



**Mwamali & another v Guyo (Suing on Behalf of the Estate of Anthony Mwangandi Musha)
(Miscellaneous Application E109 of 2023) [2024] KEHC 3730 (KLR) (19 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3730 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS APPLICATION E109 OF 2023**

**M THANDE, J
APRIL 19, 2024**

BETWEEN

LEISA JOSEPH MWAMALI 1ST APPLICANT

COUNTY GOVERNMENT OF KILIFI 2ND APPLICANT

AND

**MUSHA KARISA GUYO (SUING ON BEHALF OF THE ESTATE OF ANTHONY
MWAGANDI MUSHA) RESPONDENT**

RULING

1. In an application date 30.8.23, the Applicants seek leave to appeal out of time, the ruling delivered in 28.4.23 in Malindi MCCC No. 132 of 2019. They also seek stay of execution of the judgment delivered on 10.6.22 in the same cause pending the hearing and determination of the intended appeal.
2. The Applicants' case as set out in the Application and affidavit of the 1st Applicant, is that the matter herein arises out of a road traffic accident claim, in respect of which Resolution Insurance Company Limited (under statutory management) is mandated to defend and settle any claims against the insured under the insurance contract. The Statutory Manager of the insurance company issued a moratorium on payment of claims to policyholders and other creditors. This was affirmed by the High Court in HCCC No. E168 of 2022 which stayed all payments during the pendency of the moratorium.
3. On 28.4.23, when the matter was scheduled for ruling, their advocate was unable to log in court due to internet challenges. That after numerous attempts at following up with the court assistant, he was finally informed that the ruling was delivered dismissing their application for stay. The advocate immediately liaised with the Statutory Manager of the insurance company who instructed him to file the intended appeal. The Applicants state that their appeal is arguable with high chances of success and will be rendered nugatory if the orders sought are not granted. The delay in filing the appeal is not inordinate or so great as to be inexcusable. Further that the Respondent will not suffer any prejudice



should the orders be granted as he shall be paid once the report of the insurance company is forwarded to the Commissioner of Insurance. The insurance company is under an obligation to settle all claims for its insured but being under statutory management, is unable to do so at present.

4. The Application is opposed by the Respondent vide a replying affidavit sworn on 20.9.23. He contends that the suit is not against the insurance company but against the Applicants. Further that the moratorium does not extend to the Applicants. He argued that the Application is intended to deter the estate of the deceased from recovering the fruits of the judgment.
5. The Respondent further averred that the Applicants' advocate has always been aware of the outcome of the ruling since 28.4.23 but took no action until almost 5 months later. He argued that receiving instructions late is not sufficient reason for delay and further that the annexed memorandum of appeal is casual and does not inspire at all. The Applicants have not demonstrated how they will suffer substantial loss. The Application does not therefore meet the requirements for grant of stay pending appeal.
6. Idris Maalim, the Applicants' advocate, swore a further affidavit on 8.11.23 reiterating the averments of the 1st Applicant. He stated that his clerk Isaiah Birundu, who does not comprehend documents and timelines, pursued a copy of the ruling and on failing to get the same, inadvertently filed away the file without informing counsel. He stated that this mistake is excusable and the Applicants are apprehensive that if the orders sought are not granted, the Respondent may at any time proceed with execution of the judgment and decree. He urged the Court to grant the orders sought.
7. Isaiah Birundu swore a further affidavit on 8.11.23 stating that he scanned and sent a letter by counsel dated 4.5.23 addressed to the Executive Officer through the official email, seeking a copy of the ruling in question. He followed up through several phone calls and was informed that the file was missing. Instead of informing counsel, he filed the file away. He attributed this to as honest that the ruling was not urgent and there no timelines.
8. Parties filed their written submissions which I have duly considered.
9. The statutory period for filing an appeal in this Court from a subordinate Court is 30 days. This is stipulated in Section 79G of the [Civil Procedure Act](#) which provides:

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. The proviso to Section 79G of the [Act](#) allows a party who gets caught up and is unable to file an appeal within the stipulated period, to seek extension of time. Such party must however satisfy the Court that there is good and sufficient reason for not filing the appeal on time.
11. An order for extension of the time to file an appeal is discretionary. Such discretion must however be exercised judicially. The factors to be considered in an application such as the one before Court were set out by the Court of Appeal in [Aviation Cargo Support Limited v St. Mark Freight Services Limited](#) [2014] eKLR as follows:

For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the Court that the delay in lodging the record of appeal is not inordinate and where it



is inordinate the applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the applicant took to ensure that it came to Court as soon as was practicable.

12. The present Application seeking leave to appeal out of time was filed on 13.8.23, 4½ months after the ruling was delivered and 3½ months after the lapse of the statutory period for filing appeal. What this Court must determine is whether the explanation given by the Appellant for the delay is plausible. The reasons proffered for the delay are that the clerk who was pursuing the ruling in question did not inform counsel when he failed to get the same, but put the file away, assuming there was no urgency or no timelines. In his further affidavit, the said clerk stated that he sent the letter requesting the ruling via email on 4.5.23. I have seen the exhibited letter seeking a copy of the ruling. What was not availed to the Court is a copy of the alleged email forwarding the letter. There is no evidence that the said letter was ever sent or received, and when.
13. It is noted with concern that Counsel attributed the delay in filing the appeal to his clerk who he says has no comprehension of documents and timelines. Really? Court processes are all about documents and timelines. The question that then begs is: why would an advocate hire and retain a person who does not appreciate court documents and procedural timelines? Why indeed would an advocate entrust such a person with the task of obtaining a ruling for the purpose of filing an appeal, knowing fully well his deficiencies?
14. Further, counsel has not stated when he received instructions to file the appeal he now intends to file. Additionally, having been told of the outcome of the impugned ruling, it is not clear why the memorandum of appeal was not filed within time, noting that the draft memorandum has been filed even without the said ruling.
15. In this regard, I associate with the holding in the case of *Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another* [2018] eKLR, Ngugi, J. (as he then was) stated:

The most important consideration is for the Court to advert its mind to the fact that the power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be granted on a case by case basis. While not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised on its behalf and in their favour.
16. In the matter before me, the delay has not been reasonably explained to the satisfaction of the Court. The explanation is unsubstantiated and unsatisfactory. The Applicants have not placed before Court any or sufficient material to persuade it to exercise its discretion in their favour. The prayer for leave to appeal out of time is thus declined. It follows that the prayer for stay of execution of the judgment of 10.6.22 must also fail.
17. I have looked at the draft memorandum of appeal. The same relates to the ruling of 28.4.23 dismissing the application dated 14.12.22 for stay of execution of the judgment of 10.6.22. That application also appears to have been filed 6 months after the judgment. Notably the memorandum of appeal does not relate to the judgment itself. Even if this Court were to grant to the Applicants leave to appeal out of time, it would not be of much help as the appeal is not against the judgment but against the ruling. The judgment remains in place. Such orders if made, will therefore be in vain.



18. It is a well settled principle of law that Courts do not issue orders in vain and the Courts have time and again stated as much. This was the holding in *Eric V. J. Makokha & 4 others v Lawrence Sagini & 2 others* [1994] eKLR where the Court of Appeal stated:

An application for injunction under Rule 5(2)(b) is an invocation of the equitable jurisdiction of the Court. So its grant must be made on principles established by equity. One of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. As is said, "Equity, like nature, will do nothing in vain". On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the Court will decline to grant it.

19. In light of the foregoing, it is my finding that the Application dated 30.8.23 is unmerited and is accordingly dismissed. Each party to bear own costs.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 19TH DAY OF APRIL 2024

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M. THANDE

JUDGE

