



Kinyanjui & another v Matara & another (Suing as the administrator of the Estate of the Late Francis Matara Chege (Deceased) (Miscellaneous Application E182 of 2023) [2024] KEHC 8597 (KLR) (15 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8597 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS APPLICATION E182 OF 2023
DO CHEPKWONY, J
JULY 15, 2024**

BETWEEN

DANIEL MUIRURI KINYANJUI 1ST APPLICANT

JOHN NGUGI KARIUKI 2ND APPLICANT

AND

PAUL CHEGE MATARA AND JANE WANJIKU WANYOIKE (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE FRANCIS MATARA CHEGE (DECEASED) RESPONDENT

RULING

1. For determination before the court is the Notice of Motion application dated 25th September, 2023 which seeks the following orders:-
 - a. Spent.
 - b. Spent.
 - c. This Honourable court do issue stay of execution in Kiambu Civil Suit No. E434 of 2022, Paul Chege Matara vs Jane Wanjiku Wanyoike (Suing as the Administrator of the estate of the late Francis Matara Chege - deceased versus Daniel Muiruri Kinyanjui & John Ngugi pending the hearing and determination of the intended Appeal.
 - d. The Applicant be granted leave to appeal out of time the judgment delivered on 20th June, 2023 and the consequential orders emanating therefrom.
 - e. That costs of this application be provided for.



2. The Application is based on the Supporting Affidavit of Daniel Muiruri Kinyanjui sworn on 25th September, 2023 and the following grounds as set out on the face of it:
 - a. The Applicant intends to appeal against the Judgment by E. Ominde, Chief Magistrate delivered on 20th June, 2023.
 - b. The subject appeal is arguable with high chances of success for the reasons that the appeal is challenging the honourable court's award of general damages which were inordinately high so as constitute a miscarriage of justice.
 - c. The delay in filing the appeal was occasioned by the fact that the advocate in conduct of the matter left the firm with no proper handover and the firm is still reconciling its records with respect to that lawyer.
 - d. The delay in loading the appeal was purely inadvertent and is excusable.
 - e. There is good explanation for the failure to file within prescribed time.
 - f. The delay was not inordinate.
 - g. It is in the interest of justice that the Applicants be granted extension of time within which to file an appeal.
3. The Respondents opposed the application through the Grounds of Opposition dated 2nd October, 2023 on the following grounds:
 - a. That the Appellants have failed to satisfy the conditions set out under Order 41 Rule 6 of the Civil Procedure Rules 2010, and an order for stay of execution pending the hearing and determination of their appeal cannot issue.
 - b. That the Appellants have failed to demonstrate what substantial loss they are likely to suffer unless the orders sought are issued.
 - c. That the Appellants have not given any security for due performance of such decree or order as may ultimately be binding on them.
 - d. That the Appellant's application lacks merit is flawed untenable misconceived and it is interest of justice that their application be dismissed with costs to the Respondents.
4. On 27th September, 2023, the court directed the application to be dispensed by way of written submissions and the Applicants filed theirs dated 6th November, 2023 and the Respondent filed theirs dated 11th November, 2023 all which the court has gone through and will consider the arguments raised therein in determining the application.

Analysis and Determination

5. Having read through the Supporting Affidavit of the 1st Applicant, Daniel Muiruri Kinyanjui, the Grounds of Opposition filed by the Respondent and the written submissions filed by the parties, I find the main issue for determination being whether the application as merit to warrant grant of the orders sought therein that:-
 - a. Whether the court should grant the Applicant leave to appeal our of time.
 - b. Whether the court should grant stay of execution.



Leave to Appeal out of time

6. The law on the time within which to file an appeal is provided for under Section 79 G. of Civil Procedure Act which states as follows:-

“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”.

7. The principles applicable to an application for enlargement of time were discussed by the Supreme Court in the case of Nicholas Kiptoo Arap Korir Salat -vs- 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 under-lying 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 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 on 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 respondents if the extension is granted;
6. Whether the application has been brought without undue delay; ...

8. In the instant case, I have read through the Applicant’s affidavit and submissions to establish if he is deserving of the orders he is seeking. According to the Applicant, he intends to appeal against the Judgment delivered on 20th June, 2023 in Kiambu Civil Suit No.E434 of 2022 but time has lapsed. He explains that the delay was not intentional but was caused by the conduct of the advocate who was handling the matter and left the Law Firm without properly handing over of the matter. He has urged that the mistake of this advocate should not be visited upon the client, the Applicant.

9. Having considered the reasons advanced by the Applicant on why there has been a delay in filing the application and appeal, the court finds that since the Judgment was delivered on 20th June, 2023, and the instant application being dated 25th September, 2023, it is clear that the delay was close to four (4) months, which is not quite inordinate. However, although this Court finds that the Applicant’s reasons for the delay are not quite satisfactory, this Court proceeds in exercise of its discretion as provided for under Section 3A of the Civil Procedure Act and in the interest of justice and fair trial to allow the Notice of Motion application dated 25th September, 2023 on the following terms:-



- a. That there be a stay of execution pending the hearing and determination of the appeal on condition that:-
 - i. The Applicant deposits ½ (half) the decretal sum in court within thirty (30) days from the date hereof.
 - ii. The Applicant be and is hereby granted leave to file an appeal out of time, and the draft Memorandum of Appeal dated 25th September, 2023 attached be deemed as duly filed and served.
- b. The Appellant to file and serve the Record of Appeal within forty-five (45) days from the date hereof.
- c. The Deputy registrar to call for and avail the original record of proceedings in Kiambu Civil Suit No.E434 of 2022, Paul Chege Matara –vs- Jane Wanjiku Wanyoike.
- d. Failure to comply with directions and or order (a) and (b) will render the Notice of Motion application dated 25th September, 2023 will stand as dismissed and stay orders issued herein discharged.
- e. Mention on 17th July, 2024 before the Deputy Registrar for parties to confirm compliance and for further directions to issue.

It is hereby ordered.

**RULING DATED, SIGNED AND DELIVERED AT KIAMBU VIA ELECTRONIC MAIL THIS
15TH DAY OF JULY, 2024.**

D. O. CHEPKWONY

JUDGE

