



Bohoko v Mitau t/a Mombasa Fresh Water Supply Company (Civil Appeal E328 of 2024) [2024] KEHC 17261 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KEHC 17261 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E328 OF 2024
F WANGARI, J
SEPTEMBER 20, 2024**

BETWEEN

MATIKO BOHOKO APPELLANT

AND

**PETERSON MITAU T/A MOMBASA FRESH WATER SUPPLY
COMPANY RESPONDENT**

*(Being an appeal from the Ruling of Hon. J.B. Kalo Chief Magistrate,
delivered on 25/05/2024 in Mombasa RMCC No. 626 of 2000)*

RULING

1. This is a Ruling over an Application dated 03/10/2024. The Appellant seeks for orders for stay of execution of the Ruling delivered on 25/05/2024 by Hon. J.B Kalo pending the hearing and determination of this application and appeal. The Applicant also seeks for leave to file appeal out of time and the Amended Memorandum of Appeal filed be deemed to have been properly filed.
2. The grounds upon which the Application is made is that the Applicant was dissatisfied with the Ruling of the court dismissing the application to set aside the default judgment against the Appellant I the lower court. It was stated that the filing of the Memorandum of Appeal out of time was due to unforeseen reasons. It was further stated that if the orders were not issued, the appeal would be rendered nugatory.
3. The Respondent filed Replying Affidavit dated 14/10/2024 and averred that the Application was unmerited and should be dismissed principally because the Applicant had not met the conditions for grant of stay of execution and enlargement of appellate time.
4. The Judgment in issue was delivered on 01/11/2026 which is over 8 years ago. It is after the Appellant was served with the Notice of Execution that he filed the Notice of Motion dated 08/12/2023 seeking



to set aside the default judgment, and the same was dismissed in the Ruling dated 25/05/2024, which ruling is the subject of this application.

5. The Appellant had filed in the lower court a Notice of Motion dated 29/05/2024 seeking for review of the Ruling, but the same was withdrawn. In the meantime, execution proceedings took place and the Appellant was ordered to pay the decretal amount in monthly instalments of Kshs. 80,0000/= until payment in full. This was after the consideration of the Affidavit of Means that was filed by the Appellant.
6. The Appellant filed a Further Affidavit dated 18/10/2024, without leave of court, blaming his previous advocates on record for misleading him and not taking proper instructions from him. He prays that his application be allowed to enable him defend the suit.
7. It was directed that the application would be disposed of by way of written submissions. Both parties complied with the directions by filing their rival submissions in support of their arguments.

Analysis

8. The issue before me is whether the delay in lodging a Memorandum of Appeal has been satisfactorily explained. If the reason for delay is not sufficient, then the issue as to whether stay of execution should be granted, will not fall for determination because there will be no Appeal.
9. Waki, JA in *Seventh Day Adventist Church East Africa Ltd. & Another vs. M/S Masosa Construction Company* Civil Application No. 349 of 2005 held that;

“As the discretion to extend time is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant; the period of 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 the delay on public administration, the importance of compliance with the time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors...In an application for extension of time, each case must be decided on its own peculiar facts and circumstances and it is neither feasible nor reasonable to lay down a rigid yardstick for measuring periods of delay as explanations for such delays are as many and varied as the cases themselves...The ruling striking out the appeal is not only necessary for exhibiting to the application for extension of time but also for consultations between the applicant’s counsel and their clients and the fact that the ruling was returned to Nairobi for corrections is a reasonable explanation for the delay... Where the Respondent has already recovered all the decretal sum and costs attendant to the litigation, the right of appeal being a strong right which is rivalled only to the right to enjoy the fruits of judgement, no prejudice would be caused to the respondent who has enjoyed his rights in full if an opportunity is given to the applicants to enjoy theirs too, even if it is on a matter of principle.

10. It is imperative to note the Supreme Court of Kenya decision (*M.K. Ibrahim & S.C. Wanjala SCJJ*) in *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR where the learned Judges held 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 reasonable reason for the delay. The delay should be explained to the satisfaction of the court.

11. It follows therefore that the Applicant's explanation for the delay is key in guiding the Court's exercise of discretion on the issue of leave to appeal out of time.
12. I have perused the Application and the Supporting Affidavit. The Applicant in paragraph (20) of the Supporting Affidavit states that the he had instructed his previous advocates to file an appeal on time but he failed to do so.
13. I have also perused through the submissions filed by the Appellant dated 28/02/2025, the same position is reiterated blaming the advocates for the delay in filing of the appeal. It cannot be said that the Appellant was not aware of the Ruling delivered. The Appellant gave his previous advocates to file an appeal against the Ruling of the court but he went to slumber. There is nothing to show that the Appellant did follow-ups on his intended appeal with his counsel.
14. In *Duale Mary Ann Gurre –Vs – Amina Mohamed Mahamood & Another* [2014] eKLR, it was held as follows: -

“An advocate is the agent of the party who instructs him and such instructing client as the principal continues to have the obligation and the duty to ensure that the agent is executing the instructions given. In the case of litigation, the suit belongs to the client and the client has an obligation to do follow up with his Advocate to ensure the Advocate is carrying out the instructions as given. The litigation does not belong to the Advocate but to the client. If the Advocate commits a negligent act the client has an independent cause of action against the Advocate.”
15. I find that the Appellant has failed to give reasons for the delay that should guide this court to exercise discretion in his favour.
16. Section 79 G of the *Civil Procedure Act* provides as doth: -

“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.
17. Therefore, in my view, without a valid reason, this court has no jurisdiction to extend time. This is an exercise of discretion. Unless the court is properly moved, it has no power to exercise discretion. It is not by whim but through judicious consideration that such an application is considered.
18. Given the circumstances of the case, the Respondent is entitled to the fruits of the judgment. The threshold for granting orders to file appeal out of time has not been met. This is a proper application to dismiss with costs.



Determination

19. In the circumstances I make the following orders: -

- a. The Application dated 03/10/2024 lacks merit and is accordingly dismissed.
- b. In order to bring this litigation to an end, each party to bear its own costs.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 20TH DAY OF SEPTEMBER, 2024.

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F. WANGARI

JUDGE

In the presence of: -

N/A by the Applicant.

Ms. Musyoki Advocate h/b for Mr. Mutugi Advocate for the Respondent.

Ms. Getrude, Court Assistant

