



S.K. Kerai Constructions v Ng’etich (Suing as Administrator of the Estate of the Late Lagat Evans Kipyegon) (Miscellaneous Application E110A of 2023) [2024] KEHC 1115 (KLR) (9 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1115 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS APPLICATION E110A OF 2023
JRA WANANDA, J
FEBRUARY 9, 2024**

BETWEEN

S.K. KERAİ CONSTRUCTIONS APPLICANT

AND

BENARD NG’ETICH (Suing as Administrator of the Estate of the Late Lagat Evans Kipyegon) RESPONDENT

RULING

1. The Application before the Court is the Applicant’s Notice of Motion dated 30/05/2023 seeking the following orders;
 - i. [.....] Spent.
 - ii. [.....] Spent.
 - iii. That the Applicant be allowed to file an appeal out of time from the Judgment of Hon. O. Mogire Senior Principal Magistrate, delivered on 18th April, 2023 in Eldoret CMCC No. 078 of 2021.
 - iv. That there be stay of execution and/or further execution of the decree herein pending the hearing and final determination of the intended appeal
 - v. That the Memorandum of Appeal annexed hereto be deemed properly filed and served upon payment of the requisite court fees.
 - vi. That costs hereof be costs in the appeal.
2. The Application is filed through Messrs Nyairo & Co. Advocates and is expressed to be brought under Article 50(1) and 159(d) of the Constitution, Section 1A, 1B, 3A and 63(e) of the Civil Procedure



Act, Order 42 Rule 6 and 7, Order 50 Rule 5 and Order 51 Rule 1 of the Civil Procedure Rules. It is premised on the grounds stated on the face thereof and is supported by the Affidavit sworn by one Javan Ombado.

3. In the Affidavit, the deponent described himself as a Legal Officer at Geminia Insurance Company Limited, the Applicant's Insurer. He deponed that the said Judgment was delivered against the Applicant on 18/08/2023 at the total sum of Kshs 986,525/-, that the letter advising them of the Judgment and seeking instructions on whether to appeal was sent on 19/04/2023, that by an oversight, he overlooked the said email and it was not until 19/05/2023 that he received a call from the Advocates making a follow-up on the same, that upon checking his mail, he came across the letter and immediately informed the Legal Manager who was out of office at the time attending to a personal issue. He deponed further that the Manager resumed duty on 22/05/2023 and immediately convened a meeting to deliberate on the issue, that after the meeting, a resolution was passed that an appeal be filed, she thereafter instructed the Advocates to file the appeal, and that the Advocates prepared the Memorandum of Appeal as instructed but the time which to file it has lapsed hence the instant Application.
4. He deponed further that the appeal raises weighty issues with high chances of success, that the Applicant is ready and willing to abide by any reasonable conditions for grant of orders of stay pending appeal and proposes to deposit the entire decretal amount in a joint interest earning account for due performance of the decree as security, that unless the stay orders are granted the Applicant stands to suffer substantial loss if the Respondent proceeds with the execution of the decree as the Respondent does not have any assets to enable him refund such amount, the delay in filing the Appeal was not deliberate but was a pure oversight and is excusable, and that the Respondent will not suffer any prejudice if the orders are granted.

Replying Affidavit

5. In opposing the Application, the Respondent, through Messrs Morgan Omusundi Law Firm Advocates filed his Replying Affidavit on 14/06/2023. He deponed that that the reason given for the delay in filing the Application is not plausible, that Applicant's Advocates were long aware of the Judgment and have not shown the prejudice to be suffered if the Application is not granted, that the Application is an afterthought since it has been filed after an inordinate delay, that the Judgment is a money decree and the Applicant has no right to prevent the Respondent from enjoying the fruits of the Judgment, that the Applicant is not candid since they were aware of the Judgement, that even if leave to appeal out of time is considered, it should not hinder one from enjoying money Judgement.

Hearing of the Application

6. The Application was canvassed by way of written Submissions. Pursuant to directions given, the Appellant's Submissions was filed on 8/08/2023 while the Respondent's was filed on 18/07/2023.

Applicant's Submissions

7. Regarding the principles applicable in determining Applications for extension of time, Counsel cited the Court of Appeal case of Edith Gichugu Koine v Stephen Njagi Thoithi, Civil Application No. 11 of 2014 and submitted that there has been no inordinate delay, that the Judgment was delivered on 18/04/2023, the 30 days period within which to appeal lapsed on 18/05/2023, this instant Application was then filed on 31/05/2023 which is a delay of about 13 days which is excusable considering the circumstances leading thereto. Counsel then recounted the reasons and explanations deponed in the Supporting Affidavit and submitted further that for substantive justice to be rendered and to facilitate



