



Ngovu & another v Kamii alias Bernard Munyao & another (Commercial Miscellaneous Application E001 of 2023) [2024] KEHC 2733 (KLR) (13 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2733 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
COMMERCIAL MISCELLANEOUS APPLICATION E001 OF 2023**

**FR OLEL, J
MARCH 13, 2024**

BETWEEN

KYALE NGOVU 1ST APPLICANT

TSHUSHO CAPITAL OF KENYA LIMITED 2ND APPLICANT

AND

BERNARD MUNYAO KAMII ALIAS BERNARD MUNYAO . 1ST RESPONDENT

HENRY NDOLO JOHN ALIAS HENRY NDOLO 2ND RESPONDENT

RULING

A. Introduction

1. The Application before this court is a notice of motion application filed on 23.05.2023 brought pursuant to the provisions of section 1A, 1B,3, 3A 63(e), 65(1),(B) and 67 of the *Civil Procedure Act*, Order 21, rule 1b, Order 22 rule 22, Order 50 rule 5 , Order 51 rule 1 of the *Civil Procedure Rules* and Article 159 (2)(d) of *the Constitution* of Kenya. The Applicant seeks the following prayers, that;
 - a. Spent
 - b. The court be pleased to issue an order consolidating Machakos CMCC 495 and 492 of 2017 for purposes of the instant Application and intended Appeal.
 - c. Spent
 - d. There be stay of execution of the aforesaid Judgement pending the hearing and determination of the intended Appeal.
 - e. The court be pleased to grant leave to the Applicant/intended Appellant to appeal out of time against the Judgement by Hon A Nyoike in Machakos CMCC No's 492 and 495 of 2017 dated



16th February 2023; in the alternative, the draft annexed Memorandum of Appeal be deemed duly filed upon payment of the requisite fees thereto.

- f. The costs of this Application be provided for in the course of the intended Appeal.
2. The Application is supported by a supporting affidavit of One Malela Basil, the applicant's advocate dated 23.05.2023 in which it was deposed that judgment in the primary suit was scheduled to come up on 15.09.2022 before Hon A Nyoike -Principal Magistrate, however they was not ready and directions was given that they would be delivered on notice. Surprisingly and without notice to the parties the said judgements were delivered in their absence/without notice on 16th February 2023 and it was not until 22nd May 2023 upon service of the warrants of attachment on their clients did they became aware that the said judgments that they were waiting for had been delivered.
3. The applicant's counsel did contact the firm of B.M Mungata & Company Advocates, counsels on record for the respondent/decree-holder and they informed them that that they had effected service of the draft decree upon them via email (Inquiry@humphreyandcompany.co.ke) in April 2023. Unfortunately, they had not noticed the said email as it went to their spam box and therefore could not act on the same. By then the statutory time within which to file an appeal had lapsed and since their client is aggrieved and dissatisfied by the judgements delivered, they were desirous to have time extended to enable them lodge an appeal as against the said judgements.
4. The delay in filing this Appeal was not deliberate and/or unreasonable as no notice was issued prior to delivery of judgement. The applicant was willing to provide security as directed by court and it was in the interest of justice to grant the orders sought. Finally, this application had been made without undue delay and the balance of convenience, too tilted in favour of the applicants, who would be more prejudiced should the order sought not be granted. The application as filed had merit and they prayed that the orders sought be granted.
5. This application was opposed by the respondents through their replying affidavit sworn by their advocate BRIAN MUNYAO, who deposed that this application was laden with half-truths and glaring misrepresentation all made in an attempt to mislead court and was a tactic by the applicants to frustrate the respondents and prevent them from enjoying the fruits of their judgement. The trial court did issued judgement notice, which notice was served amongst all parties and subsequently after the judgement had been read, they did serve the applicant with a notice of entry of judgment together with a draft decree through their office email.
6. The applicant had all the time to apply for stay of execution but failed to do so. There was no proof annexed to show that indeed the email forwarding the notice of entry of judgement and draft decree had gone to the spam box of the applicant's office email and in absence of any evidence supporting that position, the applicants had fell short of proving their allegation and the same therefore had to be dismissed. Further the intended appeal was a sham, mischievous as the applicants had not tendered any evidence before the trial court and the respondents evidence tendered in the primary suit remained uncontroverted.
7. It was necessary to have litigation come to an end and therefore it was in the wider interest of justice to allow the respondent to proceed with execution. The court was thus urged to uphold Justice and invoke its jurisdiction under section 3A of the *civil procedure Act* to refuse to rubberstamp the Applicants blatant disregard for court rules and procedures. It was the respondent who stood to suffer more harm and prejudice should the orders sought be granted. The applicant had come to equity with unclean hands and that disentitled them from the equitable orders sought.



