



REPUBLIC OF KENYA



**Wepukhulu v Wafula (Miscellaneous Application 235 of 2023)  
[2024] KEHC 1158 (KLR) (12 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1158 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
MISCELLANEOUS APPLICATION 235 OF 2023  
RN NYAKUNDI, J  
FEBRUARY 12, 2024**

**BETWEEN**

**SIMON DAVID SITUMA WEPUKHULU ..... APPELLANT**

**AND**

**MOSES W WAFULA ..... RESPONDENT**

**RULING**

1. By a Notice of Motion dated 31/10/2023, Simon David Situma Wepukhulu, the Applicant seeks the following orders; -
  - i. Spent
  - ii. That this Honourable Court be pleased to grant leave ad enlarge time to allow the Applicant file his appeal out of time as per the annexed Memorandum of appeal.
  - iii. That costs of this application be provided for.

The application is premised on the grounds therein and is further supported by the Applicant's Affidavit sworn on 31/10/2023.

**The Applicant's Case**

2. He deposed that he is aware that judgment in this matter was delivered on 18/9/2023. Being dissatisfied with the said judgment, the Applicant sought assistance from the Director of Criminal Investigations who informed him that the avenue available to him is to seek review of the said judgment. Consequently, the Applicant approached his Counsel on record with the intention of having the said judgment reviewed but was informed that there are no sufficient reasons for reviewing the same and was advised that the only remedy is to file an appeal but the (30) days period for filing the appeal had already lapsed.



According to the Applicant, he has an arguable appeal with high chances of success. The Applicant maintains that the delay in filing an appeal is not inordinate and/or was not occasioned by any recklessness on his part. Further the Applicant contends that the Respondent herein will not suffer no prejudice if the application is allowed.

3. As evidenced by the Affidavit of Service of record dated and filed on 15/11/2023, this instant application was served upon the Respondent's Counsel on 10/11/2023 but there was no response whatsoever from the Respondent.

### **Analysis and Determination**

4. Having appreciated the motion, the Court finds that the only issues for determination are:
  - i. Whether the Applicant shall be granted leave to file an appeal out of time and,
  - ii. Whether the draft Memorandum of appeal dated 6/08/2019 and annexed to the Applicant's motion shall be deemed as duly filed.

5. From onset I must mention that Section 38 of the [Small Claims Court Act](#) No. 2 of 2016 on appeal provides as follows;

#### 38. Appeals

- (i) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law. (emphasis)
- (ii) An appeal from any decision or order referred to in subsection (1) shall be final.

6. Further Section 32 of the same [Act](#) provides for exclusion of strict Rules of evidence. It provides as follows;

#### 32. Execution of strict Rules of Evidence

- (i) The Court shall not be bound wholly by the Rules of evidence.
- (ii) Without prejudice to the generality of subsection (1), the Court may admit as evidence in any proceedings before it, any oral or written testimony, record or other material that the Court considers credible or trustworthy even though the testimony, record or other material is not admissible as evidence in any other Court under the law of evidence.

Evidence tendered to the Court by or on behalf of a party to any proceedings may not be given on oath but that Court may, at any stage of the proceedings, require that such evidence or any part thereof be given on oath whether orally or in writing.

- iii. The Court may, on its own initiative, seek and receive such other evidence and make such other investigations and inquiries as it may require.
- iv. All evidence and information received and ascertained by the Court under subsection (3) shall be disclosed to every party.
- v. For the purposes of subsection (2), an Adjudicator is empowered to administer an oath.
- vi. An Adjudicator may require any written evidence given in the proceedings before the Court to be verified by statutory declaration.



