



REPUBLIC OF KENYA



**Karangu v Kanyoro (Civil Appeal E800 of 2023)
[2024] KEHC 12802 (KLR) (Civ) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12802 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E800 OF 2023

JN MULWA, J

OCTOBER 24, 2024

BETWEEN

SIMON MBIRUA KARANGU APPLICANT

AND

CHRISTOPHER MBUGUA KANYORO RESPONDENT

(Being an appeal from the decision of the lower Court issued on 30th April, 2020 in Milimani Magistrate Court MCCC 8356 of 2018 delivered by Hon. P.N. Gesora (Mr.) (CM.)

RULING

1. By a Notice of Motion dated 17th August, 2023, filed under Certificate of Urgency the Applicant moved Court seeking several orders, but mainly:-
 1. Spent.
 2. That the Honourable Court be pleased to enlarge time and grant the Appellant/ Applicant leave to appeal out of time against the decision of Hon. P.N. Gesora (Mr.) (C.M) delivered on 30th April 2020.
 3. That the consequential orders of the default judgment entered against the Appellant/ Applicant be stayed pending the hearing and determination of this application be granted upon the Appellant/Applicant depositing half of the decretal sums in court.
 4. That the consequential orders of the default judgement entered against the Appellant/ Applicant be stayed pending the hearing and determination of this Appeal be granted upon the Appellant/ Applicant depositing half of the decretal sums in court.



5. That this Honourable Court be pleased to direct the Officer In Charge of Pangani Police Station to produce the original Occurrence Book containing OB 8/2019/2015 as was reported to the police station on 22/9/2015.
 6. That prayer 5 above, the Honourable Court be pleased to enquire and or take evidence of the authenticity of the Police Abstract produced by the Respondent at the trial Court and take appropriate measures if it is found to be a forgery.
 7. That the costs of this Application be provided for.
2. The Application was opposed by a Replying Affidavit sworn by Lilian Muthoni Njuguna - Advocate in conduct of the matter dated 19th September 2023.

The Respondent stated;

- a. That the Applicant's application is frivolous, vexatious and an abuse of the court process and it is only intended to frustrate, deny and delay the Respondent from enjoying the fruits of the judgment entered in his favour on the 15 February 2019 in Milimani CMCC NO 8356 OF 2018.
- b. That the Applicant claims that he only learned that he instructed Millimo Muthomi & Company Advocates upon being served with our response to his Application filed in the trial court dated 5 July 2023. However, in an Affidavit sworn on the same date in support of his application, he admitted having instructed the said firm. Annexed hereto and marked "LMN 1 is a true photostat copy of his said Affidavit.
- c. That the Applicant alleges that the application to cease acting was not served upon him by the firm of Millimo. Muthomi & Co. Advocates, which is not true. The application was duly served upon him through the WhatsApp platform to his Telephone Number 0722387441 as evidenced by the Affidavit of Service sworn on the 15th day of February 2023 by the process server, one, Onesmus Kisinga Ing'oka, Annexed hereto and marked "LMN 2" and "LMN 2 (a) are true photostat copies of the said Affidavit and WhatsApp screenshot, respectively.
- d. That the Applicant appears to blame his previous Advocates for allegedly having failed to keep him informed about the proceedings in the lower court. He has however not shown what steps he took in following up on the matter with them. It is trite law that cases belong to parties and not their Advocates.
- e. That the Applicant's allegation that the Police Abstract used to prove the case in the trial court does not exist is an afterthought and there is no evidence before the court to support the same. Further, this is an issue which could only have been raised in the lower court by way of a Defence which the Applicant never filed.
- f. That there has been inordinate delay in filing the application herein and no sufficient and/or good cause has been shown as to why the Ruling delivered on the 30th April 2020, over three years ago, should be stayed and or why time for filing an Appeal against the said Ruling should be enlarged.
- g. That the Applicant has not given the grounds upon which he wishes to appeal against the said Ruling. The intended Appeal is therefore a non-starter and with no likelihood of success whatsoever. It is therefore in the interest of justice that this application be dismissed.



- h. That the Respondent shall be prejudiced if the orders sought are granted as he has been vigilant in pursuing his rights over the years whereas the Applicant has been indolent, never took any tangible steps to defend himself and has only woken up when execution is imminent. He has not shown what irreparable loss he will suffer if the orders sought are not granted as he alleges.
 - i. That in view of what I have stated hereinabove, it is clear that there is no good reason for the grant of the orders sought in this application. Consequently, we pray that the same be dismissed with costs to the Respondent.
 - j. That the contents of this Affidavit are true to the best of my knowledge, information and belief save where otherwise expressly stated.
3. The Applicant/Appellant filed its further affidavit dated 23rd February, 2024 and stated ;
- a. That it was aware that the purpose of instituting this appeal was one fold: to have the Pangani Police Station produce the occurrence book under which OB. NO. 8/2019/2015 was recorded. The purpose of having the said Occurrence Book produced before this court is to ascertain the entry and or recording of the alleged accident in the Occurrence Book.
 - b. That from its own knowledge, upon receiving the Respondent's Response to its application dated 5th July 2023 filed at the lower court, it proceeded to Pangani Police Station to peruse the Voluminous Occurrence Book in which the Respondent alleged that an entry had been made. To its surprise, upon being issued with the said book, and upon perusing two other Occurrences Books, it discovered that no entry to the Occurrence Book(s) had been made.
 - c. That based on its perusal and what it discerned from the same therein, it's of the opinion that there never happened any accident between its motor vehicle and that of the Respondent as alleged. This is so because police officers from the station informed it that in accident cases, a complaint has to be made first and the same ought to be recorded in the Occurrence book, upon investigations a Police Abstract will be issued to enable the aggrieved party pursue legal means to ensure that they are compensated.
 - d. That in this case, considering the fact that there is no record of the alleged accident contained in the Occurrence Book, he is of the opinion that at the very least the Respondent connived with other which he later used in the prosecution of his case.
 - e. That based on the above facts, its position that its previous Advocates on record would have deduced the fact that the case against it at the lower court was hogwash and was only instituted to frustrate and or reap it off from its hard-earned economic investments.
 - f. That based on the above facts, it's his position that his previous Advocate on record would have easily deduced the fact that the case against him at the lower Court was hogwash and was only instituted to frustrate and or reap him off his hard earned economic investments.
 - g. That in order for justice to seem to be done, I humbly come before this Honourable court seeking equity since at the very least, I have been informed by my Advocates on record that this Honourable Court is not only a court of law but also of equity.
 - h. That lastly, it believes that justice will be done /not to it but also the Respondent if the Honourable Court orders the officer in Charge of Pangani Police Station to produce the Occurrence Book containing OB. No. 8/2019/2015. Such production will enable this court to help the parties reach a logical conclusion in this matter and should the entry be confirmed, it undertakes to abide by this Honourable Court's orders.