B. Analysis & Determination

8. I have carefully considered the Application and corresponding affidavits thereto on record. The two issues which arise for determination is; Whether this court should grant the Applicant leave to Appeal out of time and secondly also grant them an order of stay of execution pending determination of the Appeal (if leave is granted).
9. The applicant's prayer for an order consolidating Machakos CMCC 495 and 492 of 2017 for purposes of the instant Application and intended Appeal was not opposed and is allowed to avoid duplication of work and allow for expeditious disposal of this application.

i. Whether an order allowing the Applicants to file their Appeal out of time should be Allowed.

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 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.”

10. Order 50 rule 6 of the *civil procedure Rules* does also provides 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.”

11. The principles of granting leave to file an appeal out of time were discussed by the Court of Appeal in the case of *Omar Shurie v Marian Rasbe Yafar* (Civil Application No. 107 OF 2020) UR where it was held:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”

12. Similarly, The Court of Appeal in the case of *Thuita Mwangi V Kenya Airways Ltd* [2003] eKLR discussed some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time, 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 which could be suffered by the if Respondent the extension is granted;



- v) The importance of compliance with time limits to the particular litigation or issue; and
 - vi) The effect if any on the administration of justice or public interest if any is involved.
13. The importance of giving a sufficient reason for the extension of time to appeal was discussed in the Court of Appeal case of *Susan Ogotu Oloo & 2 Others v Doris Odindo Omolo* (2019) eKLR where it was held:-

“In an application for extension of time, the single Judge has discretion. I am aware that the discretion I have is to be exercised judiciously and not whimsically or capriciously. The guiding principles on the issue of extension of time was laid out by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v IEBC* (2014) eKLR Sup Ct Application No 16 of 2014.

The Supreme Court aptly stated extension of time is not a right of a party; a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court. Of paramount importance, the reason for delay must be explained to the satisfaction of the Court. Further, the application for extension must be brought without undue delay and it must be demonstrated if the respondent will not suffer prejudice if extension is granted”.

14. From the record, it is the applicant’s contention that judgement was initially slotted to be delivered on 15th September 2022, but was delivered without notice and in their absence on 16th February 2023. Though the respondents did aver that the trial court did issue notice before delivery of the said Judgments, none was attached to the replying affidavit as an exhibit. It is trite law that such a notice ought to have been delivered and I find that based on the above finding, the reason advanced as to why they had not filed an appeal on time is well explained.
15. As to the question of delay, the applicants were served by draft decree via email on 6th April 2023. It was their explanation that unfortunately they did not receive the same as it went to the spam inbox. The respondents on the other hand averred that the applicants were indolent and hell bent to delay settlement of the decree herein, thus undeserving in equity.
16. The general principle is that an applicant should not suffer due to a mistake of its Counsel. This was the position in *Lee G. Muthoga -v- Habib Zurich Finance (K) Ltd & Another*, Civil Application No. Nair 236 of 2009 where it was held that: “it is widely accepted principle of law that a litigant should not suffer because of his Advocate’s oversight.” In the case *Winnie Wambui Kibinge & 2 Others -v- Match Electricals Limited* Civil Case No. 222 of 2010 the Court held that: “It does not follow that just because a mistake has been made a party should suffer the penalty of not having his case heard on merit.” The mistake by counsel herein, therefore can be excused in the higher interest of justice that a party should have his case heard on merit unless there is a grave procedural and legal basis to prevent the same.
17. On the issue of arguability of the appeal, the applicant has annexed a draft memorandum of appeal indicating the issues they intend to take up on appeal. In the case of *Athuman Nusura Juma vs. Afwa Mohamed Ramadhan* [2016] eKLR the court held that;

