



**Tumbo & another v Joseph Wanderi & Company Represented by Wilson Ndundu Karanja, Julius Macharia & Eliud Mbuku Thuku (Miscellaneous Civil Application 30 of 2021) [2024] KEHC 3706 (KLR) (17 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3706 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
MISCELLANEOUS CIVIL APPLICATION 30 OF 2021  
CW GITHUA, J  
APRIL 17, 2024**

**BETWEEN**

**JULIUS KUBUIYA TUMBO ..... 1<sup>ST</sup> APPLICANT**

**STANLEY WAITHAKA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JOSEPH WANDERI & COMPANY REPRESENTED BY WILSON NDUNDU  
KARANJA, JULIUS MACHARIA & ELIUD MBUKU THUKU .... RESPONDENT**

**RULING**

1. The applicants, Julius Kubuiya Tumbo and Stanley Waithaka moved this court through a Notice of Motion dated 14<sup>th</sup> June 2023 principally seeking two substantive orders. They sought this court's leave to file their intended appeal against the Judgment delivered on 20<sup>th</sup> July 2018 in Murang'a Chief Magistrate's Court Civil Suit no. 435 of 2006 out of time and stay of execution of the said Judgment pending hearing and determination of their intended appeal.
2. The application is based on the grounds stated on its face and supported by the affidavit jointly sworn by the applicants on 14<sup>th</sup> June 2021. The applicants contend that they were aggrieved by the trial court's judgement and had instructed their advocate then on record to file an appeal; that the advocate promised to do so after obtaining proceedings from the trial court and they believed he had done so until they were prompted to visit the Murang'a Court registry by service of a notice to show cause why execution should not issue and that is when they discovered that no such appeal had been filed.
3. They asserted that they were still desirous of challenging the trial court's decision on appeal but were unable to do so without leave of the court since time to appeal had expired; that the application was made in good faith and was not an attempt to circumvent justice or delay conclusion of the matter.



4. The applicants further averred that their intended appeal had high chances of success and if the application was allowed, the respondents were not likely to suffer any prejudice. In addition, they averred that execution of the decree had commenced and they risked being committed to civil jail unless stay of execution of the impugned judgement was granted.
5. The application was opposed through a replying affidavit sworn on 8<sup>th</sup> July 2021 by Mr. Eliud Buku Thuku on behalf of the respondents. The respondents urged me to dismiss the application on grounds that there was inordinate delay of over three years before filing the application and satisfactory explanation had not been given for the delay; that the application was an afterthought and was filed in bad faith with the aim of frustrating the applicants and keeping them from enjoying fruits of their judgement. To expound on this claim, the applicants claimed that the application was filed after the respondents failed to keep their promise of making proposals on how to liquidate the decretal amount.
6. Further, the respondents implored me to find that the intended appeal was not arguable; that the application lacked merit and ought to be dismissed with costs as the court's discretion should not be exercised to assist a party who was seeking to frustrate the opposite party's quest to access justice as the applicants were doing in this case.
7. The application was prosecuted by way of written submissions which both parties duly filed and which I have duly considered. In their submissions, the parties mainly expounded on their respective cases in support and in opposition to the application as summarised above.
8. Having carefully considered the application, the affidavits sworn by the parties in support and in opposition thereto and the parties rival written submissions as well as all the authorities cited, I find that the issues which arise for my determination are twofold; namely, whether the applicants' prayer for leave to file their intended appeal out of time is merited and if it was, whether orders of stay of execution should be granted pending conclusion of the intended appeal.
9. Regarding the first issue, the law governing the filing of appeals to the High court is set out under Section 79 G of the [Civil Procedure Act](#) which states as follows:

“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. From the above statutory provision, it is clear that this court has wide and unimpeded discretion to admit an appeal filed out of time or to enlarge the time for filing of an appeal provided that the applicant satisfied the court that he or she had good and sufficient cause for not filing the appeal within the time prescribed by the law.
  - i. The Court of Appeal in [Thuita Mwangi v Kenya Airways Ltd](#) [ 2003 ] eKLR gave guidance on some of the factors a court should consider when exercising its discretion in deciding whether or not to grant extension of time to file an appeal. These are;
    - i. The length of delay.
    - ii. The reason for the delay.
    - iii. The chances of the appeal succeeding if the application was allowed.



