



Mohamed v Elmi (Civil Appeal E001 of 2023) [2024] KEHC 8690 (KLR) (18 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8690 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CIVIL APPEAL E001 OF 2023
SM GITHINJI, J
JULY 18, 2024**

BETWEEN

KURESHA ADEI MOHAMED APPELLANT

AND

AHMED ELMI RESPONDENT

*(Being an Appeal from the Judgment dated 7th December, 2022 delivered by Honourable Kadhi Mursal Mohamed, Garsen KCDC No. E022 of 2022) ***** * CORAM:
Hon. Justice S. M. Githinji Komora & Associates Advocates for the Appellant/Applicant Lughanje & Co. Advocates for the Responden)*

RULING

1. The Applicant herein has filed a Notice of Motion application brought under Order 22 Rule 22, Order 42 Rules 4, 6 and 7, Section 79G of the Civil Procedure Act, Order 51 Rules 1 and 3 of the Civil Procedure Rules under Certificate of Urgency dated the 1st day of November, 2023 seeking the following orders:
 1. Spent.
 2. Spent.
 3. That this Honourable Court be pleased to enlarge time within which the appellant ought to file the appeal and direct specified time limits as it may deem just. And if order no. 3 is granted, court be pleased to reinstate the applicant's intended appeal dated 6th January, 2023, filed out of time on 18th January, 2023 and deem it as properly filed.
 4. Spent.
 5. That the costs of this application abide the outcome of the intended Appeal.



2. The application is supported by grounds on the face of it as well as the supporting affidavit sworn by the Appellant Kuresha Adei Mohamed on the same day. He deponed that he filed an appeal dated 6th January, 2023 on 18th January, 2023 and an application for stay of execution pending appeal. The application was subsequently dismissed. The applicant/appellant now wants to regularize the appeal by seeking leave for enlargement of time to file the intended appeal out of time and consequently stay of execution pending its determination.
3. He also deponed that he has an arguable appeal with high chances of success and that the Respondent does not stand to suffer any prejudice if court grants the orders sought.
4. In Response to the said application, the Respondent filed a Replying affidavit sworn on the 6th day of December, 2023. He deposed that the application ought to be dismissed as it is anchored on an appeal that does not exist. That on 27.10.2023 the court struck out his appeal whose enlargement of time is sought.

Disposition

5. I have considered the application and in my view the issue of stay of execution of the Orders in Garsen Kadhi's case No. KCDC No. E022/2022 had been dealt with in the ruling of 27.10.2023. What now remains for determination is the issue of whether this court ought to enlarge time within which the appellant may file the appeal.
6. On the issue of leave to file an appeal out of time, the applicable provision is Section 79G of the [Civil Procedure Act](#) which expresses that appeals must be filed within a period of 30 days from the date of the decree or order from which the appeal lies. The proviso to the said section, however, allows for extension of time to appeal where good and sufficient cause has been shown. As such, extension of time within which to file an appeal is a matter of judicial discretion.
7. The applicants' prayer for leave to file appeal out of time can only be granted if he satisfies the court that he had good and sufficient cause for not filing the appeal in good time. The Supreme Court of Kenya sitting at Kisumu in the case of County Executive of Kisumu vs County Government of Kisumu & others (2017) eKLR while relying to its decision in the case of Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others Application No. 16 of 2014 (2014) eKLR the Hon. Judges reiterated the considerations to be made in such a case to be as follows:
 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; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."



8. An applicant seeking enlargement of time to file an appeal must show that he has a good cause for doing so. The applicant in the present application had a duty to persuade this court to enlarge time within which to file the appeal, I have perused the grounds on the face of the application as well as the supporting affidavit and I am not convinced that the applicant has given any good and sufficient reason to warrant enlargement of time. I have also considered that the Judgment of the trial court was delivered on the 7th day of December, 2022 and the record of appeal was filed later in September, 2023. In my view, the application is an afterthought and was only triggered by the execution process.
9. It is my considered view therefore, that, in the circumstances herein, the applicant has not satisfied the conditions for grant of the orders of stay of execution as well as leave to appeal out of time as prayed under prayer (3) of the Application dated 1st November, 2023.
10. In the end, I find that the application dated 1st November, 2023 in want of merit and the same is dismissed with costs to the respondent.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 18TH DAY OF JULY, 2024.

S.M. GITHINJI

JUDGE

In the Presence of;

Mr Komora for the Appellant

Mrs Otieno for the Respondent – (absent)

