



REPUBLIC OF KENYA



Alice Nangila Ndeto t/a Alinang Ventures v Francesca (Civil Miscellaneous Application 19 of 2023) [2024] KEHC 12348 (KLR) (15 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12348 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL MISCELLANEOUS APPLICATION 19 OF 2023**

FR OLEL, J

OCTOBER 15, 2024

BETWEEN

ALICE NANGILA NDETO T/A ALINANG VENTURES APPELLANT

AND

REV SR. DR. SIMON MUMBUA FRANCESCA RESPONDENT

RULING

1. The Application before court for determination is the Notice of Motion application dated 3rd February 2023 seeking the following orders;
 - a. Spent
 - b. spent
 - c. Pending the hearing and determination of the intended Appeal, this Honourable court be pleased to grant a stay of execution of the Judgement and decree of the small claims court (Hon B.A Luova) delivered in Machakos small claims commercial claim No 211 of 2022 (Alice Nangila Ndeto T/A Alinang Ventures Vrs Rev Sr Dr Simon Mumbua Francesca) issued on 19th December 2022.
 - d. This Honourable court be pleased to grant the Applicant/ Intended Appellant leave to file her intended Appeal out of time.
 - e. This Honourable Court be pleased to issue any other/further order that it deems fit in the circumstances of the case.
 - f. The costs of the Application be in the cause.
2. The Application is supported by the Supporting Affidavit of the applicant, Alice Nangila Ndeto sworn on an even date, who stated that the trial court found in favor of the respondent in the counter claim



and entered judgment against her in the sum of Kshs.536,132.74/= plus costs and interest, while simultaneously dismissing her suit despite finding that both parties had breached the contract under consideration. That after judgment, she was granted 30 days stay of execution which lapsed on 20th January 2023 but had been unwell for most of the said month thus failed to instruct her advocate on time to file the said Appeal on time.

3. The court has inherent jurisdiction to enlarge time, so as not to render the appeal to be an academic exercise and also to enable her exercise her right of Appeal, which was an integral tenet of right to fair trial.
4. The Respondent filed her replying affidavit on 02.03.2023 where she deponed that after judgment was delivered, the Applicant went round to her religious administrative superior's office located at Bura, Taita Taveta and their Congregation's headquarters at Mombasa to besmirch her name, claiming that she had corrupted the trial court to secure a judgment in her favour.
5. The application as filed was therefore an afterthought as no evidence had been attached to prove the applicant's illness. To the contrary she had proved that in January 2023, the applicant put her all her energy and concentration to running around to her superiors' offices to besmirch her name and also tarnish the trial courts name. The applicant having unfairly cast aspersions on the court, had moved court in bad faith and with unclean hands thus undeserving of equitable orders. The respondent also stated that the Appeal as filed was frivolous, did not raise any triable issue and prayed that the same be dismissed.

Analysis & Determination

6. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and discern that the issues which arise for determination is whether the applicant should be granted leave to appeal out of time and further whether the decree appealed against should be stayed pending Appeal.

7. Section 79G of the *Civil Procedure Act* states:-

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 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.

8. The Supreme Court in the case of Nicholas Kiptoo Korir Arap Salat vs 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:-

“The underlying principles a court should consider in exercise of such discretion should include:-

- a. 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;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;



- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
 - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
 - f. Whether the application has been brought without undue delay.
9. As stated in the case of *salat(Supra)* whether or not to grant an order for extension of time to Appeal, is a discretionary order made on considering the facts of the case, and the applicant has an obligation to give a plausible reason as to why there had been a delay in filing the said Appeal. The appellant alleged that she was unwell, but did not provide any proof of illness, to the contrary the respondent did provide proof of circumstances to show that the applicant in January 2023, was busy perambulating at their church headquarters besmirching the respondents name by insinuating that she had compromised the court to award judgment in her favour. These averments were not denied.
10. The applicant is therefore before court with unclean hands and cannot seek equitable remedy with soiled hands. In the absence of the requisite proof from the Appellant that she was unwell, I find that the applicant's plea for extension of time is not merited and the same is denied.
11. There being no Appeal, the issue of stay of execution of the decree challenged does not arise. This court also notes that on 08.02.2023 the Appellant was directed to deposit half the decretal sum in joint interest earning account with 60 days but failed to do so. That also is a clear sign of lack of seriousness on her part in perusing this Appeal.

Disposition

12. The upshot is that the Application dated 3rd February 2024 lacks merit and is dismissed with costs to the respondent.
13. The said costs are assessed at Kshs.20,000/= all inclusive.
14. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS ON THIS 15TH DAY OF OCTOBER, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this 15th day of
October, 2024

In the presence of: -

Mr. Wambugu for Appellant

Ms Mutua for Respondent

Susan Court Assistant

