



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Mwangi v Kidapu Sacco Limited & another (Miscellaneous Civil Application  
E073 of 2023) [2024] KEHC 3739 (KLR) (18 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3739 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
MISCELLANEOUS CIVIL APPLICATION E073 OF 2023**

**FN MUCHEMI, J**

**APRIL 18, 2024**

**BETWEEN**

**JOHN MBITU MWANGI ..... APPLICANT**

**AND**

**KIDAPU SACCO LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**MURGIP AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Brief Facts**

1. The application for determination dated 13<sup>th</sup> December 2023 seeks for the orders restraining the respondent whether by himself, his agents' nominees and or any person acting under his instructions from offering for sale, selling, disposing off LR. Juja/Kalimoni Block 22/6xx pending the hearing and determination of the appeal. The applicant further seeks for orders of leave to appeal out of time the ruling in Thika CM ELC No. E067 of 2022 delivered on 7<sup>th</sup> November 2023.
2. In opposition to the application, the 1<sup>st</sup> respondent filed a Replying Affidavit sworn on 25<sup>th</sup> January 2024.

**The Applicant's case**

3. The applicant states that he filed a suit in the Chief Magistrates' Court in Thika being CM ELC No. E067 of 2022 against the respondents on 21<sup>st</sup> July 2022 seeking injunctive orders against the intended sale of his parcel of land namely LR. No. Juja/Kalimoni Block 22/6xx. The applicant states that he offered the suit land as collateral for sum of money advanced to one Ruth Wanjiru Mbitu by the 1<sup>st</sup> respondent.



4. The trial court delivered its ruling on 7<sup>th</sup> November 2023 striking out the applicant's suit on account that the trial court did not have the requisite jurisdiction to deal with the matter.
5. The applicant contends that he was not aware that the ruling had been delivered in open court and therefore did not seek any remedial measures to protect his property. Furthermore, the applicant states that he did not know that the 2<sup>nd</sup> respondent had already advertised his parcel of land in the newspaper which sale was to take place on 8<sup>th</sup> December 2023. The applicant further states that he only came to learn of the said sale when the principal debtor sent to him an excerpt of the newspaper which she had received from the 1<sup>st</sup> respondent. The applicant states that he has not been informed of the outcome of the said auction and he seeks the intervention of the honourable court.
6. The applicant argues that the delay in filing the appeal is inadvertent as he was not aware that the ruling had been delivered and thus the same is not inordinate as the ruling was delivered on 7<sup>th</sup> November 2023.
7. The applicant argues that he will suffer irreparable loss and damage if the orders sought are not granted as he shall lose his property being LR. No. Juja/Kalimoni Block 22/6xx which will render the intended appeal nugatory.
8. The applicant argues that his intended appeal has high chances of success as it involved a point of law touching on the jurisdiction of the lower court.
9. The applicant contends that the respondents are unlikely to suffer any prejudice that cannot be compensated by way of costs. the applicant further states that he is only a guarantor and that the principal debtor has informed him that the loan amount has substantially been repaid with a recent payment of Kshs. 700,000/- being made.

#### **The 1<sup>st</sup> Respondent's Case**

10. The 1<sup>st</sup> respondent states the applicant commenced the suit Thika MCLE No. E067 of 2022 by way of plaint dated 21<sup>st</sup> July 2022 and they entered appearance. The 1<sup>st</sup> respondent states that despite serving the applicant with the pleadings through whatsapp vide his cell phone number, he has never appeared in court on any occasion. Furthermore, the 1<sup>st</sup> respondent states that the applicant was served with the ruling notice through whatsapp vide his cell phone number. As such, the 1<sup>st</sup> respondent contends that it is not true that the applicant was not aware of the ruling as service was effected and a return of service filed. Moreover, the 1<sup>st</sup> respondent argues that the applicant ought to have been vigilant as he instituted the case, obtained interim orders and continued to enjoy the same without bothering to know what transpired in his suit and application. The applicant only became concerned when the auction was impending.
11. Furthermore, equity aids the vigilant and not the indolent and the 1<sup>st</sup> respondent argues that the applicant has never appeared even once in court, including the first date after direction were issued ex parte, which date the applicant himself served the 1<sup>st</sup> respondent with.
12. The 1<sup>st</sup> respondent contends that the auction took place on 8<sup>th</sup> December 2023 legally and regularly as there were no court orders in place stopping the Sacco from selling by way of public auction. Furthermore, the 1<sup>st</sup> respondent contends that notices had been issued accordingly before the applicant moved the court for interim orders.
13. The 1<sup>st</sup> respondent states that the applicant has not shown that he is likely to suffer substantial loss and neither has he demonstrated that his intended appeal is arguable. Further, the applicant has not



