Kimathi (Suing on behalf of the Estate of Benson Koome Kimathi (Deceased) v National Police Service Commission & another (Civil Appeal 8 of 2019) [2024] KEHC 4668 (KLR) (17 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4668 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CIVIL APPEAL 8 OF 2019

AK NDUNG'U, J

APRIL 17, 2024

BETWEEN

CAROLINE NKATHA KIMATHI (SUING ON BEHALF OF THE ESTATE OF BENSON KOOME KIMATHI (DECEASED) ..... APPELLANT

AND

NATIONAL POLICE SERVICE COMMISSION ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

RULING

1. This ruling resolves the notice of motion herein dated 29/09/2023. The application seeks, firstly, that the judgment dated 03/08/2023 be set aside, secondly, leave to appeal out of time against the whole judgment of Justice D. Kemei dated 03/08/2023, thirdly, stay of execution pending hearing and determination of the intended appeal, and lastly, that the notice of appeal filed on 29/09/2023 be deemed as duly filed and properly on record. Temporary stay was granted by this court on 04/10/2023 pending hearing of the application interpartes. What is sought to be appealed from is the judgment of this court delivered on 03/08/2023 by Justice D. Kemei.

2. The application is brought under Article 50 (1) and 201(d) of *the Constitution*, section 1A, 1B and 3A of *Civil Procedure Act*, Order 10 rule 8 and 11, Order 22 rule 22, Order 29 and 51 of the Civil Procedure Rules and section 79 of the Public Finance and Management Act and is grounded on the grounds on the face thereof and is supported by an affidavit sworn by James Musee Nduna, the director appeals, policy and legal affairs of the Applicant.

3. In the supporting affidavit, he deponed that they were not served with a hearing or judgment notice and only learnt of the judgment that was delivered on 03/08/2023 when they were served with a party and party bill of costs on 28/08/2023. That time for filing appeal has since lapsed and therefore the need

for this court to extend time to enable the Applicant to file the appeal out of time and that the notice of appeal dated 29/09/2023 be deemed as duly filed. That the Applicant has formidable grounds of appeal due to the amount of damages awarded and will suffer irreparable loss and damage if the orders are executed. That the application has been filed without inordinate delay and the orders sought will not prejudice the Respondent.

4. The Respondent in opposing the application filed a replying affidavit dated 09/10/2023. She averred that the judgment notice was duly issued by the court and the Applicant and its advocate ought to have been vigilant since they were aware that the matter was awaiting delivery of judgment since March 2022. That the application has been brought after an inordinate delay which has not been explained and will suffer great prejudice if the application is allowed since the appeal was filed in 2019 and her son is attending school and in need of school fees. The intended appeal has no chance of success and the Applicant has not shown willingness to comply with Order 42 rule 6 (2) (b) of Civil Procedure Rules as they did not offer any security. That she is a woman of means and capable of refunding the decretal sum if the appeal succeeds and the Applicant has not shown that she is unable to refund the decretal amount.

5. She further averred that it will be fair if the Applicant is ordered to deposit the decretal in a joint interest earning account in the names of the advocates on record as she is apprehensive that she might succeed in the appeal and still be unable to enjoy the fruits of the judgment. Further, she is advised that the *Government Proceedings Act* prohibits the sale of assets of the Applicant in execution and to ease payment, it will be prudent if the decretal amount is deposited in the said interest earning account. The applicant will not suffer any prejudice or loss if the application is dismissed as she is the one who will continue suffering for being denied the fruits of the judgment if the application is allowed.

6. The Applicant filed a further affidavit dated 19/10/2023 in response to the Respondent's replying affidavit and deponed that there has not been inordinate delay in filing notice of appeal and memorandum of appeal as the memorandum of appeal was filed within stipulated timelines. That the appeal is arguable and has a high likelihood of success and that it will be prejudiced if execution proceeds as Order 29(2) of the Civil Procedure Rules provides that no order against the government may be made under Order 22.

7. The application was canvassed by way of written submissions. The Applicant argued that the application and the appeal has been brought without inordinate delay since the same was filed after the lapse of 56 days which is not inordinate delay. Further the application has been filed to ensure that its right to fair hearing is not infringed as provided under Article 25, Article 50 (1) and Article 159 (2) (d) of *the Constitution*. It maintained that the Applicant was not served with the judgment notice and was not served with the decree and the Respondent ought to have served it with the certified judgment and decree instead of party and party bill of costs.