7. The Applicant is aggrieved by the judgment of Hon. R. Otieno (Adjudicator) delivered on 19/9/2023. I have carefully and keenly perused the Applicant's draft Memorandum of Appeal on record and I wish to reproduce the grounds set out therein as follows;
1. The learned trial Adjudicator erred in law and in fact in taking into account extraneous evidence by the Respondent and thus arriving at a wrong decision.
  2. The learned trial Adjudicator erred in law and in fact in not taking into account the submissions of the Appellant.
  3. The learned trial Adjudicator erred in law and in fact in not taking into account the evidence by the Appellant.
  4. The learned trial Adjudicator erred in law and in fact in failing to appreciate the import of Section 76 (1) of the *Evidence Act* Cap 80 and thus holding that the Appellant has not proved his case on the balance of probabilities.
  5. The learned trial Adjudicator erred in law and in fact by not appreciating the import of Section 107 of the *Evidence Act* Cap 80 and thus dismissing the Claimant's claim.
  6. The learned trial Adjudicator erred in law and in fact in considering irrelevant issues contrary to the evidence on record in arriving at his judgment.
8. Looking at the said grounds as reproduced herein above. It is crystal clear that the Applicant's appeal is solely anchored on the issues evidence. A reading of Section 32 of the *Small Claims Court Act*, clearly stipulates that the said Court shall not be bound wholly by the Rules of evidence as such the Applicant herein cannot be heard to contend that the learned trial Adjudicator failed to appreciate the import of Section 76(1) and Section 107 of the *Evidence Act*. Cap 80 Laws of Kenya.
9. Let this court digress for a moment and inquire whether the *Civil Procedure Rules* under Order 42 Rule 6 (1) can come to the aid of the applicant. For this court to stay execution of the judgment of the trial court an applicant must satisfy the following conditions;
- a.
    - i. Sufficient cause
    - ii. Substantial loss
    - iii. No unreasonable delay and
    - iv. Security
  - b. The grant of stay is discretionary and the High Court is also a Court of Equity.
  - (c). It is not just to deny a successful party the benefit of judgement because he is poor.
  - d. The court does not make a practice of depriving a successful litigant of the fruits of his litigation and locking up funds to which prima facie he is entitled pending appeal. See *Stephen Wanjobi v Central Glass Industries Ltd*, Nairobi High Court Civil Case Number 6726 of 1991, *Visbham Ravij Halai v Thornton & Turpin* [1990] KLR.
10. It is also significant to reiterate that an intended appeal does not automatically operate as a stay even as I bear in mind that a party to a litigation has a constitutional right of appeal which is the cornerstone of our legal system. It is therefore, trite that an intention to appeal on the face of the record is not a ground



for stay of execution. That also applies to the principle that instituting an appeal should also not operate as a stay of execution. All that is required as stated in *Kenya Shell Ltd v Benjamin Karuga Kibiru and another* [1986] KLR 410 is for the intended appellant to satisfy the court that there is sufficient cause where the Judgment creditor should have his/her judgement and its fruits be postponed to a later date to give room for the process of appeal to take effect. It is not sufficient for the intended appellant/appellant to state in an affidavit that without stay he/she would be exposed to a risk of execution or enforcement of the impugned judgment. It must be shown that if execution proceeds there may be substantial irreparable loss to be occasioned by the respondent. It is also a cardinal principle that for a stay of execution to be granted the applicant must show that the intended appeal has high chances of success.

11. In my opinion I have considered the material evidence as advanced by the applicant and the respondent touching on various issues in invoking the discretion of this court to order for stay of execution pending appeal. Much as there may be grounds to fear that the execution proceedings may be imminent in view of the money decree from the court below the application has not satisfied the conditions for this court to grant the remedy of stay of execution pending appeal. This is in addition that the applicant has not shown that leave to appeal before this court is based on points of law. In the matter of this application it was urged of this court to enlarge time as an intervention to enable the applicant file the intended appeal. By virtue of the dicta in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR laid down the principles that govern the exercise of discretion in applications for extension of time as follows;
  - 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 discretion to extend time, is a consideration to be made on a case to case basis.
  - d. Whether there is a reasonable reason for delay. The delay should be explained to be satisfaction of the court.
  - e. Whether there will be any prejudice suffered by the respondents in 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.
12. On this account I have considered the application and it emerges the legal foundation and all rules on timeline must be interpreted in a manner that does not threaten fair trial rights. There is neither an explanation for the delay to file the appeal within time nor as sufficient cause been shown to persuade this court to exercise discretion in his favour. Given that background this court is powerless to extend time for the applicant to file the intended appeal.
13. With foregoing in mind, it is without a doubt that the Applicant's draft Memorandum dated 31/10/2023, does not raise any matters of law to warrant the enlargement of time within which the Applicant should be allowed to file his appeal. In the result the Notice of Motion dated 31/10/2023, lacks merit and is hereby dismissed with no orders as to costs.
14. It is so ordered.



**DATE SIGNED AND DELIVERED AT ELDORET THIS 12TH DAY OF FEBRUARY, 2024**

In the presence of;

Ms. Kalema for Kigen Present

**R. NYAKUNDI**

**JUDGE**

