



**Omulama (Suing in Her Own Capacity and as a Legal Representative of the Estate of Francis Ambetsa Munyanya - Deceased) v Attorney General & another (Civil Appeal E17 of 2020) [2024] KEHC 8989 (KLR) (18 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8989 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL APPEAL E17 OF 2020  
SC CHIRCHIR, J  
JULY 18, 2024**

**BETWEEN**

**ALICE AWINJA OMULAMA (SUING IN HER OWN CAPACITY AND AS A LEGAL REPRESENTATIVE OF THE ESTATE OF FRANCIS AMBETSA MUNYANYA - DECEASED) ..... APPLICANT**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**MICHAEL ASHIENE OMIDO ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Through the Notice of motion dated 25<sup>th</sup> August 2023 brought under Sections 79G, section 1A,1b,3 and 3A, of the *Civil Procedure Act* Cap 21 the Applicant seeks for the following orders:
  - a) That the Applicant be granted leave to file her appeal out of time against the judgment dated 07/10/2022
  - b) That there be a stay of execution of the High court's Judgment dated 07/10/2022 pending hearing and determination of this suit (sic).
  - c) That there be a stay of execution of the High Court's judgment dated 07/10/2022 pending hearing and determination of the Appeal.
2. The Motion is supported by the grounds appearing on the face of the Application, as well as an Affidavit sworn by the advocate on record.
3. The Advocate states that he received instructions from the applicant to institute the suit against the defendant at the lower court for refund of funeral expenses incurred when the after the deceased was hit while undergoing his sentence at Kakamega G.K prison.



4. He further states that the lower court suit was dismissed on 08/08/2019 by the trial court for want of prosecution and an Application to reinstate it was equally dismissed on 20/8/2020.
5. This prompted him to move to this court, seeking to set aside the lower court's dismissal order of 20/08/2020. This court ( Musyoka J) heard the Appeal and dismissed it on 07/10/2022.
6. It is the high court order of 07/10/2022 that the Applicant wishes to be granted leave to file an appeal against and a stay of execution of the same orders.
7. The Advocate claims that since the delivery of judgment he had made an effort to reach the Applicant, to inform her about the outcome but which efforts were futile; that he finally reached her on may 2023.
8. It is stated that the delay was occasioned by the loss of contact between the firm and their client.
9. The Applicant further argues that the appeal has a high chance of success ;that it raises real triable issues which the court should look into, and consider in the interest of justice.

### **Applicant's Submissions**

10. The Applicant reiterates the reason for the delay and urges the court to take into account the fact that its mandate is to do justice to parties ; that the exercise of the discretion should be done judiciously. In this regard she has relied on the case of *CMC holding Ltd vs Nzioki* (2004) eKLR 173.
11. It is submitted that the court should not visit the mistake of the counsel on its client and that it should dispense substantive justice without undue regard to procedural technicality.

### **Determination**

12. The Jurisdiction of the high court to extend time for filing Appeals from its judgements is founded on section 7 of the *Appellate jurisdiction Act*. The section provides as follows: “ The high court may extend the time for giving Notice of intention to appeal from a judgment of the high court or for making an Application for leave to appeal or for certificate that the case is fit for appeal , notwithstanding that the time for making such appeal may have already expired.....”
13. The decision to extend time is at the discretion of the court and the principles that guide the exercise of the said discretion has been the subject of many past decisions of the superior courts.
14. The court of appeal in the case of *Thuira Mwangi v Kenya Airways Ltd* [2003] eKLR set out the considerations as follows:
  - i) The period of delay
  - ii) The reason for the delay;
  - lii) The arguability of the appeal;
  - IV) The degree of prejudice which could be suffered by the if Respondent the extension is granted;
  - V) The importance of compliance with time limits to the particular litigation or issue; and
  - vi) The effect if any on the administration of justice or public interest if any is involved.
15. The explanation for the delay is that there was a lose of contact between the Applicant and her advocate, and hence the client could not be informed of the delivery of the high court judgment of 17/10/2022, so as to, presumably ,make a decision on whether to appeal or not.



