



Kariu Nyange Estate & another v Okoth & another (Suing as the legal representatives of the Late Patrick Kibiru Muriithi) & another (Miscellaneous Application 169 of 2023) [2024] KEHC 1159 (KLR) (9 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1159 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS APPLICATION 169 OF 2023
SM MOHOCHI, J
FEBRUARY 9, 2024**

BETWEEN

KARIU NYANGE ESTATE 1ST APPLICANT

NJORO HOUSE 2ND APPLICANT

AND

**LEAH A OKOTH & BEATRICE AKOTH NGESE (SUING AS
THE LEGAL REPRESENTATIVES OF THE LATE PATRICK KIBIRU
MURIITHI) 1ST RESPONDENT**

SHELTER CONSTRUCTION LTD 2ND RESPONDENT

RULING

1. Before me is a Notice of Motion dated 17th May 2023, filed pursuant to Order 51 Rule 1 of the [Civil Procedure Rules](#), 2010, Sections 1A, 1B, 3A, and Section 79(g) of the [Civil Procedure Act](#) CAP. 21 of the Laws of Kenya.
2. The Applicants are seeking orders, to extend the time to file an appeal against a judgment delivered on 4th April 2023, in Nakuru CMCC No. 377 OF 2012, Leah A. Okoth and Beatrice Akoth Ngesa (Suing as the legal representatives of the late Joseph Ogutu Atom) vs Kariu Nange Estate & 2 Others.
3. They argue that the appeal is arguable, meritorious and has a high probability of success. They also state that the delay in filing the appeal was not due to laziness but rather the inability to obtain a copy of the judgment from the registry. They request the Court to grant them leave to appeal out of time and provide for the costs of the application.
4. The Application is supported by a sworn Affidavit of John Wanyange Mwangi dated 17th May 2023, and is based on the following grounds:



- a. That, judgment in Nakuru CMCC No. 377 of 2012; Leah A. Akoth & Beatrice Akoth Ngesa (admins) vs. Kariu Nyange Estate & 3 others was entered on 4th April, 2023 in favor of the 1st Respondent herein.
 - b. That, the Applicants became aware of the terms of the said judgment on 5th May, 2023 when they received a letter from postal corporation of Kenya dated 13th April, 2023 informing them of the judgement being delivered. Unfortunately, the Applicants learnt of the judgment being delivered after the period within which to file an appeal had lapsed and they are desirous of pursuing an appeal in the matter.
 - c. That, however, being aggrieved by the terms of the said judgement, counsel for the Applicants has been instructed to appeal against the entire judgment/decreed dated 4th April, 2023 in Nakuru CMCC No. 377 of 2012; Leah A. Akoth & Beatrice Akoth Ngesa (admins) vs. Kariu Nyange Estate & others albeit after the time frame prescribed under the Civil Procedure Rules, 2010: and has sought leave of this Court to be allowed to file an appeal out of time which appeal if granted leave is competent and has appreciable chances of success.
 - d. That, if execution of the said judgment/decreed is not stayed, the aforesaid intended appeal for which leave is sought to be filed out of time will be rendered nugatory thereby occasioning substantial loss to the Applicant.
 - e. That, the Respondents are at liberty and may proceed to execute the decree subject of the intended appeal at any time.
 - f. That, in the premises it is only fair and just that there be stay of execution of the judgment/decreed subject herein pending the inter-partes hearing and determination of the instant application and/or the hearing and determination of the intended appeal should this Court be pleased to enlarge time and grant leave to the Applicant to file the same, as the case may be.
5. The Application is opposed by way of a sworn Replying Affidavit dated 6th June 2023 by Leah A. Okoth, and written submissions dated 19th July 2023 as follows;
- i. That, the Application was filed in flagrant violation of the well-established legal doctrines and statutory provisions relevant to the subject application and the same is devoid of merit whatsoever or at all.
 - ii. That, the Application is fatally defective for want of form and law.
 - iii. That the Application has been lodged in bad faith and is incompetent.
 - iv. That, the Application as presently constituted is overtaken by events as the statutory time limit within which an appeal is allowed has since lapsed.
 - v. That, the Application as presently constituted will occasion miscarriage of justice and great prejudice to the 1st Proposed Respondents if it is allowed.
 - vi. That, this Application ought to be dismissed for the foregoing reasons with costs to the Defendant/1st proposed Respondent.
6. This Court had directed that the Application was to be heard and determined on the basis of written submissions and parties were to file their written submissions by the 29th September 2023.



