



REPUBLIC OF KENYA



KENYA LAW
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**Kimani v Chege (Civil Appeal E971 of 2023)
[2024] KEHC 6985 (KLR) (Civ) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6985 (KLR)

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

CIVIL

CIVIL APPEAL E971 OF 2023

CW MEOLI, J

JUNE 13, 2024

BETWEEN

JAMES CHEGE KIMANI APPLICANT

AND

EVANS CHEGE RESPONDENT

RULING

1. Before the Court for determination are two (2) motions dated 21.09.2023 and 03.11.2023 brought by the James Chege Kimani (hereafter the Applicant). For purposes of this ruling, this Court will hereafter refer to the applications as the 1st and 2nd motion, respectively.
2. The 1st motion seeks inter alia that the Court be pleased to enlarge the time for filing of the appeal herein; and that pending hearing and determination of the appeal an order to stay execution of the *ex parte* judgment and orders issued on 02.03.2023 in favour of Evans Chege (hereafter the Respondent) in Nairobi CMCC No. E3466 of 2022 (hereafter lower Court suit). The motion is expressed to be brought pursuant to Section 1A, 1B & 79G of the Civil Procedure Act (CPA), Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules (CPR). On grounds on the face of the motion as amplified in the supporting affidavit sworn by Applicant.
3. To the effect that on 02.03.2023 an *ex parte* judgment was issued in the lower Court suit for Kshs. 2,533,550/- plus interest and costs which is excessive and unreasonable in the circumstance. That he was unaware of the suit and only learned of the same through a friend, by which time the statutory period for filing an appeal had lapsed. He asserts that he has an arguable appeal with a high chance of success and stands to suffer substantial loss if the Court does not grant stay of execution. He further asserts that the Respondent will not suffer any prejudice or harm if the motion is allowed, while expressing willingness to abide by any condition on security as the court may impose. In conclusion,



- he states that it is just and proper for the 1st motion to be granted as prayed so that the appeal is not rendered nugatory.
4. On 22.09.2023, Visram, J. issued *ex parte* orders in respect of the 1st motion, by granting *inter alia* a temporary stay of execution pending hearing and determination of the 1st motion, on condition that the Applicant deposits the sum of Kshs. 2,000,000/- in Court within forty-five (45) days of the date of the grant of stay, failing which the stay would automatically lapse.
 5. It is on the premise of the foregoing, that on 03.11.2023, the Applicant filed the 2nd motion seeking *inter alia* that the Court be pleased to allow the Applicant to deposit security in the form of a Title Deed No. Mavoko Town Block 3/91664 (hereinafter the title) in lieu a cash deposit of Kshs. 2,000,000/-. The motion is equally expressed to be brought pursuant to Section 1A, 1B & 79G of the *CPA*, Order 42 Rule 6 and Order 51 Rule 1 of the *CPR* and on grounds amplified in the supporting affidavit sworn by the Applicant. The gist of his deposition being that, due to harsh economic times, he was unable to raise the deposit sum as ordered by this Court. That he is ready and willing to deposit the title in Court instead of the cash deposit. He further deposes his right of appeal to be heard on appeal ought not to be impeded due to his inability to raise the deposit sums.
 6. The Respondent opposed the 1st motion by way of a replying affidavit dated 21.11.2023. He takes issue with the Memorandum of Appeal on grounds that the same seeks to appeal against the *ex parte* judgment entered on 02.03.2023, whereas the Applicant had already filed before the lower Court a motion seeking to set aside the said *ex parte* judgment which was dismissed *vide* a ruling delivered on 08.09.2023. That while the Applicant may contest liability and quantum as apportioned in the impugned *ex parte* judgment, there is no basis upon which this Court can address the issues emanating from the ruling dated 08.09.2023 the Applicant not having appealed against the said ruling.
 7. He further deposes that the reasons advanced by the Applicant on failure to lodge an appeal within time are untrue and intent on misleading this Court, as he was at all a material times aware of the *ex parte* interlocutory judgment having filed an application to set aside the same. That on account of the foretated, the Applicant has not demonstrated good and sufficient cause for not filing the appeal on time and the delay in filing the present motion is inordinate.
 8. He goes on to assert that the appeal has no chance of success as it lacks legal basis and is intended to deny him the fruits of successful litigation, and that the Applicant has not shown likelihood of loss or prejudice if the motion is not allowed. In conclusion, he maintains that the 1st motion is an abuse of the Court process and ought to be dismissed, however in the alternative and without prejudice to the foretated, should the Court be inclined to allow the 1st motion, the Applicant ought to be ordered to furnish security by depositing the judgment sum in an interest earning account.
 9. On 17.04.2024, parties agreed that both motions be determined on the basis of their respective affidavit material on record. The Applicant was directed to deposit the sum of Kshs. 1,000,000/- into Court within fourteen (14) days, failing which the 2nd motion relating to the interim orders would stand, spent.
 10. The Court has considered the rival affidavit material canvassed. Evidently, the 2nd motion is spent as it was primarily concerned with interim stay orders. By the 1st motion, the Applicant seeks enlargement of time for filing of the appeal. 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 [CPA](#). Section 79G of the [CPA](#) 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.”