8. On whether the appeal is arguable, the Applicant relied on the case of Kiu & another vs Khaemba & 3 Others (2021) KECA 318 (KLR) among other cases where it was held that an arguable/intended appeal is one that need not succeed but one that warrant's the court's interrogation. That the intended appeal has high chances of success, is arguable and merited based on the ground that the claim was time barred. It was submitted that the Applicant will suffer irreparable loss if the orders sought are not granted and the appeal will be rendered nugatory since it will be forced to institute legal proceedings to recover the decretal sum if the appeal succeed since the Respondent in her replying affidavit stated that she needs money to pay for expenses. Reliance was placed on the case of G.N Muema P/A (sic) Mt. View Maternity & Nursing Home v Miriam Maalim Bishar & another (2018) eKLR where the court held that it was sufficient for the applicant to demonstrate that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to the Respondent.

9. On the other hand, the Respondent submitted that the Applicant has not met the threshold set by the Supreme Court in the case of Kenya revenue Authority & 2 others vs 4 others (2022) since no reasonable explanation has been given for the delay in filing the appeal. That extension of time is not a right but an equitable remedy and equity does not aid the indolent. The Applicant was not vigilant and had lost interest in the appeal. Further, notices for delivery of judgment were sent via email to respective advocates. That she stands to be prejudiced since she has been denied justice for 6 years and the case does not attract public interest and in case the application is allowed, the Applicant should be ordered to pay at least half of the decretal amount within a limited period.

10. She further submitted that the pleadings filed by Miss Brenda Ajwang are incompetent and should be struck out for failing to comply with Order 9 rule 9 of the Civil Procedure Rules which provides that a change of advocate after the judgment has been delivered shall not be effected without an order of the court. That the Applicant was represented by Mr. Paul Ojwang Advocate and they were not served with an application allowing Brenda Ajwang to act on behalf of Paul Ojwang. Reliance was placed on the case of John Langat vs Kipkemoi Terer & 2 others (2013)eKLR and Florence Hare Mkaha v Pwani Tawakal Mini Coach & another (2014) eKLR. That the Respondent is a woman of means since she is in gainful employment and she possess assets hence she would be able to refund the decretal amount if the appeal succeeds.

11. Further, Order 42 rule (2)(b) sates that stay of execution will not be granted unless such security has been given by the Applicant but the Applicant has not shown willingness to comply with the provision to provide security on account that it is a public body subject to provisions of *Government Proceedings Act*. She submitted that she disagree with this contention as was held in Ikon Prints Media Company Ltd vs Kenya National Highway authority & 2 others (2015)eKLR & Midrocwater Drilling Co. Ltd v National Water Conservation & Pipeline Corporation (2021) eKLR. Therefore, the Applicant should be ordered to pay the entire decretal amount since the Respondent has shown that she is a woman of means or alternatively, the Applicant be ordered to deposit the decretal amount to enable it enjoy stay of execution. Further the intended appeal has no chances of success.

12. Before considering the merit of application, I will first consider the point of law raised by the Respondent. She submitted that the pleadings filed by Miss Brenda Ajwang are incompetent and should be struck out for failing to comply with Order 9 rule 9 of the Civil Procedure Rules which provides that a change of advocate after the judgment has been delivered shall not be effected without an order of the court. That the Applicant was represented by Mr. Paul Ojwang Advocate and they were not served with an application allowing Brenda Ajwang to act on behalf of Paul Ojwang.

13. Order 9 Rule 9 aforesaid states that;

> "When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—
>
> a. upon an application with notice to all the parties; or
>
> b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

14. From the record of appeal before this court, the Applicant represented itself through its different litigation counsels. At one point, Mr Paul Ojwang Advocate, a litigation counsel with the Applicant acted on behalf of the Applicant. Ms. Sarah Muthiga, a litigation counsel for the Applicant filed the submissions in the appeal before this court. The instant application was filed by Brenda Opiyo, a

litigation counsel for the Applicant. It therefore follows that there was no change of firms of advocates since the Applicant represented itself through its different litigation counsels.

15. It is further noted that the Respondent only raised this issue of representation in her submissions. She did not raise it in her replying affidavit to give the Applicant a chance to respond to the same. It is trite law that submissions are not pleadings and that new issues cannot be raised in submissions. In Republic vs. Chairman Public Procurement Administrative Review Board & another Ex parte Zapkass Consulting and Training Limited & another [2014] Korir, J. stated:

> " The Applicant, the respondents and the interested party all introduced new issues in their submissions. Submissions are not pleadings. There is no evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored."

16. Moving on to the merit of the application, I will first consider the application for extension of time. The Applicant is seeking extension of time to appeal to the Court of appeal against the whole judgment of Justice D, Kemei and that the notice of appeal filed on 29/09/2023 be deemed as duly filed. Section 7 of the *Appellate Jurisdiction Act* gives the High Court power to extend time. It provides that;

> The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:
>
> .....

