



Kagwi & another v Muthii & another (Suing as the Administrators of the Estate of the Late Geoffrey Muthii Karani) (Miscellaneous Civil Application E751 of 2023) [2024] KEHC 5183 (KLR) (Civ) (13 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5183 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

MISCELLANEOUS CIVIL APPLICATION E751 OF 2023

CW MEOLI, J

MAY 13, 2024

BETWEEN

GICHINI KAGWI 1ST APPLICANT

STEPHEN MAINA NG'ANG'A 2ND APPLICANT

AND

BILHAH WAMBAIRE MUTHII 1ST RESPONDENT

SUSAN WABAIYA MUTHII 2ND RESPONDENT

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE
GEOFFREY MUTHII KARANI**

RULING

1. For determination is the motion dated 02.09.2023 by Gichini Kagwi and Stephen Maina Ng'ang'a (hereafter the 1st and 2nd Applicant/Applicants) seeking *inter alia* that the Court be pleased to grant leave to the Applicants to appeal out of time against the judgment delivered in Nairobi Milimani CMCC E764 of 2021 and to stay execution of the judgment in Nairobi Milimani CMCC E764 of 2021 which in the substantial amount of Kshs. 1,227,550/-, pending hearing and determination of the intended appeal.
2. The motion is expressed to be brought among other pursuant to Section 1A, 1B, 3A & 100 of the [Civil Procedure Act](#) (CPA), Order 21, Order 22 Rule 22, Order 42 Rule 4 & 6, Order 50 Rule 4 and Order 51 Rule 1 of the [Civil Procedure Rules](#) (CPR) and is premised on the grounds thereon as amplified in the supporting sworn by Anita Ndunge Kanini, counsel on record for the Applicants.



3. The gist of her affidavit is that judgment in Nairobi Milimani CMCC E764 of 2021 was delivered on 27.01.2023 and the Applicants being dissatisfied therewith intend to lodge an appeal, which raises pertinent issues; that Susan Wabaiya Muthii and Bilhah Wambaire Muthii (hereinafter the Respondents) may levy execution against the Applicants, which action will render the intended appeal nugatory and thus occasioning irreparable loss and damage; that the intended appeal raises arguable issues, and it is in the interest of justice that the judgment delivered on 27.01.2023 be stayed and the intended appeal be heard on merit. Counsel goes on to depose that should the decretal amount be paid over, the said Respondents would be in no position to make refunds if the intended appeal succeeds.
4. She further deposes that the Applicants are ready, willing and able to furnish such reasonable security by way of a Bank Guarantee to be issued by a reputable bank up to the policy limit of Kshs. 3,000,000/-. That the application has been made in good faith and without unreasonable delay thus would not occasion any prejudice to the Respondents. Counsel states that delay was occasioned by factors beyond her control as she is yet to obtain certified copy of proceedings and judgment whereas the Court file could not be traced in the Court registry. In conclusion she reiterates that the application is meritorious and that any prejudice to the Respondents can be compensated through costs.
5. The Respondents oppose the motion through a replying affidavit dated 10.05.2023 sworn by Kisiangani Eddah, counsel on record for the Respondents. She views the motion as dilatory, misconceived, frivolous and an abuse of the Court process and solely aimed at denying the Respondents the fruits of judgment. She further asserts that the Court has no jurisdiction to order stay of execution pending appeal when there is no appeal in existence. That it is not in dispute that the Applicants were always aware of the judgment of the trial Court and that the delay of seven (7) months in applying has not been satisfactorily explained by the Applicants, a clear indication of bad faith. That no good and sufficient cause for not filing the appeal within time has been demonstrated and the Applicants are merely seeking the court's acceptance of their indolence.
6. Besides, the prayer for stay of execution is not merited as it has not met the mandatory threshold required under Order 42 Rule 6 of the [CPR](#). Pointing to the fact that the Bank Guarantee attached has expired, counsel asserts that the Applicants have not offered security. In summation she deposes that Section 3A of the [CPA](#) gives the Court inherent power to make such orders necessary for the ends of justice and to prevent the abuse of the Court process.
7. Parties agreed to have the motion determined on the basis of their respective affidavit material on record.
8. The Court has considered the rival affidavit material before it. Alongside the prayer for leave to appeal out of time, the Applicants have sought stay of execution of the lower court judgment and decree pending hearing and determination of the intended appeal. It is evident on a plain reading of Order 42 Rule 6(1) of the [CPR](#), that an order to stay execution pending hearing and determination of an appeal presupposes the existence of an appeal. The filing of an appeal is a condition precedent to the exercise of this court's appellate jurisdiction under Order 42 Rule 6 (1) of the [CPR](#).
9. Hence the invocation of the jurisdiction of this court under Order 42 Rule 6 (1) or 6 (6) of the [CPR](#) must be preceded by the filing of an appeal, or compliance with the procedure for filing an appeal, in this case a memorandum of appeal (See Order 42 Rule 1 of the [CPR](#)). Thus, as rightly argued by the Respondent's counsel, where a party specifically seeks stay of execution pending hearing and determination of an appeal not yet filed, the court may be acting in vacuo by considering the Applicant's prayer for stay of execution pending a non-existent appeal. The Court of Appeal in [Abubaker Mohamed Al-Amin v Firdaus Siwa Somo](#) [2018] eKLR while citing with approval the decision of the High Court in [Rosalindi Wanjiku Macharia vs. James Kiingati Kimani \(Suing as the](#)



Legal Representative of the Estate of Martin Muiruri (Deceased) [2017] eKLR approved the reasoning that stay of execution pending appeal must be predicated on an existing appeal.

