



**Gerald Gatonye Mwaura t/a Tonye Agencies v Solvochem East
Africa Limited (Miscellaneous Application E508 of 2023)
[2024] KEHC 6490 (KLR) (Commercial and Tax) (15 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6490 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E508 OF 2023**

MN MWANGI, J

MAY 15, 2024

BETWEEN

GERALD GATONYE MWAURA T/A TONYE AGENCIES APPLICANT

AND

SOLVOCHEM EAST AFRICA LIMITED RESPONDENT

RULING

1. The applicant filed a Notice of Motion application dated 22nd June, 2023 pursuant to the provisions of Order 42 Rule 6 & Order 51 Rule 1 of the [Civil Procedure Rules 2010](#), Sections 3 & 3A of the [Civil Procedure Act](#), Cap 21 Laws of Kenya, and all other enabling provisions of the law seeking the following orders –
 - i. Spent;
 - ii. This Honourable Court be pleased to grant leave to the applicant/intended appellant to file an Appeal out of time against the judgment and decree of the Small Claims Court at Nairobi delivered by Hon. Judith Omollo, Senior Resident Magistrate and Adjudicator, on 21st day of March, 2023 in SCCCOMM E6964 OF 2022; Solvochem East Africa Limited V Gerald Gatonye Mwaura T/a Tonye Agencies;
 - iii. Spent;
 - iv. That there be a stay of execution of the Judgment and Decree of the Small Claims Court at Nairobi delivered by Hon. Judith Omollo, Senior Resident Magistrate and Adjudicator, on 21st day of March, 2023 in SCCCOMM E6964 OF 2022; Solvochem East Africa Limited V



Gerald Gatonye Mwaura T/a Tonye Agencies, and any and all attendant consequences pending hearing and determination of the intended appeal;

- v. The Court be pleased to make such further order as may be just and expedient in the circumstances to meet the overriding objectives; and
 - vi. Costs of this application be provided for.
2. The application has been brought on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Mr. Gerald Gatonye Mwaura, the applicant herein. In opposition thereto, the respondent filed a replying affidavit sworn on 24th July, 2023 by Mitul Ranginga, the respondent's Finance Manager.
 3. The instant application was canvassed by way of written submissions. The applicant's submissions were filed by the law firm of Mutai Maina Kimeu & Associates Advocates on 14th February, 2024, whereas the respondent's submissions were filed on 29th September, 2023 by the law firm of Kimani & Muriithi Associates Advocates.
 4. Mr. Kimani, learned Counsel for the applicant referred to the provisions of Section 79G of the [Civil Procedure Act](#) and submitted that an appeal against the judgment of the small claims Court ought to have been filed on or before 21st April, 2023, and that the applicant filed the instant application on 22nd June, 2023, approximately 120 days from 21st April, 2023 which delay is not so inordinate to warrant this Court to decline to grant the orders sought herein. Counsel attributed the said delay to the delay in extraction of the decree which was done and served on the applicant on 15th June, 2023. Counsel explained that it took some time before they could receive instructions from the applicant hence the delay.
 5. Counsel relied on the case of [Edith Gichungu Koine v Stephen Njagi Thoithi \[2014\]](#) eKLR and contended that in dealing with applications of this nature, the Court has a duty to ensure that the factors considered are consonant with the overriding objective of civil proceedings in litigation. He also relied on the Court of Appeal case of Martha Wambui v Irene Wanjiru Mwangi & another and asserted that the application herein is merited. Mr. Kimani cited the provisions of Order 42 Rule 6 of the [Civil Procedure Rules, 2010](#) and the case of Butt v Rent Restriction Tribunal [1982] KLR 417, and argued that the purpose of an application for stay of execution pending appeal is to preserve the subject matter of the appeal. He urged this Court to grant the said order so as not to render the intended appeal nugatory.
 6. He relied on the case of Mbutia v Jimba Credit Corporation Ltd [1988] KLR 1 and submitted that in the event the instant application is disallowed, the applicant stands to suffer irreparable loss and damage in view of the fact that a decree has been extracted, and his goods already proclaimed at the instance of the respondent. Counsel relied on the case of [Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Limited & 4 others \[2015\]](#) eKLR and the Court of Appeal case of Nduhiu Gitahi v Warugongo [1988] KLR 621, and contended that in the event that the appeal is successful, the respondent will not be in a position to refund the decretal sum if it is paid over to it.
 7. Mr. Muriithi, learned Counsel for the respondent submitted that there are no justifiable reasons for the extension of time for the applicant to file his appeal and for stay of execution of the decree pending the hearing and determination of the intended appeal. He stated that there has been inordinate and unexplained delay in filing the instant application since it was filed approximately two months after the judgment in the Small Claims Court was delivered. Further, the application herein was not filed until after the applicant was served with a proclamation notice in execution of the decree issued by the Small Claims Court.



