



**Chege v Musyoki (Civil Appeal E303 of 2023)
[2024] KEHC 1522 (KLR) (20 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1522 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E303 OF 2023
DKN MAGARE, J
FEBRUARY 20, 2024**

BETWEEN

SIMON NGUGI CHEGE APPLICANT

AND

KENNETH MUTHENGI MUSYOKI RESPONDENT

RULING

1. This is a Ruling over an Application dated 31/10/2023, leave to Appeal out of time and stay of execution. The same is true for extension of time within which to Appeal. The Applicant prioritized the stay of execution prayers.
2. The judgment of the lower court was delivered on 6/4/2023 and the judgment sent by Hon. J Kalo via email at 1703 on the day of judgment. Almost 7 months later, 207 days later the Application was drawn seeking. My reading of the application is that the Applicant is interested more in stay than leave to Appeal out of time.
3. Upon perusing the application, I do not find any reason for delay. It is not disputed that the Judgment was delivered and sent to parties on the same day. Why will the Applicant be looking for a judgment already sent? If it is printing, they could have printed anywhere even in a cybercafé. I am unable to agree that they ignored the emailed copy and sought a certified copy. I am sure an emailed copy is as good as any other in deciding whether to Appeal. I also note that the honourable court emailed a signed copy. This reminds me of the decision by Justice C B Madan as beautifully captured by Justice Odunga J (as he then was), alluded to in the case of *Kioko Peter v Kisakwa Ndolo Kingoku* [2019] eKLR while referring to the reasoning of CB Madan JA, (as he then was) in the case of *N vs. N* [1991] KLR 685. The Learned Judge lamented as follows:

“Parties and Counsel ought to give the courts some credit that the courts are not manned by morons who can be easily duped into believing all manner of incredible stories with little or



no iota of truth. It is these kinds of allegations that Madan, J (as he then was) had in mind when in N vs. N [1991] KLR 685 when he expressed himself in the following terms:

“I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted.”

4. I sincerely wish that Applicants will re-look at their Applications and existing jurisprudence before filing. The issue before me is whether the delay in lodging a Memorandum of Appeal has been satisfactorily explained. If the reason for the delay is not sufficient, then the issue as to whether a stay of execution should be granted will not fall for determination because there will be no Appeal.
5. I am reminded of the words of Waki, JA (as then he was in the case of Seventh Day Adventist Church East Africa Ltd. & Another vs. M/S Masosa Construction Company Civil Application No. Nai. 349 of 2005 held that:

“As the discretion to extend time is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant; the period of delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with the time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors...In an application for extension of time, each case must be decided on its own peculiar facts and circumstances and it is neither feasible nor reasonable to lay down a rigid yardstick for measuring periods of delay as explanations for such delays are as many and varied as the cases themselves...The ruling striking out the appeal is not only necessary for exhibiting to the application for extension of time but also for consultations between the applicant’s counsel and their clients and the fact that the ruling was returned to Nairobi for corrections is a reasonable explanation for the delay... Where the Respondent has already recovered all the decretal sum and costs attendant to the litigation, the right of appeal being a strong right which is rivalled only to the right to enjoy the fruits of judgement, no prejudice would be caused to the respondent who has enjoyed his rights in full if an opportunity is given to the applicants to enjoy theirs too, even if it is on a matter of principle.”

6. Extension of time is neither a right nor a privilege. It is a discretionary order. The principles for the same were set out in the binding decision of the Supreme Court of Kenya decision (M.K. Ibrahim & S.C. Wanjala SCJJ) in Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others [2014] eKLR where the learned Judges held as follows: -

- “(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 for 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) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
7. The Applicant is under a duty to place before the court material to act upon. While doing so, they must be reminded that courts are not morons who take any kind of wild allegations at face value. This belief that the court will extend time as a matter of course has no bearing in civil practice. Extension of time is a window to remedy injustice which rigours of time visit upon innocent parties. It is never a door to allow indolent parties to obfuscate issues and as a result derail the course of justice. In *Dilpack Kenya Limited v William Muthama Kitonyi* [2018] eKLR Odunga J. observed that:-
- “In an application for extension of time, where the Court is being asked to exercise discretion, there must be some material before the Court to enable its discretion to be so exercised. Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the court why the discretion should nevertheless be exercised in his favour and the rule is that where there is no explanation, there shall be no indulgence. See *Ratman vs. Cumarasamy* [1964] 3 All ER 933; *Savill vs. Southend Health Authority* [1995] 1 WLR 1254 at 1259.
8. It follows therefore that the Applicants explanation for the delay is key in guiding the Court’s exercise of discretion on the issue of leave to appeal out of time.
9. It is self-evidence that the Judgment was available for the parties on the day of delivery on 6/4/2023 at 1703 East African Standard Time. The explanation given by the Applicant cannot be believed. I don’t think even the Applicant believed it.
10. Further, this Application was filed about 7 months after the delivery of the impugned Judgment, which is also the same date they received the judgment. The Applicant was under a duty to show the reasons for delay. However short the period of delay, it must be explained. The court was not given a satisfactory explanation for the delay.
11. Even for argument purposes, if it is true the Applicant was looking for judgment, though they had a copy, there was no need for a copy of the judgment and the request for the same. A copy of judgment cannot be supplied through magic, conjecture, or hyperbole. The same ought to have been applied for and paid for.
12. But again, why will the Applicant need a copy of the judgment after being supplied with one? This reminds of the musings in *Alfred Iduvagwa Savatia vs Nandi Tea Estate & another* [2018] eKLR J. Mohammed JA. cited Aganyanya, JA in *Monica Malel & Another V. R.*, Eldoret Civil Application No. Nai 246 of 2008 where the Learned Judge stated;-
- “When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show the applicants are not quite sure of why the delay in filing the notice of appeal within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay.”
13. The jurisdiction of this court to extend time is circumscribed in Section 79G of the *Civil Procedure Act*, which provides as doth: -
- “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.”