17. The above provisions of Section 7 of the *Appellate Jurisdiction Act* leave no doubt that the High Court have jurisdiction to extend the time for filing a notice of appeal in respect of a judgment of the court.

18. Rule 4 of the Court of Appeal Rules also states that;

> " The Court may, on such terms as may be just, by order, extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended."

19. It was deponed in the supporting affidavit that judgment was delivered on 03/08/2023. The judgment having been passed on 03/08/2023, notice of appeal ought to have been lodged on or before 17/08/2023 according to rule 77 of the Court of Appeal Rules which states that;

    1. A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court.

    2. Each notice under subrule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against the decision for which appeal is lodged.

20. The present application for leave to appeal out of time was filed on 29/09/2023; therefore, the delay that we are dealing with here is about 42 days. Under the proviso to Section 7 of the *Appellate Jurisdiction Act* aforesaid, this court may grant leave to file a notice of appeal out of time. The act does not however prescribe the principles the court should consider in an application for extension of time.

21. However, extension of time is a discretionary and a very powerful tool which should be exercised with abundant caution, care and fairness. The Supreme Court in Nicholas Kiptoo Arap Korir Salat –Vs-

Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR, lay down the following general principles to guide the courts in applications for extension of time: -

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 the discretion to extend time, is a consideration to be made on a case to case basis;

d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;

e. Whether there will be any prejudice suffered by the respondents if the extension is granted;

f. Whether the application has been brought without undue delay; and

.....

22. The Court of Appeal in Gachugu v Karaine & 3 others (Civil Application 208 of 2020) [2022] KECA 1411 (KLR) (16 December 2022) while considering a similar application set out the following grounds to be considered before granting order for extension of time by stating as follows;

> " The principles that guide the exercise of jurisdiction under Rule 4 of the Court of Appeal Rules are now well settled by numerous enunciations in case law both binding and persuasive...The principles distilled from the above case law may be enumerated inter alia as follows:
>
> i. The mandate under Rule 4 is discretionary, unfettered and does not require establishment of "sufficient reasons". Neither are the factors for exercise of the courts unfettered discretion under the said Rule limited to: the period for the delay, the reason for the delay (possibly) the chances of the appeal succeeding and the degree of prejudice to the respondent if the application is granted; the effect of the delay on public administration and the importance of compliance with time limits; the resources of the parties and also whether the matter raises issues of public importance.
>
> ii. Orders under Rule 4 of the Court of Appeal Rules should not only be granted liberally but also on terms that are just unless the applicant is guilty of unexplained and inordinate delay in seeking the Courts indulgence or that the Court is otherwise satisfied beyond para-adventure, that the intended appeal is not an arguable one.
>
> iii. The discretion under Rule 4 of the Court of Appeal Rules must be exercised judiciously considering that it is wide and unfettered, meaning on sound reasoning and not on whim or caprice see Githere vs. Ndiriri.
>
> iv. As the jurisdiction is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant to the issues falling for consideration before the Court.

v. The degree of prejudice to the respondent entails, balancing the competing interests of the parties, that is the injustice to the applicant in denying him/her an extension, against the prejudice to the respondent in granting an extension.

vi. More considerations include, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes, the public interest issues implicated in the appeal or intended appeal and whether prima facie, the intended appeal has chances of success or is a mere frivolity;

vii. Whether the intended appeal has merit or not is not an issue determined with finality by a single judge, hence the use of the word "possibly";

viii. The law does not set out any minimum or maximum period of delay. All it states, is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the Court's flow of discretionary power, with the only caveat being that there has to be valid and clear reason upon which discretion can be favourably exercised.

(xi) The right to a hearing is not only constitutionally entrenched, but also the cornerstone of the rule of law.

It is instructive to note that the rules do not set out the number of days that would be considered as inordinate, and therefore each case should be determined on its own facts, as held in the case of Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet [2018] eKLR in which this Court stated as follows:

"The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable."

23. To enable this court to exercise its discretion in favour of the Applicant, the Applicant had the duty to satisfy the above conditions and show this court that it had good and sufficient cause for not filing the notice of appeal in time. The reason advanced by the Applicant is that it was not served with the hearing and or judgment notice and was only appraised of the existence of the judgment when it was served with a party and party bill of costs by the Respondent.

24. The Respondent on the other hand argued that the judgment notice was sent to respective parties through emails by the court.

25. I have perused the court record and I have seen a judgment notice dated 19/06/2023 from the court addressed to the Respondent's advocate only indicating that the judgment will be delivered on 03/08/2023. The notice is not addressed to the Applicant and it is not clear whether the same notice was served upon the Applicant's advocate or not. Further, the record indicates that the Applicant were absent when the judgment was delivered. This being the case where the judgment was delivered on notice, it was prudent to serve all the parties in the matter and since there is no proof on the record that the Applicant was served, it is my view that the application for extension of time is merited.

