



REPUBLIC OF KENYA



**Ndwiga & another v Nyawa (Miscellaneous Application  
E88 of 2023) [2024] KEHC 2271 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2271 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
MISCELLANEOUS APPLICATION E88 OF 2023**

**SM GITHINJI, J**

**MARCH 7, 2024**

**BETWEEN**

**ALEXANDER MUCHANGI NDWIGA ..... 1<sup>ST</sup> APPLICANT**

**ELIAS MURIITHI MITUGO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**MOHAMED MUJERA NYAWA ..... RESPONDENT**

**RULING**

1. On 5<sup>th</sup> July 2023, the Applicants moved this court vide a Notice of Motion dated 30<sup>th</sup> June, 2023, under sections 3, 3A, and 79G of the *Civil Procedure Act*; Order 22 rule 22, Order 42 rule 4, 6 and 7 and Order 51 Rules 1 and 3 of the *Civil Procedure Rules*, 2010. The orders sought were framed as follows: -
  1. Spent.
  2. Spent.
  3. That this honourable court be pleased to order a stay of execution of the judgment of the Honourable Principal Magistrate's Court at Kilifi in CMCC No. E237 of 2021 delivered on 02.08.2022 by the honourable G.O Kimanga (SRM), Resident Magistrate (sic) pending the hearing and determination of the intended appeal.
  4. That this Honourable Court be pleased to grant the Applicant leave to file an appeal out of time.
  5. That as a condition for stay of execution pending the hearing and determination of this appeal/ intended appeal, this Honourable Court be pleased to direct that the Applicant/Appellant be and is hereby ordered to provide/ issue security for the entire decretal sum/amount in the form of a bank guarantee to be issued by Family Bank Limited.



6. SUBThat Honourable Court be pleased to give directions on the appeal.
7. That the costs of this application abide the outcome of the appeal.
2. The grounds in support of the application were outlined on the face of it and in the supporting affidavit sworn by Alexander Muchangi Ndwiga on 4<sup>th</sup> July 2023. Briefly, the Applicants' case is that on 2<sup>nd</sup> August 2022, judgment was entered in favour of the Respondent in Kilifi CMCC No. E237 of 2021. In the said judgment, the Applicants were found 100% liable and the Respondent awarded Kshs. 200,000/- and Kshs. 3,350/- as general and special damages respectively together with costs and interests. The Applicant averred that the delay in challenging the said judgment was occasioned by the registry's failure to forward a copy of the judgment in good time.
3. The Applicants were apprehensive that the Respondent may commence execution hence rendering their intended appeal nugatory. They annexed a copy of a draft memorandum of appeal and a bank guarantee for security.
4. The Respondent opposed the application. He filed a Replying Affidavit dated 17<sup>th</sup> July 2023. He deposed that the application is an afterthought aimed at delaying making payments of the decretal sum. His reasons are that upon service of the notice of entry of judgment on 24<sup>th</sup> April 2023, the Applicants' advocates in a letter dated 9<sup>th</sup> May 2023 indicated the Applicants' willingness to make payment however subject to reduction of the costs. The Respondent's advocate agreed to their request vide a letter dated 11<sup>th</sup> May 2023, but instead they filed the present application.
5. The Respondent asserted that there was no plausible reason for the delay and that the intended appeal lacks any chances of success. For the said reasons, he urged the court to dismiss the application.
6. The application was canvassed by way of written submissions which I have carefully considered. The issues that arise for determination are:
  - i. Whether leave should be granted to file appeal out of time.
  - ii. Whether an order for stay of execution should issue.
7. Section 79G of the *Civil Procedure Act* is the operative law in determining whether leave to appeal out of time should be granted. It 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.”
8. It follows therefore that the Applicants' request to file appeal out of time may only be accepted if they satisfy the court that they had good and sufficient cause for not filing the appeal in time.
9. The Supreme Court in the case of County Executive of Kisumu -v- County Government of Kisumu & others [2017] eKLR while quoting the case of Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others



Application No. 16 of 2014 [2014] eKLR reiterated the considerations to be made in such a case as follows:

“(23) It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The Court delineated the following as:

1. 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;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and...”

10. In this case, the impugned judgment was delivered on 2<sup>nd</sup> August 2022. Statutorily, the appeal was to be filed on or before 2<sup>nd</sup> September 2022. The Applicants did not do so. They explained that the delay was occasioned by inability to obtain a copy of the judgment in time for reasons that the court file had been forwarded to the registry typing pool. I have perused the application and affidavit thereto, there is no evidence that the Applicant tried to request or retrieve a copy of the judgment from the lower court or a filed certificate of delay. In the circumstances, I find that the delay of about 11 months has not been satisfactorily explained.

11. I equally agree with the Respondent’s argument that the application is an afterthought aimed at delaying the course of justice. A perusal of the letters attached in the Replying Affidavit reveals that when notice of entry of judgment was served upon the Applicants’ advocates, they clearly expressed their intention to settle the decretal amount on condition that costs be reviewed downwards. The Respondent’s advocates indeed agreed to that condition. The Applicant did not rebut this evidence.

12. In the foregoing, I find no reason to exercise discretion in favour of the Applicants. For the avoidance of doubt, I decline to grant leave to file appeal out of time. Having said so, stay of execution would serve no purpose and cannot therefore be granted.

13. The outcome is that the notice of motion dated 30<sup>th</sup> June 2023 is hereby dismissed with costs.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 7<sup>TH</sup> DAY OF MARCH, 2024.**

.....

**S.M. GITHINJI**



**JUDGE**

**In the Presence of; -**

Mr Ngare for the Respondent

Firm of Kimondo Gachoka are for the Applicant (absent)