16. The judgment was delivered on 07/10/2022 while the present application was filed on 25<sup>th</sup> August 2023, a delay of about 11 months. I consider the delay to have been inordinate.
17. The applicant has submitted that the delay was occasioned by their inability to trace their client and inform her of the outcome of the judgment.
18. I have considered the reasons for the delay. The Advocate said he lost contact with the client. This suggests that he had been acting for the Applicant all along. It is expected that he had the email or at least the telephone contacts of his client in his records. In the circumstances, the “loss of contact” should have been explained further. How did the counsel lost contact of a client whom he had represented right from the lower court , all the way to the appeal before this court?
19. Further there is no explanation from the Applicant herself as to why she did not follow up her case. If she was actively following up her case, then the issue of lost contacts would have been a non- issue.
20. I also note that despite the Advocate stating that he traced the client in may 2023, there is no explanation as to why the filing of the Application was done 3 months later , that is , on August 2023.
21. The importance of giving a sufficient reason for the extension of time to appeal was discussed in the supreme court decision in the case of Nicholas Kiptoo Arap Korir Salat v IEBC (2014) eKLR Sup Ct Application No 16 of 2014 where the court stated: “ ... extension of time is not a right of a party; a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court. Of paramount importance, the reason for delay must be explained to the satisfaction of the Court “
22. Considering the circumstances of this case as set out above, I do find that the explanation for the delay is far from being sufficient.
23. The Applicant has further argued that the mistakes of an Advocate should not be visited upon the client. However, in this case, the mistakes were not just on the part of the advocate. There are indications that the Applicant was equally indolent. It is an act of indolence to hire an Advocate and disappear completely from the scene. Cases belong to litigants, not their Advocates.
24. The Applicant cannot therefore approach this court in the disguise of “mistakes of an Advocate “ while she has not demonstrated that she made efforts to get in touch with her Advocate. It is instructive that the Applicant has not sworn an Affidavit to explain her side of the story.
25. In Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR the court had this to say about the tendency of litigants to blame their Advocates for all manner of ills : “ it is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions in the conduct of litigation. Courts have always emphasized that the parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel. In Mwangi v Kariuki (199) LLR 2632 (CAK) Shah, JA ruled that mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant’s careless attitude.”
26. In any event the history of this case is littered with acts of indolence on the part of the Applicant. The suit was instituted in the lower court on 4<sup>th</sup> October 2018. The Applicant failed to prosecute it, and it was consequently dismissed for want of prosecution.
27. That first dismissal should have been a wake- up call to the Applicant, and should have spurred her into vigilance during the subsequent attempts to revive it. The delay in filing the Appeal against the judgment of the high court, demonstrate that the Applicant never learned any lesson from that first dismissal at the lower court.



28. The applicant has relied on Article 159(2)(d) of the *Constitution* in urging the court to consider the substantive justice . However , it is now well settled that Article 159 (2) (d) of the constitution is not a panacea for all procedural ills. In *Nicholas Kiptoo Arap Salaat vs IEBC and 6 others*(2013) eKLR, Justice P. Kiage had this to say about the tendency to take cover under the aforesaid Article of the constitution: “ Iam not in the least persuaded that Article 159(2) (d) of the *Constitution* and the oxygen principles which both command the courts to do substantial justice in an efficient, proportionate and cost- effective manner and to eschew defeatist technicalities were ever meant to aid and overthrow or destruction of rule of procedure and to create an anarchical , free- for- all in the administration of justice. This court , and indeed all courts must never provide succor or cover to parties who exhibit scant respect for Rules and timelines.”
29. The delay has not been sufficiently explained . This court has no basis to grant the prayer sought.

**Whether stay of execution should be granted.**

30. I do not understand what the Applicant wants this court to stay. The Applicant wanted this court to reinstate a suit. This court said “ No”. what this meant was that the suit in the lower court remained dismissed. There is no order capable of being stayed therefore. This prayer is not capable of being granted. It is hereby dismissed.
31. There is no merit in the entire Application dated 25<sup>th</sup> August 2023.It is hereby dismissed.
32. Each party to meet their own costs.

**DATED , SIGNED AND DELIVERED AT KAKAMEGA THIS 18<sup>TH</sup> DAY OF JULY 2024.**

**S. CHIRCHIR**

**JUDGE**

In the presence of :

Godwin- Court Assistant.

Michael Omido- 2<sup>nd</sup> Respondent