- demonstrated that he was condemned unheard as he failed to attend court in a case he instituted himself.
14. The 1<sup>st</sup> respondent states that the applicant has admitted that there is a glaring indebtedness by the borrower Ruth Mbitu to the Sacco. As at 8/12/2023 when the auction was taking place, the balance stood at Kshs. 1,056,302/-. The 1<sup>st</sup> respondent further contends that the Kshs. 700,000/- was deposited after the fall of the hammer on 12/12/2023 which had no effect on the already concluded auction.
  15. The 1<sup>st</sup> respondent argues that the application has not given any plausible reasons why the applicant should file his intended appeal out of time. The ruling was delivered on 7/11/2023 and yet the applicant moved the court on 13/12/2023 after he realized that the auction was successful.
  16. The 1<sup>st</sup> respondent contends that the Sacco has already suffered losses in terms of the legal costs, auctioneer costs as they had already been contracted, the advertisement in the local newspaper as well as the hammer falling on the security which will be prejudicial to them if the orders sought are granted.
  17. The applicant filed a Further Affidavit dated 23<sup>rd</sup> February 2024 and states that he was never served with the pleadings and notices as alleged as at the time he was not using his whatsapp application because it was not working. The applicant argues that the 1<sup>st</sup> respondent has not led evidence by way of blue ticks that in deed he received the documents. The applicant further states that from the screen shots produced by the 1<sup>st</sup> respondent in his annexures clearly indicate that the ruling notice was never received as the screen shot only bears a single tick which is a clear demonstration that service was never effected.
  18. The applicant states that the 1<sup>st</sup> respondent has not furnished any evidence in court indicating that the auction took place, the outcome of the same, the details of the highest bidder, proof of payment of the deposit of Kshs. 100,000/- and equally the payment of 25% at the fall of the hammer.

### **The Applicant's Submissions**

19. The applicant relies on Section 79G of the *Civil Procedure Act* and the case of *Charles Karanja Kiiru vs Charles Gitbinji Muigwa* [2017] eKLR and submits that he filed the instant application six (6) days late from the requisite period as provided and therefore, a period of six days is not inordinate. Furthermore, the applicant relies on the case of *Kamlesh Mansukhalal Damki Patni vs Director of Public Prosecution & 3 Others* [2015] eKLR and submits that the reasons for the delay in filing the appeal are that he was not served with the ruling notice and therefore he was not aware when the ruling was delivered.
20. The applicant further submits that his intended appeal raises substantial issues for determination particularly on the issue of the place, plight and applicability of the *Co-operative Societies Act* in the lower court file.

### **The Respondents' Submissions**

21. The respondents submit that the applicant has failed to account for the reasons why he delayed in filing the instant appeal. The respondents argue that the applicant is only highlighting that the delay was 6 days but has not given any satisfactory reasons why the 6 days delay was there to begin with.
22. The respondents submit that the applicant instituted suit No. MCLE No. E067 of 2022 by way of a plaint on 21<sup>st</sup> July 2022 and further filed an application under certificate of urgency seeking interim orders and the same were issued restraining the respondents from interfering, disposing and/or selling by public auction LR No. Juja/Kalimoni Block 22/6xx in the interim until 2/8/2022. The respondents submit that upon issuance of the interim orders, the applicant never set his feet in court on the seven occasions the matter proceeded. The respondents argue that the applicant is seeking equity although



he has been indolent in prosecuting his matter yet it is trite law that equity aids the vigilant and not the indolent and delay defeats equity. To support their contentions, the respondents rely on the cases of *Ibrahim Mungara Mwangi vs Francis Ndegwa Mwangi* [2014] eKLR and Omar Shurie vs Marian Rashe Yafar Civil Application No. 107 of 2020 UR and submit that the applicant is not deserving of the equitable remedies sought in the instant application.

23. The respondents submit that the applicant's intended appeal has very low chances of success as he wishes to appeal on the ground that the trial magistrate erred by holding that the dispute ought to be referred to the tribunal under Section 76 of the *Co-operative Societies Act* whereas the applicant, a guarantor was also a member of the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent argues that the 1<sup>st</sup> respondent is claiming through a member as per Section 76(1)(a) of the *Co-operative Societies Act* and therefore the tribunal has the jurisdiction to determine the dispute and thus entertaining this matter in the instant court will only be offending the doctrine of exhaustion.