- i. That what is deponed herein is true to the best of my knowledge, belief and information, sources of which have been disclosed.

Analysis and Determination

4. In the present case the main issue from the face of the Application is for the Court to enlarge time and grant the Appellant/Applicant leave to appeal out of time against the decision of Hon. Gesora CM. delivered on 30th April 2020.

The Appellant/Applicant in its supporting affidavit stated that he had multiple proceedings filed against him and lost track of the decisions issued against him in the above mentioned cases and that he depended on information acquired from numerous advocates in the said cases. This should not pass a ground for one to fail attended to cases filed against them or by them in Court.

5. The Appellant/Applicant further its submissions stated that the Advocate's failed to inform him of the court proceedings. It's important to note that cases don't belong to Advocate's, as a client one has to be watchful and attend to their cases just as they would tend to any emergency, if it arose. The Appellant/Applicant seemingly places blame on the firm of Milimo & Muthomi is therefore unfounded, as no evidence has been tendered to prove that the Appellant/Applicant took an initiative to follow up on their case.

6. Leave to appeal out of time is provided under Section 79G of the *Civil Procedure Act*. It 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 each 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.”

7. It is clear the wording of Section 79G of the *Civil Procedure Act* that before the court considers extension of time, the applicants must satisfy the court that they have good and sufficient cause for filing the appeal out of time. The court notes that the applicant lodged his appeal on 17/08/2023 more than 3 years after the appeal window had closed. He has not provided sufficient evidence to prove that his former advocates were guilty of laches and that they had sufficient reasons for the delay.

8. The Proviso to the section empowers the court to enlarge time upon the applicant satisfying the court reasons for the delay, length of the delay and chances of success in the intended Appeal as well as degree of prejudice to the prejudice laid down in the cases of Obunga & Another vs. Onsare [2023] eKLR and Leo Sila Mutiso v. Hellen Wangai Mwangi [1999] 2EA 231 which case set out the principles to be considered in the court's exercise of discretion on whether or not to enlarge time to file appeal out of time.

The said power is discretionary upon circumstances of each case.

9. Upon consideration, the court finds that in his submissions before this court and well stated in his Supporting Affidavit, the applicant other than seeking leave to file Appeal out of time, he also seeks leave to be allowed to introduce new evidence. This is not in the courts view an appropriate prayer at this stage as such is during the hearing of the appeal, if the court grants him the leave to file the intended appeal out of time.



10. For interrogation at this stage is whether the applicant has satisfied the principle for leave to appeal out of time.
11. As for delay, there is no satisfactory reasons stated why the application could not have been filed within reasonable time. By all standards, a delay of over three years is inordinate and blaming his former advocates cannot be a good reason to continue holding on to the judgment fruits from the respondent who holds a lawful and regular judgment in his hands, yet cannot enjoy the fruits thereof.
12. On the chances of success of the intended appeal, the court has perused the Memorandum of Appeal filed albeit out of time and without leave of court. It is dated 17/08/2023.

The Appellant and Applicant faults the trial court for failure to authenticate if the documents and in particular, the police abstract relied upon by the Respondent was genuine and by that proposes that the OCS Pangani Police Station be directed to produce the original Occurrence Book OB8/2019/2015.

With great respect to the Applicant, this is a matter that can only be interrogated during hearing of the intended appeal and not at the interlocutory stage.
13. The Appellant did not participate in the trial court proceedings. The issue of the police abstract could have been dealt with before the trial court. His failure for none participation in the trial court having not been explained to the satisfaction of the trial court and his applications for setting aside the courts judgment this court would be doing an injustice to the respondent by unprocedurally taking an action to issue an order not sought in the motion before this court.
14. The court notes that the Applicant is willing to deposit 50% of the decretal sum in court as security pending hearing and determination of the intended appeal.
15. For the foregoing, the court finds merit in the prayer for leave to file appeal out of time. The Memorandum of Appeal dated 17/08/2023 having been filed without leave of court will not be deemed as properly filed. Let the applicant file a fresh Memorandum of Appeal and serve within 7 days of this ruling.
16. On the issue of stay of execution pending hearing and determination of the intended appeal, the court finds no merit therein. It is dismissed with costs.
17. The court shall however grant the Applicant 30 days to settle the full decretal sum to the Respondent through his Advocates on record failing which the Respondent shall be at liberty to execute for the full decretal sum.

Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF OCTOBER 2024.

JANET MULWA

JUDGE

