



**Annastacia v Mutunga (Miscellaneous Application 147 of 2023)
[2024] KEHC 948 (KLR) (7 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 948 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS APPLICATION 147 OF 2023**

**FR OLEL, J
FEBRUARY 7, 2024**

BETWEEN

SUSAN WAMBUI ANNASTACIA APPELLANT

AND

MAURINE NDINDA MUTUNGA RESPONDENT

RULING

1. The application before this court is the Notice of Motion application dated 7th August 2023 brought pursuant to provisions of Section 1A, 1B, 3A, 79G and 95 of the *Civil Procedure Act*, Order 22, rule 22, Order 42 Rule 6 and Order 51 rules 1 and 3 of the *Civil Procedure Rules* and all other enabling provision of law. Prayers (1), (2) and (4) of the said application are basically spent and the main prayer sought is prayer (3) & (5) that; The applicant be granted leave to Appeal out of time as against the judgement of Hon M.A. Otindo Principal Magistrate dated 24th May 203 delivered in Machakos CMCC NO E113 of 2022 and further that pending hearing and determination of the Appeal, they be granted an order of stay of execution of the judgment/decree referred to above.
2. The application is supported by the grounds on the face of the said application and the supporting affidavit of the Appellant one; Susan Wambui Annastacia dated 7th August 2023, where she avers that she was informed by her advocate's on record that the delay in filing the memorandum of appeal was caused a delay in obtaining a copy of the judgment and lack of communication with her over the same. she is aggrieved by this judgement and thus had opted to seek leave to appeal out of time. The intended Appeal was not an afterthought and had overwhelming chances of success. If stay was not granted, there was likelihood of the Respondent attaching her property which would render the Appeal nugatory.
3. This application is opposed by the Respondent, MAureen Ndinda Mutunga, who filed a Replying Affidavit dated 31st October 2023. she maintained that the said application was misconceived as the applicant was all along aware of the lower court decree and had not given a good reason as to why



extension of time should be granted. Secondly the applicant had not met the conditions for granting stay under Order 42 Rule 6(2)(b) of the *Civil Procedure Rules*, 2010 and thus the said application should be dismissed.

Analysis & Determination

4. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and discern that the only issues which arise for determination is whether time should be extended to allow the Appellant file her Appeal out of time and subsequently, if allowed, should this court grant stay of execution of the Judgment/Decree dated 24th May 2023 issued in Machakos CMCC No E113 of 2022.
5. Under Section 79G of the *civil procedure Act* a party is allowed to appeal against a decree/ruling within 30 days. But where there was a delay, the court could admit/allow the appeal to be filed out of time if the applicant satisfies the court that he/she had a good and sufficient cause for not filing the appeal in time. In the Supreme court citation of *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others* (2014) eKLR the following principles of extension of time was laid down;
 - a. 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.
 - 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 case by case basis;
 - d. Whether there is a reasonable explanation for the delay. The delay should be explained to the satisfaction of the court.
 - e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - f. Whether the application has been brought without undue delay; and
 - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
6. The court too could fall back on provisions of Section 1A, 1B & 3A of the *Civil Procedure Act*, which granted the court inherent powers to issue such orders as it may deem necessary and further enjoined the court to determine disputes in a just manner while considering the lower rather than higher risk of injustice. In the citation of *Shabbir Ali Jusab v Anaar Osman Gamrai & another* (2013) eKLR it was held that; the court should focus on substantive justice and disregard procedural technicalities
7. The Appellant averred that the delay in filing the Appeal was caused by a delay in obtaining a copy of the Judgement from court and lack of communication with the Appellant. Being aggrieved and dissatisfied by the said Judgement, she did instruct her advocates to file an appeal as against the said Judgement. Substantive justice dictated that they be given a chance to ventilate the Appeal which was said to be meritorious.
8. 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. An applicant must give court a reasonable explanation for the delay to the satisfaction of the court before the court can issue discretionary orders to his/her favour.
9. Unfortunately for, the Appellants, their explanation for the delay, does not hold. Their excuse that her advocate could not access the judgement delivered is hollow and not supported by any correspondence



to court seeking for a copy of the said judgement and/or seeking for the court file to be availed. In any event nothing further prevented the said advocates from filing a “holding memorandum of Appeal” as they waited for a copy of the judgement, which memorandum of appeal could be amended as appropriate later on.

10. Further the applicant has not provided any proof of lack of communication/late communication between her and her advocate during this intervening period to indeed prove her ignorance of the judgement earlier delivered and appeal timelines. The reasons advanced for the delay are thus not plausible and are hereby rejected.
11. There being no Appeal filed, the provisions of Order 42 Rule 6(2)(b) of the *Civil Procedure Rules*, 2010 cannot come into play and thus it is unnecessary to consider the aspect of stay of the decree dated 24th May 2023, issued in Machakos CMCC No E113 of 2022.

Disposition

12. Taking all relevant factors into consideration I do find that the application dated 7th August 2023 is unmerited and proceed to dismiss the same with costs to the Respondent.
13. The costs of this Application is assessed at Kshs .25,000/= .
14. It is so ordered.

RULING WRITTEN, DATE AND SIGNED AT MACHAKOS THIS 7TH DAY OF FEBRUARY, 2024

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 7TH DAY OF FEBRUARY, 2024

In the presence of: -

Mr. Ouko for Applicant

Mr. Kilonzo for Respondent

Sam - Court Assistant