10. Earlier, the Court of Appeal in the case of *Equity Bank -Vs- Westlink MBO Limited* [2013] eKLR while commenting on Rule 5 (2) (b) of the *Court of Appeal Rules*, whose wording is substantially similar to Order 42 Rule 6 (1) of the *Civil Procedure Rules*, and on Order 42 Rule 6 (6) of *Civil Procedure Rules*, left no room for doubt that an application for stay of execution pending appeal could only be entertained before it after the filing of an appeal or a Notice of Intended Appeal. (See also *Balozi Housing Co-operative Society Limited -Vs- Captain Francis E. K. Hinga* [2012] eKLR). In this case, an appeal is yet to be filed and therefore no basis upon which this Court could exercise its appellate jurisdiction under the said provision in a miscellaneous matter.
11. If the Applicant desired to seek an order to stay execution alongside the prayer for the late admission of their appeal, they ought to have first filed the memorandum of appeal in a proper appeal and the relevant application. In my considered view, the words that “an appeal may be admitted out of time” in Section 79G, appears to admit both retrospective and prospective applications. So that leave under the Section may be sought before or after a memorandum of appeal is filed. However, it may be more prudent for a party who also seeks stay of execution pending appeal in the same motion for leave to appeal out of time to have filed the memorandum of appeal in advance. In the circumstances, the prayer seeking a stay execution of the judgment in Nairobi Milimani CMCC E764 of 2021 pending hearing and determination of the intended appeal has no legal anchor and cannot be entertained.
12. Turning now to the prayer seeking leave to appeal the ruling delivered on 04.07.2022 in Nairobi Milimani CMCC E764 of 2021, the power of the Court to enlarge time for filing an appeal out of time is expressly donated by Section 79G, as well as generally, by Section 95 of the *Civil Procedure Act*. Section 79G of the *Civil Procedure Act* provides 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.”

13. The principles governing leave to appeal out of time are settled. The successful applicant must demonstrate “good and sufficient cause” for not filing the appeal in time. In *Tbuta Mwangi v Kenya Airways* [2003] e KLR, the Court of Appeal while considering Rule 4 of the *Court of Appeal Rules* which was in pari materia with Section 79G of the *Civil Procedure Act*, reiterated its decision in *Mutiso v Mwangi* [1997] KLR 630 as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

14. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the Court should exercise its discretion, or in other words, the factual basis for the exercise of the Court’s discretion in his favor. The Supreme Court in the case of *Nicholas Kiptoo Korir Arap*



Salat v 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 include;

1. 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;
2. A party who seeks for 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 a case- to-case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;
6. Whether the application has been brought without undue delay.
7.”

See also County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] eKLR.

15. At the outset it is pertinent to note that the Applicants’ affidavit is marked by a deficiency of evidence in support of the facts necessitating the instant application. Nevertheless, the only explanation for delay in filing the instant motion advanced, is that delay was occasioned by factors beyond counsel’s control as she is yet to obtain a certified copy of proceedings and judgment the Court file being unavailable in the lower Court registry. The date when the purported handwritten copy of the judgment attached to the affidavit in support (annexure ANK2) was obtained has not been stated . Nor demonstration of attempts to obtain the said copy attempted. Undisputedly, the impugned judgment having been delivered on 27.01.2023, the present motion was lodged on 02.09.2023, some eight (8) months later.
16. It is settled that the period of delay as well as explanation thereof are key considerations in an application of this nature. A party seeking extension of time must not be seen to presume on the court’s discretion. Here, the period of delay is inordinate, and the Applicants affidavit material attempts no explanation for it, other than for the bland attempt to do so. The Court of Appeal in Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 Others [2019] eKLR addressed itself on the question of delay as follows; -

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained, hence a plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There have to be valid and clear reasons, upon which discretion can be favourably exercisable.....”
17. A motion of this nature principally stands or falls on the demonstration of “good and sufficient cause” by an applicant; it is what unlocks this Court’s discretion. The Court agrees with the Respondents that the Applicants have not demonstrated “good and sufficient cause”. Notably, the Applicants themselves did not deem it necessary to swear their own affidavit in support of the motion. It could well be that



they are disinterested in the matter, and granting the prayers sought on their purported behalf might only work prejudice against the Respondents through delay.

18. While the court is alive to the emphasis in *[Vishva Stone Suppliers Company Limited v RSR Stone \(2006\) Limited](#)* [2020] eKLR concerning the importance of the right of appeal, the right is not absolute and must be balanced against the Respondents corresponding right to have the dispute determined expeditiously. The prayer for leave to appeal out of time has not been justified. In the circumstances, the Court finds no merit whatsoever in the motion dated 02.09.2023. The motion is hereby dismissed with costs to the Respondents.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 13TH DAY OF MAY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: N/A

For the Respondents: Mr. Wachira

C/A: Erick

