



**Owiti v Etabale (Miscellaneous Civil Application E234 of 2023)
[2024] KEHC 16983 (KLR) (7 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 16983 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION E234 OF 2023
F WANGARI, J
FEBRUARY 7, 2024**

BETWEEN

OWAKA EDWIN OWITI APPELLANT

AND

CHRISTINE ASHUMA ETABALE RESPONDENT

RULING

1. The Applicant vide an application dated 1/9/2023 sought for the following orders: -
 - a. Spent
 - b. That the Honourable Court be pleased to grant the Applicant leave to Appeal out of time against the judgment of the Honorable Principal Magistrate in Mombasa SRMCC No. 1482 of 2019 and delivered on 23/5/2023.
 - c. That this court be pleased to order a stay of execution of the above Judgement and Decree pending hearing and determination of the application and intended appeal.
 - d. That as a condition for stay of execution pending the hearing and determination of this appeal, the Applicant/ Appellant be and is hereby ordered to provide security for the entire decretal sum in the form of a Bank Guarantee to be issued by Family Bank Limited.
 - e. That the costs of the application abide the outcome of the appeal.
2. The Appellant relied on grounds that the delay in filing the appeal was due to the fact that there was delay in getting instructions to appeal on time as the Insurance Company gave instructions late. The Appellant was ready and willing to deposit a Bank Guarantee of the entire decretal sum.
3. The application was opposed through the Respondent's Replying Affidavit dated 12/9/2023. It was stated that the application was an afterthought. The Notice of Entry of Judgment dated 31/5/2023



was served upon the Appellant and the same was acknowledged. It cannot be said that there was a delay in getting a copy of judgment.

4. Further, after the Insurance company failed to settle the decretal sum, a declaratory suit was instituted against Direct Insurance Company and the suit was still pending as at the time of filing the Replying Affidavit.
5. Directions were taken that the application be disposed of by way of written submissions. Both parties complied by filing the rival submissions.

Analysis and Determination

6. I have considered the application, the Applicant's submissions, authorities cited as well as the law and in my view, the following are the issues for determination;
 - a. Whether the application is meritorious;
 - b. What is the order as to costs?
7. On the first issue, the application basically seeks for leave to file an appeal out of time. Section 79G of the *Civil Procedure Act* is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. It provides as follows: -

“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.”

8. The decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion just like any other exercise of discretion by the court. Some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time were suggested by the Court of Appeal in *Thuita Mwangi V Kenya Airways Ltd [2003] eKLR*. They include the following: -
 - i. The period of delay;
 - ii. The reason for the delay;
 - iii. The arguability of the appeal;
 - iv. The degree of prejudice that will be suffered by the Respondent if the extension is granted;
 - v. The importance of compliance with time limits to the particular litigation or issue;
 - vi. The effect if any on the administration of justice or public interest if any involved.
9. On the period of delay, the Applicant in his application and supporting affidavit stated that judgment in the lower court was delivered on 23/5/2023. The appeal ought to have been filed within 30 days after delivery of judgment. This application was filed on 9/9/2023 which is almost 4 months after judgment was delivered. The Applicant states the proceedings from the court were delayed.
10. Further, after forwarding the same to the Insurance Company for settlement, the Insurance company delayed in giving instructions to file an appeal. There is also no Certificate of Delay issued by the court.



11. On arguability of the appeal, the Appellant submits that the trial court failed to apply itself to the precedents and principles of law in awarding damages. It was stated that the damages awarded were inordinately high and excessive thus occasioning miscarriage of justice. The Appellant did not attach the judgment subject to this appeal. It therefore cannot be determined if the appeal is arguable or not.
12. I do agree with the Respondent that the intended appeal is an afterthought after the Declaratory suit was instituted against the Insurance Company, prompting the company to give late instructions for filing of this appeal. By granting the Appellant the orders being sought, it would amount to denying the Respondent the fruits of her judgment. I am therefore inclined to disallow this application.
13. On the issue of costs, the same follows the event. This is what section 27 of the *Civil Procedure Act* decrees. However, this court has discretion to either award or not award any costs. This was well enunciated by the Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR. The Appellant being unsuccessful, he shall bear the costs of the application.
14. Flowing from the foregoing, I proceed to make the following orders: -
 - a. The application dated 1/9/2023 lacks merit and is thereby dismissed.
 - b. The costs of the application awarded to be Respondent.

Orders accordingly

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 7TH DAY OF FEBRUARY, 2024.

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F. WANGARI

JUDGE

In the presence of:

N/A by the Appellant

N/A by the Respondent

Barile, Court Assistant