Applicant's Case

7. The Applicants filed their written submissions on the 30th June 2023 contending that, as to whether the Court should enlarge time? and grant the Applicant leave to file an appeal out of time. The first issue this Court has to deliberate on, is whether to enlarge time and grant the Applicant leave to appeal out of time.
8. That, the principles to be considered by the Court in exercising the discretion whether or not to enlarge time were set out in the case of *Nation Media Group & Another Vs William Kimutai B. Keitany* (2017) eKLR it was held as follows:

“The principles to be considered in an application for leave to enlarge time to file an appeal out of time, were considered by the Supreme Court in application No 16 of 2014 (*Nicholas Kiptoo Arap Korir Salat Vs the Independent Electoral and Boundaries Commission & 7 Others* which are;

 - 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 a case to 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; and consideration for extending time.”
9. As to whether in certain cases, like election petitions, public interest should be a consideration for extending time the Applicants contends that, they have met the requirements as laid out by the Court when seeking leave to file an appeal out time.
10. They have demonstrated a reasonable cause as to why they delayed in filing the appeal out of time. Furthermore, extension of time is an equitable remedy reserved for a deserving Applicant and it is our contention that the applicants have demonstrated a good and sufficient cause for not filing the appeal in time and the same ought to be granted.
11. It is Applicants submissions that, they became aware of the terms of the judgement on 5th of May, 2023, a month after the judgement had been delivered. As has been laid out in their supporting affidavit, the Applicants immediately took steps to try and mitigate the damage done by the delay by formally lodging a complaint with their former advocates and instructing new counsel to come on record to try and sort the issue out.
12. The Applicants opine that mistakes of counsel should not be visited upon the clients. It is their former counsel on record who failed to communicate on time to the Applicants hence occasioning this particular delay. It is also worth noting that once the applicants learnt of the judgement having been delivered, they immediately took steps to file an application seeking leave to appeal out of time.



13. The Applicants contend that, they did not delay in coming before Court and that they have good and sufficient cause for not filing the appeal on time. They urge this Court to find in favour of the Applicants and to enlarge time and grant leave to file appeal out of time.
14. As to whether the Applicants have satisfied the principles governing stay of execution? It is submitted that, an applicant seeking stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules, 2010, namely:
- i. that substantial loss may result to the applicant unless the order is made,
 - ii. that the application has been made without unreasonable delay; and
 - iii. that such security as the Court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.
15. That this position was buttressed in Chris Munga N. E Bichage v Richard Nyagaka' Tongi & 2 others 2013 eKLR where the Court stated the principles to be applied in considering an application for stay of execution as thus:-
- “The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the Court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous.
- Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.”
16. The Applicant's submits that, their Appeal is arguable, that, for an appeal to be deemed arguable, it must raise at least one arguable point. Ideally, the substantive pleading that discloses the grounds upon which one appeals is the Memorandum of Appeal. In the case of African Cotton Industries Ltd v Patrick Wambua Ikusya [2021] eKLR the Court of Appeal relied on a memorandum of appeal provided by the applicant to conclude that the grounds raised therein were arguable. In the present case the Applicants have annexed a memorandum of appeal which we submit raises arguable issues.
17. The Applicant's submits that, the Application for Stay has been brought without unreasonable Delay, that once they were made aware of the judgement they Immediately took steps to move the Court without undue delay on their end. The Applicants fully rely on their supporting affidavit which has spelt out the steps taken by the applicants to move the Court. We submit that they move the Court timeously.
18. The Applicant contend that they will Suffer Substantial Loss if Stay Orders are not Granted and should the decree- holder proceed with the execution process.
19. The Court in Danros (K) Limited & Another ys. Murtaza Adamjee [2021] eKLR described what amounted to substantial loss in the following terms:
- “The decision of Platt Ag JA, in the Shell case, in my humble view sets out two different circumstances



when substantial loss could arise, and therefore giving context to the 4th holding above. The Ag JA (as he then was) stated *inter alia* that:

"The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the *Civil Procedure Rules* was not met. There was no evidence of substantial loss to the Applicants, either in the matter of paying the damages awarded which would cause difficulty to the Applicants itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two Courts... (emphasis added)"

The learned Judge continued to observe that:-

"It is usually a good rule to see if Order XLI Rule 4 of the *civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the Applicants, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money." (Emphasis added)

Whether Security for Due Performance of the Decree has been given.

20. It is trite law that an Applicant cannot succeed in an application for stay of execution pending appeal unless they give security for due performance of the decree as was held in *John Kinuthia Njoroge v Mariorie Muriqu Saidi* (2021) eKLR.

"Furnishing of security is one of the pre requisite conditions for granting of orders of stay. The Court of Appeal, in *Visbram Ravji Halai vs. Thornton & Turpin* (1963) Ltd [1990] eKLR, held that whereas the power of the Court of Appeal to grant a stay pending appeal is unfettered, the jurisdiction of the High Court to do so under Order 41 rule 6 of the *Civil Procedure Rules* is fettered by three conditions, namely; establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security."