- iv. The degree of prejudice to the respondent if the application was allowed.
11. Again, the Supreme Court in *Nicholas Kiptoo Arap Salat v Independent Electoral and Boundaries Commission & 7 others* (2014) eKLR emphasized the need for a party to establish sufficient cause for the delay in question before the court could exercise its discretion in its favour noting that extension of time was not an automatic right but was an equitable remedy only available to deserving parties. In addition, the court underscored the importance of applications of this nature being filed without undue delay and the need to consider the degree of prejudice the opposite party was likely to suffer if the application was allowed.
12. In this case, it is not disputed that the judgment intended to be challenged on appeal was delivered on 20<sup>th</sup> July 2018 and therefore, the applicants were statutorily required to file their intended appeal on or around 21<sup>st</sup> August, 2018.

The present application was filed on 15<sup>th</sup> June 2021 about three years later. In my considered view, a delay of about three years was prolonged and inordinate.

13. The reason given by the applicants to explain the long delay is in my opinion unsatisfactory given that they did not explain why it took them more than two years to follow up with their erstwhile advocates to find out whether or not he had filed their appeal as allegedly instructed. After delivery of the judgement, the applicants appear to have gone into deep slumber and only woke up after the respondents commenced execution of the judgement.
14. Whereas it is true that mistakes of an advocate should not be visited on a litigant, it is also true that suits belong to the parties not their advocates and as such, where a litigant has instructed an Advocate in a matter, he or she has an obligation to follow up on instructions given to ensure that they were not only executed but were also executed in good time.

As correctly stated by the Court of Appeal in *Habo Agencies Limited v Wilfred Odhiambo Musingo* (2015) eKLR “.....It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

15. Additionally, in *Bi-Mach Engineers Limited v James Kaboro Mwangi* (2011) eKLR, the same court re-interated the duty of an applicant to follow up on instructions given to an advocate and expressed itself as follows:

“.....The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy.”

16. Flowing from the foregoing, I am of the considered view that the applicants have failed to satisfactorily account for the delay in filing their intended appeal on time. The respondents averment that the application was not filed in good faith as it was filed after the applicants failed to keep their promise of making proposals to liquidate the decretal amount remained unchallenged as the applicants did not file a further affidavit to controvert the same.



The applicants did not also contest the respondents claim that the suit in the lower court was concluded after 15 years owing to delay mostly occasioned by the applicants.

17. As stated by the Supreme Court in the Nicholas Kiptoo Salat Case [Supra], extension of time is an equitable remedy which is available only to deserving litigants who were able to demonstrate that sufficient cause existed for their failure to file their intended appeal on time which the applicants have failed to do. It may also be important to remember that equity aids the vigilant not the indolent like the applicants in this case.
18. In view of the foregoing, I am persuaded to find that the applicants have not demonstrated that they were deserving of exercise of this court's discretion in their favour. In the premises, their prayer for extension of time to lodge their intended appeal fails and is hereby dismissed.
19. Having declined to grant the prayer for extension of time, the prayer for stay of execution of the trial court's judgement and decree automatically falls by the wayside as it does not have any legs to stand on.
20. The upshot is that the Notice of Motion dated 14<sup>th</sup> June 2021 lacks merit and is hereby dismissed in its entirety with costs to the respondents.

**DATED, SIGNED AND DELIVERED AT MURANG'A THIS 17<sup>TH</sup> DAY OF APRIL 2024.**

**C.W . GITHUA**

**JUDGE**

In the presence of :

Ms Waititu for the Applicants.

Mr Mutegi holding brief for Ms. Ann Thungu for the Respondents.

Ms. Susan Waiganjo, Court Assistant.