8. Counsel contended that if at all the applicant was keen to pursue an appeal against the judgment of the small claims Court, he would have at the very least filed a Memorandum of Appeal which does not need to be accompanied by any other documents at the time of filing. To buttress this submission, he relied on the case of *Paul Njage Njeru v Karija K. Mugambi [2021]* eKLR. Mr. Muriithi argued that the applicant has also not exhibited a certificate of delay or shown any efforts he made in trying to obtain any documents from the Small Claims Court Registry. It was stated by Counsel that a perusal of the draft Memorandum of Appeal annexed to the applicant's affidavit in support of the application herein reveals that the applicant does not have an arguable appeal.
9. Counsel submitted that the allegation that the respondent is not in a position to refund the applicant the decretal sum if paid out to it, and the applicant's intended appeal succeeds, has not been backed up by any evidence. Mr. Muriithi asserted that the respondent is a company that is still active in business, thus it is in a position to reimburse the applicant the decretal sum in the event he succeeds in the intended appeal. He referred to the case of *Equity Bank Limited v Taiga Adams Company Ltd [2006]* eKLR and argued that since the applicant has not stated that he is ready and willing to provide security, the instant application should be dismissed.

Analysis And Determination.

10. I have considered the application filed herein, the grounds on the face of it and the affidavit filed in support thereof. I have also considered the replying affidavit by the respondent together with the written submissions by Counsel for the parties. The issues that arise for determination are -
 - i. Whether leave to file an appeal out of time should be granted to the applicant; and
 - ii. Whether an order for stay of execution pending appeal should issue.
11. In the affidavit filed by the applicant, he deposed that Hon. Judith Omollo, Senior Resident Magistrate and Adjudicator, delivered judgment in favour of the respondent for payment of Kshs.242,960.21, and that the respondent has now extracted a decree and has threatened to execute it against the applicant any time now having served him with a Proclamation Notice dated 22nd June, 2023.
12. He averred that he is aggrieved by the aforesaid judgment and is keen to appeal against it. He further averred that the said judgment being a money decree, unless the orders sought herein are granted he may be forced to pay the decretal sum to the respondent, yet such dues may not be recoverable upon a successful appeal since the respondent does not have the means to reimburse the said amount of money.
13. The respondent in its replying affidavit deposed that there are no justifiable reasons for the extension of time for the applicant to file a Memorandum of Appeal or any other document. He averred that the judgment by the Small Claims Court was delivered on 20th March, 2023 and forwarded to the applicant's Advocates via email on 21st March, 2023.
14. It was stated by the respondent that the instant application was filed more than three (3) months after judgment was entered, which is inordinate delay that has not been explained by the applicant. The respondent also stated that the applicant will not be prejudiced in any way in the event the instant application is disallowed, but the respondent stands to suffer more prejudice through the continued denial of the fruits of its judgment.

Whether leave to file an appeal out of time should be granted to the applicant.