### **The Law**

24. Order 42 Rule 6(6) of the *Civil Procedure Rules* 2010 empowers this court to grant a temporary injunction on terms it deems fit so long as the procedure for filing an appeal from the subordinate court has been complied with. It provides thus:-

Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from subordinate court or tribunal has been complied with.

25. In the instant case, the ruling of the trial court was delivered on 7<sup>th</sup> November 2023 and the applicant has sought leave to file the appeal out of time. Thus it is prudent that the court examines whether the applicant has provided sufficient reasons to warrant filing an appeal out of time first.

### **Whether the court should exercise its discretion to grant the applicant leave to file his appeal out of time;**

26. Section 79G of the *Civil Procedure Act* states:-

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 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.

27. It is clear from the wording of section 79G of the *Civil Procedure Act*, that before the court considers extension of time, the applicant must satisfy the court that that he has good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of *Diplack Kenya Limited vs William Muthama Kitonyi* [2018]eKLR an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.



28. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat vs IEBC and 7 others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that:-

“The underlying principles a court should consider in exercise of such discretion should include:-

- a. Extension of time is not a right of any 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 by 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 respondent if the extension is granted;
- f. Whether the application has been brought without undue delay.

29. Similarly in the case of *Paul Musili Wambua vs Attorney General & 2 Others* [2015] eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-

“.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

30. The applicant has argued that he was not aware that the ruling was delivered in open court on 7<sup>th</sup> November 2023 and therefore he was unaware of the subsequent scheduled auction of his suit property. The respondents claim that they served the applicant with the ruling notice via his whatsapp through his telephone number 0729 268870.

31. The court record shows that the trial court delivered its ruling on 7<sup>th</sup> November 2023 whereas the applicant filed the instant application on 13<sup>th</sup> December 2023. This is about six (6) days after the requisite period within which to file an appeal. Although a delay of six (6) days is not inordinate it is prudent to examine if the reasons given by the applicant for the delay are plausible. From the trial court record, the applicant instituted the suit in Thika Chief Magistrates Court being MCLE No. E067 of 2022 on 21<sup>st</sup> July 2022 *vide* a plaint. On the same date, the applicant filed an application through certificate of urgency seeking interim orders restraining the respondents herein from interfering, disposing and/or selling by public auction LR No. Juja/Kalimoni Block 22/6xx. The trial court granted the said orders on an interim basis until 2/08/2022. Upon issuance of the interim orders, the matter came up for allocation of the file to a respective court, and the applicant was not present in court. Notably since interim orders were granted by the court on 21<sup>st</sup> July 2023, the matter came up



for mention and hearing on seven (7) occasions and the applicant did not attend any of the mentions or hearing. Furthermore, the 1<sup>st</sup> respondent served the applicant with the various notices through the applicant's phone number 0729 268870 via whatsapp and yet the applicant did not attend court. To prove service, the 1<sup>st</sup> respondent has annexed screen shots of the "sent" and "delivered" messages of service and further filed affidavits of service dated 17<sup>th</sup> February 2023, 27<sup>th</sup> March 2023 and 11<sup>th</sup> October 2023. The affidavit of service dated 11<sup>th</sup> October 2023 indicates that the applicant was served with the ruling notice on 4<sup>th</sup> October 2023 via whatsapp and the message was seen and delivered. Thus, it is my considered view that the 1<sup>st</sup> respondent effected proper service. Moreover, it is evident that upon being granted the interim orders on 21<sup>st</sup> July 2023, the applicant went to sleep. It is trite law that equity does not aid the indolent and the applicant ought to have been vigilant in prosecuting his case. Thus, this court is not convinced that the applicant has given plausible reasons justifying the delay in filing the instant application.

32. I have further perused the grounds of appeal as set out in the Memorandum of Appeal and without delving into the merits of the appeal noted that the appeal does not raise any arguable grounds of appeal. Thus, it is my considered view that the applicant has not established to the satisfaction of the court the reasons why time should be enlarged to enable him file his appeal.
33. It is imperative that the court cannot grant an injunction pending appeal since there is no appeal in existence. If this was to happen, it would be like putting the cart before the horse and such orders would have no ground to stand on. Further more, it is not disputed that the auction of the property has already taken place following a lawful execution of judgement.

#### **Conclusion**

34. Consequently, I find that the application dated 13<sup>th</sup> December 2023 lacks merit and is hereby dismissed with costs to the respondent.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 18<sup>TH</sup> DAY OF APRIL 2024**

**F. MUCHEMI**

**JUDGE**

