



Makenzi v LMK (Minor Suing Through Mother and Next Friend CMM) (Civil Miscellaneous Application E140 of 2023) [2024] KEHC 1442 (KLR) (14 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1442 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL MISCELLANEOUS APPLICATION E140 OF 2023**

FR OLEL, J

FEBRUARY 14, 2024

BETWEEN

IRENE WANZA MAKENZI ALIAS IRENE MAKENZI APPLICANT

AND

LMK (MINOR SUING THROUGH MOTHER AND NEXT FRIEND CMM) RESPONDENT

RULING

1. The application before this court is the Notice of Motion application dated 27th July, 2023 brought pursuant to provisions of Section 1A, 1(B) and 3A, 79G of the *Civil Procedure Act*, Order 22 rule 22, Order 42 Rule 6, Order 50 rule 6 and Order 51 rule 1 of the *Civil Procedure Rules* and all other enabling provision of law. Prayers 1 and 2 of the said application are basically spent and the main prayers sought are prayer (2) and (4) of the said application that; they be granted leave to appeal out of time as against the Judgement/ decree of Honourable M. Thibaru, Adjudicator/Resident Magistrate issued on 29th May 2023, in Machakos small claims court No 88 of 2023.
2. This application is supported by an affidavit of the appellant/applicant one Irene Wanza Makenzi dated 27th July 2023 and is opposed by the respondent who filed a replying affidavit dated 24th August 2023
3. The Applicant stated that judgement was entered as against her on 29th May 2023 in Machakos small claims court claim No 88 of 2023 by Honourable M. Thibaru Adjudicator/Resident Magistrate. Being aggrieved and dissatisfied with the same, she had instructed her advocates to lodge and appeal as against both quantum and liability. By the time she was issuing the said instruction, time to lodge the said appeal had lapsed and therefore there was need to seek for extension of time to file the said appeal out of time.
4. The delay in filing the appeal was occasioned by the need for communication between herself and her advocates and also, they had to get a copy of the said judgement and ascertain the position and options



available. By the time they concluded this process, time allowed to lodge the appeal had lapsed. The proposed appeal was meritorious and had high chances of success as the respondent was awarded high quantum, which she did not deserve.

5. Finally, the applicant also stated that unless stay of execution was granted, there was a real likelihood of the applicant attaching her property and that would cause her irreparable loss and harm. Her insurer Direct line Insurance co ltd, was willing and ready to offer bank guarantee as security for the decretal sum. This application had been made in good faith and no prejudice would be occasioned to the respondent, should the orders sought be granted.
6. The Respondent posited that the said application was an afterthought, frivolous vexatious and constituted an abuse of the process of the court. The applicant was directed to serve this application on the respondent, but deliberately chose not to do so. The appellant had been asking her to be patient as her insurer was preparing the decretal sum cheque, but ultimately failed to deliver the same. The appellant thus did not deserve any sympathy as they had all along mislead her advocate, when actually they were filling this application behind the her back.
7. The applicant was all along aware of the judgement they intend to appeal against as her advocate had forwarded to the applicants advocate the draft decree on the said 29.05.2023 when judgement was delivered. This was effected by email, which she attached as an exhibit. After the stay period had lapsed, parties exchanged several correspondences on settlement and therefore the reason proffered for the delay did not hold water. They had sent auctioneers to attach the suit motor vehicle and prayed for this application to be dismissed with costs.
8. The parties agreed to have this application canvassed by way of written submissions and only the respondent filed their submissions.

Analysis & Determination

9. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and Respondent's submission filed and the issues which arise for determination is whether the Applicant should be granted leave to appeal out of time and if yes whether stay of execution of the decree should be issued,
10. Section 79G of the [Civil procedure Act](#) 2010 does provide that

“Every appeal from a subordinate court to the high court shall be filed within a period of 30 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 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.
11. Further Order 50 rule 6 of the [Civil procedure rules](#) does provide that;

“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 powers to enlarge time upon such terms (if any) as the justice of the case may require, and such enlargement maybe ordered although the application for the same is not made until after the expiration of the time appointed or allowed.”



12. There is no doubt that the discretion to extend time is not a right of the party, but is an equitable remedy that is only available to a deserving party after laying a basis to courts satisfaction that there exists reasonable explanation as to why there has been a delay. The court will also consider if any prejudice will be suffered by the respondent and if the application has been brought without unreasonable delay.
13. In the Supreme cause 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.
14. In *Imperial Bank Ltd (in receivership) & Ano v Alnasir popat and 18 others* the court observed that;
- “some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercised its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a parties opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; public interest issues implicated in the appeal or intended appeal and whether, prima facie, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration it must be born in mind that it is not really the role of a single judge to detriment definitely the merits of the appeal. That is for the full court if and when it is ultimately presented with the appeal.”
15. In the *salat* case(*supra*)the supreme court did observe that;
- “Extension of time being a creature of equity, only enjoy ,one can only enjoy if he acts equitably: he who seek s equity must do equity .Hence, one has to lay a basis that he was not at fault so as to let time lapse. Extension of time is not a right of a litigant against court, but a discretionary power of the courts, which litigants have to lay a basis where they seek courts to gran the same.”
16. The decree sought to be appealed against was made on 29th May 2023, and this application filed on 28th July 2023. This is period of about 30 days after the statutory time allowed in law. While the delay can be excused as not being inordinate, the facts herein dictate that the orders sought ought not to



be granted. It has been shown by correspondences annexed that the applicant, through her insurer was in the process of preparing the cheque for the decretal sum. They even forwarded a copy to the respondent's counsel, and requested for a few days to enable them get the second signatory. The said cheque DTB No 10 3535 is dated 06.07.2023 and the respondent's averments are not denied by the applicant.

17. The applicant's averments proffered to explain the delay is therefore a false narrative. It has been shown that the applicant by her conduct is deliberately seeking to delay or obstruct the cause of justice. Extension of time being a creature of equity, one can only enjoy discretionary orders to her favour, if she acts equitably. The applicant has obviously moved court as an afterthought with soiled hands and is most underserving in equity of the order sought.
18. One the issue of stay of execution, since there is no appeal filed, the proviso of order 42 rule 6 of the Civil Procedure Rules does not kick in.

Disposition

19. Taking all relevant factors into consideration I do find that the Notice of motion Application dated 27. 07. 2023 is without merit and proceed to dismiss with costs to the Respondent.
20. The two other applications filed in this cause dated 04.08.2023 and 14.08.2023 all relate to seeking order of stay of execution of the decree by Honourable.M.Thibaru, Adjudicator/Resident Magistrate issued on 29th May 2023, in Machakos small claims court No 88 of 2023, too are dismissed.
21. On 18th August 2023, Hon Justice Mumbua.t. Matheka (Sitting as duty Judge had directed the Appellants to deposit the entire decretal amount in court. If the order was effected, I direct that the said decretal sum be released to the Respondent. If not, the Applicant is granted 14 days within which to settle the same or execution to issue.
22. The Applicant will pay the respondent costs of Kshs.50,000/= being costs of the dismissed applications within the next 14 days. In default Execution to issue.
23. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 14TH DAY OF FEBRUARY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 14th day of February, 2024.

In the presence of;

Ms Ochoki for Applicant

Mr. Muumbi for Respondent

Sam - Court Assistant