11. 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 *Thuita Mwangi v Kenya Airways* [2003] eKLR, 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.”

12. 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:

“(T)he 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.



13. Here, the Applicant's affidavit is marked by a deficiency of facts in support of the application. The Applicant merely asserting that "I was not aware that ex parte/interlocutory judgment had been issued against me and only came to learn of it through a friend at the Chief Magistrate's Court, Milimani after entry of the ex-parte/interlocutory judgment". The date when the purported information came to the Applicant's attention was not stated. On his part, the Respondent counters that the Applicant was at all a material times aware of the interlocutory judgment having earlier filed an application to set aside the said judgment.
14. From the respective affidavit material, and memorandum of appeal, it is apparent that the Applicant's challenge relates to the impugned *ex parte* judgment entered on 02.03.2023. However, it appears that the Applicant had prior to approaching this court, properly filed before the lower Court an application, dated 16.02.2023 seeking to set aside the ex parte judgment, which motion was dismissed on 08.09.2023. Thereafter, the Applicant moved this Court vide the 1st motion seeking to appeal, not from the ruling on the motion before the lower court, but the ex parte judgment.
15. Hence clearly, by the date of his motion in the lower court, the Applicant was aware of the ex parte judgment. The Applicant is mixing matters here. It is difficult to see how his explanation that he was unaware of the ex parte judgment applies to a proposed appeal that is premised on the very ex parte judgment which was the subject of his earlier lower court motion, rather than the ruling. See annexures marked "EC 1" & "Annexure EC-2". Ideally, the subject of the Applicant's memorandum of appeal ought to have been the ruling rendered on 08.09.2023 and not the ex parte judgment of 02.03.2023. By filing an application for leave in respect of the ex parte judgment, the Applicant blundered because, by the date of the said 1st motion, the Applicant was still within time to file an appeal in respect of the ruling of the lower court on the motion for setting aside, hence obviating the need for leave.
16. That said, 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 explanation proffered is wanting, not to mention the long period of delay since the ex parte judgment.
17. 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 favorably exercisable....."
18. A motion of this nature principally stands or falls on the demonstration of "good and sufficient cause" by an applicant; it is what unlocks the Court's discretion. The Court agrees with the Respondent that the Applicant has not demonstrated "good and sufficient cause". 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 a blundering party who squanders his legal options has only himself to blame. He cannot expect the respondent to suffer prejudice arising from his default. The prayer for leave to appeal out of time has not been justified. The Court finds no merit in 1st motion upon which the 2nd motion is premised. Both are hereby dismissed with costs.

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



C.MEOLI

JUDGE

In the presence of:

For the Applicant: Mr. Manoti h/b for Mr. Masara

For the Respondent: Ms. Ndwiga h/b for Mr. Momanyi

C/A: Erick

