the end and for the reasons set out above, the application dated 19.12.22 is dismissed with costs to the Respondent.

DATED AND DELIVERED THIS 19TH DAY OF JANUARY 2024



M. THANDE
JUDGE