26. The other order sought is stay of execution pending hearing and determination of the appeal. Order 42 rule 6 (1) grant this court power to order for stay by stating that;

> "(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside."

27. The principles guiding the grant of stay of execution pending appeal are provided under Order 42 rule 6(2) of the Civil Procedure Rules which states;

> "(2) No order for stay of execution shall be made under subrule (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."

28. In the case of Butt v Rent Restriction Tribunal [1982] KLR 417 the court of Appeal gave guidance on how a court should exercise discretion in an application of stay of execution and held that:

> "1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
>
> 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
>
> 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
>
> 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
>
> 5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its

own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

29. See also the case of Halal & Another v Thornton & Turpin Ltd, (1963) Ltd [1990] eKLR where the Court of Appeal held that:

> " The High Court's discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely; - Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay. In addition, the Applicant must demonstrate that the intended Appeal will be rendered nugatory if stay is not granted..."

30. The court also must be satisfied that there is an arguable appeal before granting stay of execution as was held in the case of Benedict Ojou Juma & 10 Others v A.J. Pereira & Sons Ltd [2016] eKLR, thus;

> " The applicant must first satisfy the court that appeal or intended Appeal is not frivolous, that is to say, that it has an arguable Appeal."

31. Has the Applicant satisfied the above conditions? As to arguability of appeal, the Court of Appeal in Mwalimu & 6 others v Halal & another (Civil Application E091 of 2022) [2023] KECA 634 (KLR) held that;

> " It is therefore important for the applicant to satisfy the Court that the ground or intended ground is bona fide without satisfying the Court that the said ground will necessarily succeed. As long as the point raised is bona fide and ought to be argued fully before the Court, the same meets the arguability or non-frivolity test."

32. I have perused the memorandum of appeal attached to the Applicant's further replying affidavit and I do not consider it to be frivolous.

33. As to whether there was inordinate delay in filing the application, the delay is of 42 days. It is instructive to note that the rules do not set out the number of days that would be considered as inordinate, and therefore each case should be determined on its own facts, as held in the case of Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet [2018] eKLR in which it was stated as follows:

> " The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable."

34. As to whether substantial loss will be occasioned, the Applicant was supposed to demonstrate how the same was likely to occur as was held by Musinga J in Daniel Chebutul Rotich& 2 Others v Emirates Airlines Civil Case No. 368 of 2001 stated that;

> " It is not enough for an applicant to merely state that it is likely to suffer substantial loss, it must make effort to demonstrate how the same is likely to occur. Disruption of business and loss of reputation can only be suffered if stay of execution was refused and the applicant refused to pay or became unable to pay and auctioneers had to move in to carry out execution. "Substantial loss" is a relative term and more often than not can be assessed by

the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and the applicant is therefore forced to pay the decretal sum."

35. In our instant suit, it is the Respondent's case that she would suffer great prejudice if the application is allowed since the appeal was filed in 2019 and her son is attending school and in need of school fees. This in itself contradicts her later statement in proceedings that she is a woman of means who would be in a position to refund the decretal amount should the intended appeal succeed. In view, and in those circumstances, am persuaded that the Applicant would suffer substantial loss if stay was not granted more so for reason that being a public body, it appropriates voted funds and the impossibility of recovery after payment risks the loss of public funds.

36. The other condition is furnishing of security. The Applicant has not offered any security. In the replying affidavit, the Respondent proposed that an order be granted ordering the Applicant to deposit the decretal amount in a joint account in the name of both advocates. Further, since the *Government Proceedings Act* prohibits the sale of assets of the Applicant in execution, to ease payment, it will be prudent if the decretal amount is deposited in the said interest earning account. In the submissions, she proposed that a substantial amount of the decree be deposited to her as she is a woman of means and capable of refunding the same. She argued that the Applicant has not shown willingness to comply with the provision to provide security on account that it is public body subject to provisions of *Government Proceedings Act*.

37. The Civil Procedure Rules states that no security is required from the Government. This is Order 42, rule 8 which provides;

> "No such security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity."

38. In the premises, I am inclined to allow the application dated 29th September 2023 and I make the following orders;

    1. That leave be and is hereby granted to the Applicant to file Appeal out of time.
    2. That a Notice of Appeal be filed within 14 days hereof.
    3. That a stay of execution is granted pending the hearing and determination of the appeal.
    4. Costs to abide the outcome of the appeal

DATED SIGNED AND DELIVERED VIRTUALLY THIS 17TH DAY OF APRIL 2024.

A.K. NDUNG'U

JUDGE