21. Further in expounding the importance of stay, the Court in *Arun C Sharma Vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates & 2 Others* (2014] eKLR, stated that:-

"The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent.

That is why any security given under Order 42 rule 6 of the *Civil Procedure Rules* acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose."

22. The Applicants herein have stated that they are ready and willing to provide security as will be ordered by the Court. We submit that the requirements of security for performance of a decree serves a very



- crucial role: it balances the interests of the judgment debtor to maintain the viability of the appeal and the interests of the decree holder to enjoy the fruits of the judgment in case the appeal fails. The Applicant is willing and ready to adhere to such conditions regarding security as the Court may order.
23. In conclusion, the Applicants submit that they have met the legal threshold required when seeking to enlarge time and leave to file an appeal out of time and urge the Court to exercise its discretion and allow the application in its entirety.
24. The Applicants contends that they have demonstrated that they would suffer substantial loss should the orders sought not be issued. The decretal amount in question is quite substantial and the Applicants would not be able to recover it should the Court not grant them stay,
25. The Applicants submit that, although extension of time is not a right of a party. The right being an equitable remedy is in line with the principles of natural justice enshrined in our constitution as well as the right to appeal contained in Article 50 (q) of the constitution.
26. In the case of *Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited* [2020] eKLR Where the learned judge in discussing the request to allow applicant to exercise their undoubted constitutionally, underpinned right of appeal out of time adopted the Tanzanian case of *Abbas Sherally & Another vs. Abdul Fazaiboy*, Civil Application No. 33 of 2003; for the holding inter alia that:
- (i) "the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;
 - (ii) the right to be heard is a valued right; and
 - (iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice."
27. The Applicants submit that, the right of appeal is definite and like other right clearly enshrined in the constitution, the right to appeal supersedes the technicality of the manner and the time in which the appeal is made. Since the Applicant has a meritorious appeal that has a very high chance of success and that it would be a great peril to dismiss the application and appeal without giving the same a proper hearing and determination.
28. That, in giving the reasons for the delay of appeal, the Applicant relies on ground number 4 of the Application and paragraph 7 of the accompanying supported affidavit which emphasizes that failure to appeal on time was not as a result of indolence but rather the inability to procure copy of the judgement from the registry in time.
29. Section 79G of the Civil Procedure Act provides that; -
- “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 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.”



30. The underlined part of the section applies in this case as it is the evident that the failure to file the memorandum of appeal was never indolent or deliberate but rather an event that was out of the control of the applicant. The Court therefore has the power to determine the same and admit the appeal.
31. That the Respondents via their replying affidavit claim that the memorandum of appeal was filed a year later from the date of judgement which is a blatant lie on their part and ought not to be entertained by the Court.
32. The Applicants submit that, the memorandum of appeal annexed was duly filed on 22nd December 2022 which is two months late according to Section 79G of the *Civil Procedure Rules* contrary to the declaration of the respondents. However, the reason for delay is plausible by dint that it was occasioned by circumstance beyond the applicant's control.
33. Having satisfied that the delay to appeal was never an afterthought, the same should not be rendered the memorandum of appeal nugatory as was envisioned in the case of *Almas Hauliers Ltd v Abdulnasir Abukar Hassan* (2017 eKLR a delay of four months was found not to be inordinate.
34. Reliance is placed on the case of *Stecol Corporation Limited v Susan Awuor Mudembe* [2021] eKLR the learned judge determined as follows:
- “Courts have over time excused parties where such delay is not inordinate as is in this Case and even in cases where there is inordinate delay, depending on the circumstances of each case and reasons for the delay, Courts have accorded parties an opportunity to be heard on appeal”.
35. That this is a Court of justice that ought to consider the interest of both the applicant and the respondent and that, the delay is not inordinate in consideration of the fact that the memorandum of appeal though filed out of time was lodge for purposes of exploring the right of appeal and interests of justice.
36. Section 95 of the *Civil Procedure Rules* provides that:
- “Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Act, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”
- This is in line as read together with Order 50 Rule 6 of the *Civil Procedure Rules* 2010 that provides:
- “Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the Court, the Court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.....”
37. That the Court has the discretionary powers to enlarge the time and admit the appeal out of time in pursuit of the ends of justice. Delay especially when it's not in the fault of a litigant should not be a ground for prejudice on their part.
38. Further that no prejudice will be suffered by the respondent. On the contrary, the respondent shall be granted an opportunity to defend the appeal with merit and that the applicant's appeal out of time should be allowed as prayed.