“whether the intended appeal has merits or not is not an issue to be determined by a court when dealing with an application of this nature but by the court dealing with the merits of the appeal, that is why the requirement that the intended appeal be arguable is preferred with the word “possibly.”



18. The court can at this point not determine whether the appeal will succeed or not but upon perusal of the memorandum of appeal, it does it raise issues that can be determined on appeal. The prayer for extension of time is thus merited.
- (ii) Whether an order of stay of execution should be granted.
19. Stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. It is evident from the said provision that power to grant stay of execution pending appeal is an exercise of discretion of the court on sufficient cause being shown by the Applicant that substantial loss may result to the applicant if the orders are denied; the application should be made without undue delay and the court will impose such security as the court may impose for the due performance of any decree or order as may ultimately be binding on the Applicant.(see Butt Vs Rent Restriction Tribunal (1982) KLR 417 and James Wangalwa & Another Vs Agnes Nalika Chereto (2012) eKLR).
20. Having found that the delay was not inordinate. I move to the issue of the likelihood of suffering substantial loss. It was sufficient if an applicant seeking a stay of execution demonstrated that he/she would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful. See G. N. Muema P/A (516) Mt View Maternity & Nursing Home Vs Miriam Maalim Bisbar & Another (2010) eKLR , National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike & Another (2006) eKLR.
21. Guided by the above authorities, and in absence of proof that the respondents have the means to refund the decretal amount, if paid and this appeal is successful, I do find that the Appellants have proved that they will suffer substantial loss, if stay of execution is not granted.
22. On the security, the Appellants indicate that they are willing to abide by this court's direction as to security. The court has to balance the interest of the Appellant who seeks to preserve the status quo pending hearing of the appeal and to ensure the appeal is not rendered nugatory and the interest of the Respondent. In other words, the court should not only consider the interest of both parties. See Kenya Shell Ltd Vs Kibiru & another (Supreme); Mukuma Vs Abuoga (1988) KLR 645.

Disposition

23. Taking all relevant factors into consideration and in order not to render the intended appeal illusory, and taking into account the circumstances of this case, to wit that the Appellants never proffered any evidence before the trial court I do grant issue the following orders;
- a. Leave is granted to the applicant to file appeal out of time against the judgment delivered in Machakos CMCC 495 and 492 of 2017 and they are directed to file and serve the same within 14 days from the date of issuance of this order.
 - b. An order of stay of execution of the Judgment/decree in Machakos CMCC 495 and 492 of 201 is hereby issued pending the hearing and determination of the appeals filed on condition that the applicant do pay the respondent's half the decretal sum and costs as assessed under both decrees and to deposit the other half of the decretal sum for both decree's in court. This should be affected within the next 30 days of delivery of this Ruling
 - c. In default of complying with order number (c) above, the orders staying execution shall lapse and the respondent shall be at liberty to execute.
 - d. The applicant's will pay auctioneers costs for the proclamation levied



- e. The costs of this Application will be borne by the applicant's and the same is assessed at Kshs.25,000/= to be paid to the respondent's within 30 days.

24. It is so ordered.

RULING WRITTEN, DATE AND SIGNED AT MACHAKOS THIS 13TH DAY OF MARCH, 2024

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 13TH DAY OF MARCH, 2024

In the presence of: -

Mr. Outa for Appellant

No appearance for Respondent

Sam Court Assistant