- access to justice, the Court should allow the Application so as not to shut out the Appellant from the seat of justice and grant leave to file the appeal out of time. She cited the Court of Appeal case of *Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited* Civil Application No. 55 of 2020 where, she submitted, the Court held that a delay of one year, 2 months and 7 days from the date of the decision and a period of 3 months and 14 days from the date of capacitation with a Certificate of Delay was not inordinate and extended time within which to appeal. She urged the Court to find that the delay and/or oversight was not deliberate and was on the part of the Applicant's insurer.
8. Counsel called upon the Court to balance the competing interests of the parties, that is, the injustice to the Appellant in denying him an extension, against the prejudice to the Respondent in granting an extension. She stated that the Respondent has not demonstrated any prejudice that he is likely to suffer if the orders are granted, that the Applicant has a right to be heard on appeal and it is in the interest of justice that the Application be allowed, that the Court has a duty to ensure that substantive justice is served without undue regard to procedural technicalities, and that the right to be heard is paramount. She added that substantial loss and/or prejudice is a factual issue which must be supported by evidence, that in the absence of such evidence, the Court ought to find that no prejudice will be suffered by the Respondent. She cited the case of *Stecol Corporation Limited v Susan Awuor Mudembi*, Civil Application E024 of 2021, Article 159(e) of the *Constitution* and also the case of *Telkom Kenya Limited v John Ochanda and 996 Others* [2015] eKLR.
 9. Regarding stay of execution, Counsel argued that the Appellant has met the prerequisite for grant thereof, that the principles upon which the Court may stay the execution of orders and/or decrees appealed from are well settled under the provisions of Order 42 Rule 6 of the *Civil Procedure Rules*, the same are that an Applicant should satisfy the Court that substantial loss may result to him unless the order is made, that the application has been made without unreasonable delay; and that the applicant has given such security as the Court orders for due performance of such decree. She then submitted that the Respondent's financial means is unknown, that the amount in issue is colossal and if paid to the Respondent and the intended appeal succeeds, then the amount received will be out of reach as the Respondent will be unable to refund it, that in the absence of any proof as to the financial ability and/or assets of the Respondent, the Applicant risks suffering loss that cannot be compensated monetarily in the likely event that the intended appeal succeeds, and that the Replying Affidavit filed by the Respondent has no averment as to the means and/or rebuttal evidence as to the ability to refund the amount.
 10. Counsel then submitted that the Applicant it is ready and willing to furnish adequate security for due performance of the decree, and is offering to deposit the entire decretal amount in a joint interest earning account. In conclusion, she cited the case of *Butt v Rent Restriction Tribunal* (Nairobi Civil Application No. 6 of 1979).

Respondents' Submissions

11. On his part, Counsel for the Respondent submitted that Section 79G of the *Civil Procedure Act* is the operative law in answering the question whether the prayer to enlarge time to file an appeal is merited, that the phrase used is "an appeal may be admitted out of time", that this therefore means that the appeal ought to have already been filed before or together with an application seeking leave to extend time. He cited the case of *Mugo & Others v Wanjiru & Anor* (1970) EA 482.
12. Counsel submitted further that the decision whether to grant leave to appeal out of time is an exercise of discretion, that some of the factors that aid Courts in exercising such discretion were suggested by the Court of Appeal in *Thuita Mwangi v Kenya Airways Ltd* (2003) eKLR to include the period of delay, reason for the delay, arguability of the appeal, degree of prejudice which could be suffered by the



Respondent if the extension is granted, importance of compliance with time limits to the particular litigation or issue, and effect, if any, on the administration of justice or public interest if any is involved. He submitted further that the present application was filed 2 weeks after lapse of the 30 days stay of execution granted by the trial Court, that it is alleged that the delay was occasioned by an oversight by the Legal Manager of the Applicant but there is however no evidence to show that the Applicant was not indolent or followed up on the Judgment with its Advocates.

13. Regarding stay of execution, Counsel submitted that an applicant must establish that he will suffer substantial loss should stay not be granted and that the application has been filed timeously and that he is willing to deposit security for due performance of the decree, that the duty of the Court is, as far as possible, to balance the interests of the parties, that this would require safeguarding the interests of the decree holder to the decretal sum, but also ensuring that should the appeal succeed, it will not have been rendered nugatory by earlier payment to a party who is unable to repay the decretal sum upon the success of the appeal. As to what amounts to “substantial loss”, Counsel cited the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR and urged that the Respondent has shown that he will be able to refund the amount were the appeal to succeed, and that the Applicant has not shown that the Respondent has no means to refund the money. He also cited the case of *Equity Bank Ltd v Taiga Adams Company Ltd* [2006] eKLR and *Machira t/a Machira & Co. Advocates v East African Standard (No. 2)* 2 KLR 63 and submitted that it is not enough to merely state that substantial loss will result and also that the Applicant has not been clear what substantial loss it will suffer.
14. On security, Counsel submitted that the Applicant should deposit the entire decretal sum into a joint interest earning account in the names of the two advocates of the parties.

