



**Githae v Manyasi (Miscellaneous Civil Application E174 of 2022)
[2024] KEHC 6356 (KLR) (17 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6356 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS CIVIL APPLICATION E174 OF 2022**

A MSHILA, J

MAY 17, 2024

BETWEEN

JOHNSTONE KARIOKO GITHAE APPLICANT

AND

CHRISTINE NAFULA MANYASI RESPONDENT

RULING

Background

1. The Notice of Motion dated 3rd October, 2022 was brought pursuant to, Order 42 Rule 6, Order 40 rule 1 & 4, Order 43, Order 51 rule 1 of the *Civil Procedure Rules* as well as Section 1A, 1B, 3A, 79G and 95 of the *Civil Procedure Act*, Article 48 and 165 (6 & 7) of the *Constitution* of Kenya and all enabling provisions of the law; the Applicant seeks for the following orders;
 - a. Spent
 - b. Spent
 - c. Pending hearing and determination of the intended appeal a temporary injunction restraining the Respondent and her agents including Chartered Auctioneers from attaching auctioning and or selling any of the Applicants registered property in execution of the decree of the trial courts decree given on the 2/01/2019 arising from Thika CMCC 485 of 2018.
 - d. Leave be granted to the Applicant to appeal to the High Court against the entire Ruling of the trial court out of time and consequential orders of Hon. O. Wanyaga SRM in Thika CMCC 485 of 2018 dismissing the application dated 11/09/2019 with costs.
 - e. Such further and / or other Orders be made as the court may deem fit and just to grant.
 - f. The costs of this application be provided for.



2. The Application was supported by the grounds on the face of the application and on the sworn Affidavit of Johnstone Karioko Githae who stated that the intended Appellant was dissatisfied with the surreptitious proceedings in Thika CMCC 485 of 2018 where a claim of Kshs. 518,440 was allowed in the absence of the Applicants participation.
3. The trial court had entered an irregular ex-parte judgment on 2/01/2019 in the sum of Kshs.530,377/50 together with costs of Kshs.95,977/- consciously knowing that the Applicant had been excluded from the proceedings.
4. Upon realizing the secret conduct of the Ruling delivered on 18/07/2019 by the trial court in the his absence, the Applicant proceeded to file an application dated 11/09/2019 seeking to set aside the judgment and be allowed to file his defence. This application was dismissed on 3/08/2022 with costs to the Respondents; The Applicant being dissatisfied with the whole ruling intends to file an appeal against the Ruling as it has occasioned great injustice to him; therefore securing funds on the 3/10/2022 he filed the instant application;
5. The parties were directed to canvass the application by way of written submissions; hereunder is a summary of the parties rival submissions;

Applicant's Case

6. The Applicant submitted that the delay was occasioned by lack of funds to escalate the matter to the High Court. That the delay was not inordinate as it was brought at the earliest time as was practicably possible. It was the Applicant's case that he has a defence that raises triable issues that he should be allowed to have the matter heard and be determined by the court;

Respondent's Case

7. The application was opposed and argued that the application is based on outright lies, distortion of facts and unmeritorious statements. The Applicant was personally served with Summons to enter Appearance but failed to do so; the service was proper and upon requesting for a default judgment the trial court upon satisfying itself that the service was proper proceeded to do so; thereafter the Respondent effected the execution process and appointed an Auctioneer;
8. The Applicant filed a similar application with the one filed in lower court, the said application was heard and determined, yet the Applicant is again bringing an application of the same nature in this court.
9. From the fore-going the Judgment Debtor continues to buy time and deny the decree holder from enjoying the fruits of the judgment considering that this is a matter which was determined hence continues filing unnecessary applications to continue delaying the matter.
10. The Judgment Debtor/ Applicant's intended appeal to be filed has no basis and has no chances of survival hence is an abuse of the court,
11. The principles laid down in the Constitution and the Civil Procedure laws behoves all parties to expedite the processes; Delays in resolving claims like the instant one is highly prejudicial to the insurance business and the general public.
12. The Respondent urged the court to dismiss the application with costs to the Respondent.