39. That the delay to appeal the judgement dated 13th October 2021, was not inordinate but rather unfortunate as the delay to procure the judgement, which was instrumental in filing the appeal as well as the record of appeal was acquired after statutory limit of time had lapsed despite the applicant's efforts to procure the same.
40. It is in the Courts power, ability and discretion as conferred to it by the constitution to allow the appeal with undue regard for lateness or otherwise technicalities
41. In Conclusion the Applicants submit that, they deserve the exercise the Court's discretion to admit the appeal out of time which is in the interest of justice notwithstanding that plausible explanation has been rendered.
42. The Applicant's urge that the Court invokes its inherent discretion to set aside the proceedings and judgment as captured in Section 3A of the Civil Procedure Act states otherwise:

“Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

Respondents Case

43. The Respondent opposed the Application by way of filed Grounds of Opposition dated 20th December 2022 supported by a sworn Replying Affidavit by Millicent N. Wasonga together with the 1st Respondent's written submissions dated 2nd May 2023 urging that,
44. As to whether there is good and sufficient cause for not filing the appeal in time, the Applicants submit that, the main provision of the law governing the application for leave to appeal is set out by Order 43 Rule 3 of the Civil Procedure Rules which states thus:

“An application for leave to appeal under Section 75 of the Act shall be in first instance be made to the Court making the order sought to be appealed from, either orally at the time the order is made or within fourteen days from the date of such order.”
45. That, the judgment sought to be appealed from was delivered on 13th October 2021 while the instant application seeking leave to appeal out of time was filed more than a year later.
46. That, the only ground cited by the applicant for not filing the appeal within the statutory time limit is inability to procure a copy of the judgment in time.
47. That, the Applicants have not tendered any evidence to confirm the said allegation since the letter dated 1st February 2022 requesting for a copy of judgment relied on by the applicants is in reference to a letter that is dated 31st January 2021 way before the judgment herein was delivered on 13th October 2021.
48. That it's therefore clearly evident your lordship that the applicants have been indolent and the decision to file the instant application was an afterthought. The applicants have not demonstrated any reasons for failing to file the intended appeal within the stipulated time limits and should therefore not be allowed to forestall the cause of justice by filing unnecessary applications which are a misconception and a waste of the Court's time.
49. As to whether there are any prospects of success of the intended appeal? The Respondents rely on the case of Bandali T/A Shimon Enterprises Vs. Wills Civil Application No. 12 of 1991 cited with



approval the ruling in *Sango Bay Estates Ltd. vs. Dreder Bank AG* (1971) EA in which S. Pry J. stated the principle upon which an application for leave to appeal may be granted as follows;

“As I understand it, leave to appeal from an order in civil proceedings will normally be granted where prima facie it appears that there are grounds of appeal which merit serious judicial considerations...”

50. That the prospects of success of the Appeal is minimal. The Court in the iconic case of *Swain vs. Hillman* (2001)1 AII ER 91 cited:

“That a real prospect of success, means that the prospect for the success must be realistic rather than fanciful. The Court considering a prospect for permission is not required to analyze whether the grounds of the Proposed appeal will succeed, but merely whether there is real prospect of success.”

51. That the intended appeal does not have any real prospects of success and in the circumstance the instant application ought to be dismissed with costs to the 2nd Respondent.

Analysis & Determination

52. In the locus classicus case of *Kamlesh Mansukhalal Damki Patni Va Director of Public Prosecution & 3 Others* (2015] eKLR, the Court of appeal held that:

“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 won't to say in Kenya, from Wanjiku, by dint of Article 159 (1) *Constitution* which succinctly states that "judicial authority is derived from 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." (Emphasis added)..

53. I have evaluated the reason offered for the delay. I find and hold that the delay in obtaining certified proceedings and judgment cannot be faulted on the Applicants. I find and hold that the delay is excusable and that it has been satisfactorily explained. I also find that the Application meets the tests for the Court to exercise its discretion in the Applicants favor. Accordingly, I allow Notice of Motion dated 17th May 2023 on the following terms:

- i. The Applicants shall deposit the entire decretal amount in an interest-bearing bank account in the names of counsels for the Applicants/Appellants and the 1st Respondent/Decree Holder within the next 21 days from the date hereof.



- ii. Leave to file an Appeal is hereby granted and the filed draft memorandum of Appeal is hereby deemed as duly filed.
- iii. A Temporary Order of Stay against Execution of judgment/Decree in Nakuru CMCC NO. 377 OF 2012 is hereby issued pending hearing and determination of the Appeal.
- iv. The Notice of change of Advocate is deemed as duly and properly on record.
- v. A default by the Applicants/Appellant in compliance of order (i) above automatically vacate all orders granted herein and the Notice of Motion dated 17th May 2023 shall have been deemed dismissed.
- vi. Costs shall be in the cause.

It is so ordered.

SIGNED, DELIVERED VIRTUALLY ON TEAMS PLATFORM ON THIS 9TH DAY OF FEBRUARY 2024.

MOHOCHI S.M

JUDGE