Analysis & Determination

15. I have considered the Application, response thereto, Submissions by Counsel and the authorities cited. It is clear that the issues that arise for determination are the following:
 - i. Whether the applicant should be granted leave to file the appeal out of time
 - ii. Whether the orders for stay of execution should issue
16. I now proceed to determine the said issues.

i. Whether the Applicant should be granted leave to appeal out of time

17. Section 79G of the *Civil Procedure Act* 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 a good and sufficient cause for not filing the appeal in time.” [Emphasis added].”

18. In the case of *Edith Gichungu Koine v Stephen Njagi Thoithi* [2014]eKLR, the Court of Appeal guided that in an application for extension of time, the Court ought to take into account several factors as observed by Odek JJA as follows:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but no limited to, the period of delay, the reasons for the



delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

19. The Applicant has explained that the reason for delay was that Counsel was awaiting instructions from the insurance company on whether to appeal. In my view, it has been satisfactorily explained that the delay occurred due to an inadvertent oversight within the various channels of decision-making within the insurance company. This Court will therefore be reluctant to punish a litigant for blame that is attributable to his insurer. On this point, I am guided by the decision in *Kamlesh Mansukhalal Damki Patni v Director of Public Prosecution & 3 Others* [2015] eKLR, where the Court of Appeal stated as follows:

“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 wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of the *Constitution* which succinctly states that

“judicial authority is derived from the 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).

20. The Court of Appeal commented further as follows:

“It suffices to comment that a court of law should be hesitant at closing the door to the corridors of justice prior to a litigant being heard on his complaint”

21. Guided by the principles enunciated above, I am satisfied that it is in the interests of justice to grant leave to file the appeal out of time.
22. I may also comment that the impugned Judgment was delivered on 18/04/2023 which means that the statutory period for filing an appeal lapsed on or about 18/05/2023. The Applicant then filed the present application on 31/05/2023, about 13 days later. In my view, and considering the circumstances of this case, this 13-day period of delay is not too long to be considered inordinate.
23. Counsel for the Respondent submitted that in Section 79G of the *Civil Procedure Act*, the phrase used is “an appeal may be admitted out of time”, and that this therefore means that the appeal ought to have already been filed before or together with an application seeking leave to extend time. I am not persuaded by this argument because in my view, the same is a result of interpretation of the proviso to Section 79G, not a result of the express wording of the Section. Since Section 79G does not expressly state that an Appeal must first have been filed before Section 79G can apply, I am of the view that



interpretation of the said provision must not be read in isolation but with other provisions of the law. It must also take into account of the spirit and intention of the law.

ii. Whether orders for stay of execution should be granted

24. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 Rule 6(2) of the [Civil Procedure Rules](#) which provides:

“No order for stay of execution shall be made under sub rule (1) unless—

- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

25. “Substantial loss” was explained in the case of [James Wangalwa & Another v. Agnes Naliaka Cheseto](#) [2012] eKLR, by Gikonyo J in the following terms:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the [CPR](#). This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

26. The Applicant urged that it would be occasioned substantial loss if the order for stay is not granted and the appeal later succeeds as the Respondent’s financial strength is not known. On his part, the Respondent argued that the Applicant has not presented any material to demonstrate that the Respondent is incapable of refunding the decretal amount. This issue was addressed by the Court of Appeal in the case of [National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another](#) [2006] eKLR where the following was expressed:

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge”

27. In this case, I find that the Respondent has not provided any evidence to demonstrate his ability to refund the decretal sum should the appeal succeed. In other words, besides simply proclaiming his ability to refund, the Respondent has done nothing further to lay to rest the Applicant’s fear or apprehension that it would be unable to recover the money

28. On the issue of delay, I have already made a finding above that the Application was filed without unreasonable delay.



Final Orders

29. In light of the above, I make the finding that the Application herein is merited. Accordingly, I order as follows;
- i. The Applicant's Notice of Motion dated 30/05/2023 is allowed in terms of prayer 3 and 4 on the condition that within 45 days from the date hereof, the Applicant deposits the decretal sum of Kshs 1,184,055/- in an interest earning bank account to be opened in the names of the law firms on record for the parties in this matter.
 - ii. Subject to compliance with the said conditions therefore, the Applicant is granted the following:
 - a. Leave to file an appeal out of time challenging the Judgment delivered in Eldoret Chief Magistrate's Court Civil Case No. E078 of 2021 on 18/04/2023.
 - b. Stay of execution of the Judgment delivered in the said Eldoret Chief Magistrate's Court Civil Case No. E078 of 2021 on 18/04/2023 and the Decree arising therefrom, pending the hearing and determination of this Appeal.
 - iii. The Appellant shall file and the Memorandum of Appeal within 14 days from the date hereof.
 - iv. In the event of default in complying with any of the above orders within the timelines stipulated, the same shall lapse and the Respondent shall be at liberty to execute the Decree.
 - v. Costs in the Cause.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 9TH DAY OF FEBRUARY 2024

WANANDA J.R. ANURO

JUDGE