14. The ground proffered is fictitious and is neither plausible nor tenable. The Applicant failed to give a plausible reason for the delay. In the case of *John Martin Muchiri Mugo v British-American Insurance Company (K) Limited* [2018] eKLR, justice P.J.O. Otieno, stated as doth: -

“From the narrative, the applicant allegedly became aware of the delivery of judgment on 22/6/2022. The Applicant sat on their rights till November, 2022 when they filed this application. There is no plausible explanation for the delay. I am thus not satisfied that there is an explainable delay.

15. The Applicant delayed for over 7 months. The delay is inordinate and has not been explained. There is no evidence that judgment was applied for. A delay of over months has not been explained and as such the delay is unexplained, inexcusable, and inordinate. As was held in *Hamam Singh & Others Vs Mistri* [1971] EA 122:

“...in relation to applications to this court for leave to appeal out of time, it has been held that mistakes of a legal advisor may amount to sufficient cause but not inordinate delay on his part...”

16. Therefore, in my view, without a valid reason, this court has no jurisdiction to extend time. It is not manna to dish out. It is exercise of discretion. Unless the court is properly moved, it has no power to exercise discretion. It is not by whim but through judicious consideration that such an application is considered. In *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR, justice Nyarangi JA, as he then was stated as doth;

“With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what

I have already said is consistent with authority: “By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.

17. I dare add that even in cases where the court has jurisdiction to hear a matter, when certain factors are missing, the court cannot invoke inherent jurisdiction to grant orders which the law determines they



cannot issue. Distilling from the above authorities, I have held in the past that the factors to consider in dealing with such an application are: -

- a. The length of delay.
 - b. The reason for delay.
 - c. The animus of the applicant.
 - d. The prejudice to the Respondent.
18. The Applicant has not explained the delay. It is my considered opinion that the 4 factors above are sequential. Therefore, one must fulfill each as before moving to the next. The delay is inordinate and there are no reasons for delay. When the delay is reasonable, there must be a real and genuine reason for delay.
19. Where there is doubt, either way, the court can then exercise discretion one way or another. The court cannot find that the delay is inexcusable, inordinate and no reason is given and then, out of sheer whims and fiat, extend time. That makes litigation unpredictable and unending.
20. In our court system, delay is usually documented. Without documentation, it never happened. For example, a lost file where there is no record of follow-up, is not lost. When applying for proceedings, they must first be as of necessity, a letter bespeaking the proceedings and payment of deposit. Without such, proceedings were never requested. The *raison d'être* for payment is to enable the court to prioritize according to payment and only serious applicants for proceedings. Without payment, no proceedings are being sought. Further, proceedings must be formally sought, even where the same was requested for in court, the registry must be moved and follow-ups be done.
21. The Applicant was clearly indolent. In *Salome Alice Akinyi v Aridempta Veronica Ooko & another* [2019] eKLR, Justice J Kamau stated as follows regarding the issue of vigilance: -
- “24. It is correct as the Respondents submitted that “equity aids the vigilant and not the indolent.” However, it was the view of this court that although the Applicant had delayed in filing her appeal, the delay of four (4) months in bringing the application seeking leave to file an application out of time was not inordinate.”
22. An appeal can thus be made even if a formal decree had not been formally extracted. A decree includes a judgment. The only thing the Applicant could have done is to pay and collect the judgment, which was available from January 2023.
23. The Applicant delayed for over 7 months. The reason given is not genuine and has not been explained. It cannot be said to be an oversight. Justice Asike-Makhandia J in *Gerald Kithu Muchanje v Catherine Muthoni Ngare & another* [2020] eKLR stated that:-
- “There is no maximum or minimum period of delay set out in law. However, a prolonged and inordinate delay is more likely than not to disentitle the applicant of such leave. Likewise, the reason or reasons for the delay must be reasonable and plausible. In *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR this Court stated:-
- “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.”

24. Given the circumstances of the case, I have also to consider both parties. The Respondent is entitled to the fruits of the judgment. The injustice to the Respondent if the Application were to be allowed exceeds the prejudice to the Applicant if the Application is disallowed. In *Harris Horn Senior, Harris Horn Junior vs. Vijay Morjaria* Nyeri Civil Appeal No. 223 of 2007 when confronted with similar arguments, the Court made observations therein inter alia as follows:

(32) As for the need to do justice to the parties before it, we have no doubt that this is the core business of the Court. However, a court of law cannot ignore principles of substantive law or case law governing the particular aspect of justice sought from its seat. Its primary role is to ensure that the justice handed out is kept anchored on both the law and the facts of each case.”

25. This is a proper application to dismiss with costs.

Determination

26. In the circumstances I make the following orders: -

- a. The Application dated 31/10/2023 lacks merit and is accordingly dismissed.
- b. The Respondent shall have costs assessed at Kshs. 25,000/-.
- c. The file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 20TH DAY OF FEBRUARY, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Ndolo for the Applicant

No appearance for the Respondent

Court Assistant - Brian

