



REPUBLIC OF KENYA



Barasa v Kipkoech (Civil Case E016 of 2023) [2024] KEHC 6901 (KLR) (12 June 2024) (Ruling)

Neutral citation: [2024] KEHC 6901 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
CIVIL CASE E016 OF 2023
JR KARANJA, J
JUNE 12, 2024**

BETWEEN

JAMES KIPYEGO BARASA PLAINTIFF

AND

PATRICK KIPKOECH DEFENDANT

RULING

1. The application vide the Notice of Motion dated 28th September 2023 filed herein on 3rd November 2023 under a certificate of urgency seeks two main orders viz: -
 1. Stay of execution of the decree and orders arising from the judgment delivered on 7th august 2023 in Kapsabet CMCC No. E016 of 2021 pending the hearing and determination of the intended appeal.
 2. Leave be granted to the Applicants to file an appeal out of time against the said judgment and decree.

2. The grounds in support of the application are set out in the Notice of Motion and buttressed by the Applicant's supporting affidavit deponed on 28th September 2023.

The Respondent opposed the application on the basis of the grounds and averments contained in his replying affidavit deponed on the 19th February 2024.

The hearing inter-parties of the application was by written submissions which were filed by both parties through their respective advocates.

The submissions were duly considered by this court as against the grounds of appeal and these in opposition thereto. In that regard, what emerged as the basic issue for determination was whether the Applicant had provided and established satisfactory grounds for exercise of this court's discretion in his favour.



3. Basically, 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 anytime 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.”

4. Extension of time to file an appeal is therefore an equitable remedy available to a party at the discretion of the court and for good reason.

The parameters for exercise of such discretion are now settled with the major ones being the period of delay, the reason for the delay and the prejudice the Respondent may suffer if extension of time is granted [See *Mombasa County Government v Kenya Ferry Services and Another* [2019] eKLR and *Thuita Mwangi v Kenya Airways Limited* [2003] eKLR] [See also, *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, Nairobi Civil Application 255 of 1997].

5. Herein, the draft memorandum of appeal dated 28th September 2023 was annexed to and filed together with the present application on the 3rd November 2023. The delay in filing the appeal was for a period of almost three (3) months.

The Applicant indicated that he became aware that the judgment had been delivered on 26th September 2023 when he made enquiries at the court registry. He contended that his advocate on record at the time failed to notify him of the progress of the case and that was the more reason why he delayed to file the intended appeal within the prescribed time. He did not mention the previous advocate but the annexed copy of the judgment shows that the Applicant was the Plaintiff in the primary suit and that the judgment was delivered in the presence of his advocate, one Mr. Serem.

6. The primary suit record/ file was not availed during the hearing of this application. It could not be ascertained from that record whether or not the parties were also present when the judgment was delivered. In any event, it was expected that they were aware of the judgment date through their respective advocates and if they were not, it was their respective responsibility to keep track of the case from the start to the end especially the date of the judgment which was the climax of the entire suit at that level.

There was nothing like an affidavit from the Applicant’s previous Advocate to own up to his alleged contribution in failing to have the intended appeal filed within time. Therefore the reason given here by the Applicant that his previous advocate did not update and fully appraise him of the development concerning the case was just but a lame excuse which is insufficient and unsatisfactory for this court to exercise discretion in his favour.

7. In *Waweru and Another v Kirori* [2003] KLR 448; the Court of Appeal stated that: -

“the rules of the court must prima-facie be obeyed and in order to justify a court in extending the time during which some step in the procedure requires to be taken there must be material on which the court can exercise its discretion.”



This court may add that the material alluded to in the foregoing statement should not only be satisfactory but also cogent. In an earlier decision by the Court of Appeal in *Fredrick Jones Kinyua and Another v Wanda Baird* [2000] eKLR, it was stated that: -

“in an application of this nature, an Applicant must give a satisfactory explanation for the delay to warrant the court exercise its discretion in his favour.”

8. Generally, with regard to applications for extension of time to file an appeal, the principles set out by the Court of Appeal in the case of *Fakir Mohammed v Joseph Mugambi and Others* [2005] eKLR would apply “Mutatis-Mutandis” to the present application. In that case, it was held that: -

“the exercise of this court’s discretion under Rule 4 has (follows) a well beaten path.....

There is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted, the effect of delay on public administration, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors.”

9. In the present case, there was a delay of over two months in filing the appeal. This was unreasonable and inordinate and the main reason given by the Applicant was not established by cogent material neither was it satisfactory. The Applicant was simply indolent and equity, even the law, cannot aid an indolent party. The Applicant has also failed to demonstrate by cogent material any other satisfactory reasons for exercise of discretion in his favour.

Consequently, the leave sought in prayer (2) to file an appeal out of time is hereby declined thereby rendering prayer (1) for stay of execution pending the hearing and determination of the intended appeal baseless and a non-starter.

In sum, the application is dismissed in its entirety with costs to the Respondent.

Ordered accordingly.

DELIVERED AND DATED THIS 12TH DAY OF JUNE 2024.

J. R. KARANJAH,

JUDGE