15. This Court has the discretion to extend time within which a dissatisfied party can lodge an appeal against the decision of a Subordinate Court pursuant to the provisions of Section 79G of the Civil Procedure Act which states 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.”

16. The Supreme Court in the case of Naomi Wangechi Gitonga & 3 others v Independent Electoral & Boundaries Commission & 17 others [2018] eKLR set out the guiding principles when it comes to extension of time, being the conditions which were also expressed in the case of Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 others [2014] eKLR as follows-

“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a Court should consider in exercise of such discretion:

1. 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;
2. a party who seeks...extension of time has the burden of laying a basis to the satisfaction of the Court;
3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
4. [where] there is a reasonable [cause] for the delay, the delay should be explained to the satisfaction of the Court;
5. whether there will be any prejudice suffered by the respondents if the extension is granted;
6. whether the application has been brought without undue delay; and,
7. whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

17. It is evident from the record that the judgment in the Small Claims Court was delivered on 21st March, 2023. Under the provisions of Section 79G of the Civil Procedure Act, any party dissatisfied with the said Judgment had a right to lodge an appeal against it on or before 24th April, 2023 which would have been within 30 days from 21st March 2023, exclusive of public holidays. Section 79G of the Civil Procedure Act provides that in the event an appeal is not lodged within 30 days as prescribed, it may be admitted out of time if the appellant satisfies the Court that there was sufficient cause for not filing the appeal in time.

18. The applicant in this case filed the instant application on 22nd June, 2023, approximately two (2) months which is equivalent to sixty (60) days after the judgment in the Small Claims Court was delivered, and approximately one (1) month after the elapse of the thirty (30) days provided for by law.



Due to the said delay, the applicant is duty bound by the law to give a plausible explanation as to as to the cause of the said delay to warrant being granted an order for extension of time. In Abdul Azizi Ngoma vs. Mungai Mathayo [1976] KLR 61 at 62, the Court of Appeal held:

“We would like to state once again that this court’s discretion to extend time under rule 4 only comes into existence after ‘sufficient reason’ for extending time has been established and it is only then that other considerations such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered.” (Emphasis added).

19. The applicant contended that the delay in filing the instant application and an appeal against the judgment of the Small Claims Court was occasioned by the delay in extraction of the decree, which was only done on 15th June, 2023. This Court agrees with the respondent that when filing a Memorandum of Appeal, which is the first document to be filed when lodging an appeal against the decision of a Subordinate Court to the High Court, all that the applicant required was a copy of the judgment and not the decree. The decree would have formed part of the documents in the Record of Appeal which is filed after admission of the appeal to hearing.
20. It is not disputed that the applicant’s Counsel was served with a copy of the Small Claims Court judgment delivered on 20th March, 2023, the following day being the 21st March, 2023 via email. For this reason and in the absence of any sufficient reason being advanced as to what occasioned the delay in lodging an appeal against the said judgment and in filing the application herein, I find that the delay in this case is not only inordinate but is also inexcusable.
21. This Court is bound by the Supreme Court holding in the case of Naomi Wangechi Gitonga & 3 others v Independent Electoral & Boundaries Commission & 17 others (supra) where it was held that 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. Further, equity only aids the vigilant and not the indolent. Since the applicant only filed this application after he was served with a Proclamation Notice dated 22nd June, 2023, and he has not demonstrated any steps taken towards successfully lodging an appeal within the prescribed timeline, I am persuaded that the applicant is guilty of laches, and not deserving of an equitable relief.
22. In the premise this Court finds that the applicant has not made out a case to warrant grant being granted an order for extension of time to file an appeal. Consequently, this Court shall not deal with the issue of stay pending appeal as that would be an academic exercise.
23. The application dated 22nd June, 2023 is devoid of merits. It is hereby dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF MAY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

No appearance for the applicant

Mr. Munene for the respondent

Ms. B. Wokabi – Court Assistant.

