



**Mwangi & another v Muiruri (Civil Appeal 327 of 2023)
[2024] KEHC 5830 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5830 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 327 OF 2023
FN MUCHEMI, J
MAY 23, 2024**

BETWEEN

PETER KARIUKI MWANGI 1ST APPLICANT

SULTAN SALIM ABRY 2ND APPLICANT

AND

RUTH MUKUHI MUIRURI RESPONDENT

RULING

Brief Facts

1. The application dated 27th September 2023 seeks for orders for leave to file an appeal out of time against the judgment in Gatundu SPMCC No. 178 of 2020 delivered on 28th September 2022. The applicants further seek for orders of stay of execution in respect of the said judgment delivered on 28th September 2022 pending the hearing and determination of the appeal.
2. In opposition to the application, the respondent filed Grounds of Opposition dated 27th October 2023.

Applicants' Case

3. The applicant states that judgment in SPMCC No. 178 of 2020 was delivered on 28th September 2022 whereby the court found in favour of the respondent against the applicants. The trial court found the applicants 100% liable and awarded the respondent damages in the sum of Kshs. 300,000/- as general damages and Kshs. 4,050/- as special damages with costs and interest. The applicants further state that they were granted 30 days stay of execution.
4. The applicants contend that the time within which they were allowed by statute to appeal the judgment has since lapsed. Further, the applicants state that their advocates received a copy of the judgment



from the court, three months after the delivery of the judgment on 18th January 2023 and immediately proceeded to review it with a view of making their informed and final decision on the available options. The applicants contend that the delay in availing a copy of the said judgment was due to the typing process by the lower court.

5. The applicants state that their intended appeal raises pertinent issues and has a high chance of success. The applicants are apprehensive that the respondent will execute against them as the respondent is on the verge of taking out warrants of attachment and a proclamation notice.
6. The applicants further state that they have brought the instant application promptly and without unreasonable delay. The applicants argue that they stand to suffer irreparable loss and damage unless leave to file their appeal out of time is granted.

The Respondent's Case

7. The respondent opposes the application on the premise that the applicants have filed their appeal out of time without obtaining the leave of the court contrary to order 43 rule 2 of the *Civil Procedure Rules* and thus should be struck out. Further, the respondent argues that the applicants are seeking to remedy an illegality as they have filed their appeal out of time, without the leave of the court and are now seeking to admit a nonexistent appeal.
8. The respondent argues that the applicants have not shown good and sufficient cause for not filing the appeal in time but only faults the court registry for the delay but without proof. Moreover, pursuant to Section 79G of the *Civil Procedure Act*, nothing precluded the applicants from filing their memorandum of appeal within 30 days of the judgment and thereafter prepare the record of appeal. Accordingly, the applicants are guilty of laches as they admitted to receiving a copy of the judgment in 2022. As such, the respondent urges the court not to exercise its discretion in favour of the applicants.
9. The respondent contends that no orders can be issued for stay as the application has been filed in a nonexistent appeal filed out of time and without the leave of the court and the applicants cannot seek redress from the court to remedy an illegality.
10. Directions were issued that the application be canvassed by way of written submissions and the record shows that only the respondent complied by filing submissions on 28th February 2024. The applicants on the other hand had not filed their submissions by the time of writing this ruling.

The Respondent's Submissions

11. The respondent submits that the applicants sought leave to file their appeal out of time however they already filed their memorandum of appeal on 27th September 2023. Relying on the case of *Gilbert Mwangi Njuguna v Judicial Service Commission & Another* [2020] eKLR, the respondent submits that filing an appeal out of time without seeking an extension of time and subsequently seeking the court to extend time and recognize such an appeal is tantamount to moving the court to remedy an illegality.
12. The respondent relies on the case of *Ronald Mackenzie v Damaris Kiarie* [2021] eKLR and submits that the delay is inexcusable as the intended appeal was filed in 2023 without the leave of the court yet judgment was delivered in 2022.
13. The respondent further relies on the case of *Musikari Nazi Kombo v Moses Masika Wetangula & 2 Others* [2013] eKLR and submits that the applicants have not substantiated the failure to file an appeal was due to the registry staff which allegations have not been substantiated.



The Law

Whether the court should exercise its discretion to grant the applicants leave to file their appeal out of time;

14. 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.

15. It is clear from the wording of section 79G of the *Civil Procedure Act* that before the court considers extension of time, the applicants must satisfy the court that they have good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of *Diplack Kenya Limited v 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.

16. 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 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.”

17. Similarly in the case of *Paul Musili Wambua v 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.”

18. The applicants have faulted the trial court for the delay in filing their appeal as the registry took a long time in availing to the applicants a copy of the typed judgment. The issue of delay of typed proceedings and judgment is a well-known issue in our legal system and courts have extended time and held that such delay is not on the part of the party but the court and this issue consist of facts beyond a party’s reach. This was stipulated by the Supreme Court in the case of *Hassan Nyanje Charo v Khatib Mwasbetani & 3 Others* [2014] eKLR where the court stated:-

Counsel for the applicant has stated that he has exercised all due diligence to get the proceedings from the Court of Appeal, but to no avail.....

Would it be in the interests of justice then to turn away an applicant who has prima facie, exercised all due diligence in pursuit of his cause, but is impeded by the slow turning wheels of the court’s administrative machinery? We think not.

19. The Supreme Court further expounded in the case of *County Executive of Kisumu v County Government of Kisumu & 8 Others* [2017] eKLR and held:-

However, we hasten to add that a ground of delay of getting typed proceedings is not a prima facie panacea for a case of delay whenever it is pleaded. Each case has to be determined on its own merit and all relevant circumstances considered. It is worth reiterating that in considering whether or not to extend time, the whole period of delay should be stated and explained to the satisfaction of the court.

20. In the present case, the Magistrate’s court delivered its ruling on 28th September 2022 in the presence of the advocates for both parties. The court then granted 30 days stay of execution. The applicant filed the instant application on 27th September 2023 which is approximately 11 months after the requisite period within which to file the appeal. Furthermore, although the applicants have faulted the trial court registry for the delay in lodging the appeal, the applicants have not annexed any evidence to confirm the allegations. It is noted that the date they applied for a copy of the judgment or letters to the executive officer following up on the request were not annexed to this application. Neither have the applicants attached a copy of a certificate of delay to show that the registry took long to avail a copy of the typed judgment and proceedings. Furthermore, the applicants have contended that they received a copy of the typed judgment on 18th January 2023 but they filed their memorandum of appeal on 27th September 2023. The applicants have an obligation to explain delay. No plausible explanation has been given as to why the applicant waited for 7 months before filing their memorandum of appeal. Therefore, it is my considered view that the delay of 11 months is inordinate and inexcusable. Furthermore, the applicants have not given any plausible explanation on the reasons for delay.

21. 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 evident that the chances of the appeal succeeding if the instant application is granted are slim. In the circumstances it is my considered view that the applicants have not established to the satisfaction of the court why time should be enlarged to enable her file their appeal.

22. Therefore having declined to grant the prayer for admitting the appeal out of time, the prayer for stay of execution of the lower court’s judgment and decree automatically fails for the reason that there is no existing appeal.



23. It is thus my considered view that the application dated 27th September 2023 lacks merit and is hereby dismissed with costs to the respondent. This appeal file is closed having been opened erroneously.
24. It is hereby so ordered.

RULING DELIVERED, DATED AND SIGNED AT THIKA THIS 23RD DAY OF MAY 2024.

F. MUCHEMI

JUDGE