Issues for Determination

13. Having considered the Application, Replying Affidavit and the written submissions the court frames the following issue for determination;
 - a. Whether the Applicant should be granted leave to file appeal out of time;

Analysis

14. The applicable law is found under Section 79G of the Civil Procedure Act which grants the court powers to enlarge time in which to file an appeal. Section 79G of the Civil Procedure Act provides as follows 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.”
15. The principles that aid Courts in exercising the discretion as to whether to extend time to file an appeal out of time were suggested by the Court of Appeal in Thuita Mwangi v Kenya Airways Ltd [2003] eKLR. They include the following:-
 - (i) The period of delay;
 - ii) The reason for the delay;
 - iii) The argue-ability of the appeal;
 - iv) The degree of prejudice which could be suffered by the if Respondent the extension is granted;
16. On the issue of period of delay it is noted that the Respondent on 13/06/2018 filed a claim against the Applicant in Thika CMCC NO. 485 OF 2018 for Kshs. 518,440/=. An *ex-parte* judgment was entered on 2/01/2019 causing the Applicant to file his application to set the said judgment aside on 11/09/2019. In its ruling dated 3/08/2022, the trial court dismissed the Applicant’s application with costs to the Respondent.
17. Being aggrieved with the decision the Applicant filed this application seeking leave to appeal out of time against the decision dated 3/10/2022. The Applicant annexed the impugned ruling that was delivered on 3/08/2022 to his application seeking leave to appeal out of time which was filed on 3/10/2022 and it is noted that the period of delay translates to a period of two (2) months; There are legions of authorities that have found a period of four (4) months not to be inordinate; herein the period of delay translates to two months which period this court is satisfied cannot be deemed as inordinate.
18. The reason for the delay advanced by the Applicant was the lack of financial resources and the need to look for alternative counsel to prosecute the appeal; the reasons given for the delay, the first one being finances, the second one being distance in that he had to source for an Advocate based in Nairobi as opposed to Kerugoya and the third one being the acquisition of vital proceedings; this court is satisfied that the Applicant has given a reasonable and satisfactory explanation given for the delay.
19. On the arguability of the Appeal the Applicant attached a copy of the impugned Ruling dated 3/08/2022 and a copy of the Draft Memorandum of Appeal to his application. It is noted that the



trial court found that the Applicant had been properly served with the pleadings. And after the trial court perused the Draft Defence also found that it did not raise arguable issues to warrant the setting aside of the interlocutory judgment;

20. The main issue is service and after perusal of the impugned Ruling as against the Draft Memorandum of Appeal this court is satisfied that the issue of service by a non-existent law firm raises triable issues; it is also noted that the Respondent was willing to accept thrown away costs and was amenable to the case proceeding to full hearing and determination on merit; this a fundamental right that the trial court disregarded; for those reasons this court is satisfied that the Applicant has an arguable appeal.
21. On the issue of security, it was this Courts considered view that the Respondent would not suffer any prejudice if the Applicant was granted the orders for stay with conditions for furnishing security; the Applicant is found to have complied with the order of 19/04/2023 and paid to the Respondent the sum of Kshs.200,000/- as security.

Findings and Determination

22. For those reasons this court makes the following findings and determination;
 - i. The application is found to have merit and it is hereby allowed
 - ii. Leave to appeal out of time is hereby granted; time to file the appeal is hereby enlarged by forty-five (45) days from the date hereof;
 - iii. The Record of Appeal be filed and served within Forty-five (45) days hereof. In default the orders shall stand discharged.
 - iv. The Applicant shall bear the costs of this application.
 - v. Mention on 16/072024 for compliance.

Orders Accordingly.

DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 17TH DAY OF MAY, 2024

A. MSHILA

JUDGE

In the presence of;

Mourice – Court Assistant

Wambui Shadrack and Miss Wanjiku - for the Applicant

Karuhanga – for the Respondent

