



Kagondi & 2 others v Muriuki; Murithi (Third party) (Miscellaneous Civil Application E057 of 2022) [2024] KEHC 12525 (KLR) (17 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12525 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
MISCELLANEOUS CIVIL APPLICATION E057 OF 2022
RM MWONGO, J
OCTOBER 17, 2024**

BETWEEN

MARTIN MURIUKI KAGONDI 1ST APPELLANT

JOSEPH MUREITHI NJERU 2ND APPELLANT

NENO SACCO SOCIETY LTD 3RD APPELLANT

AND

CAROLINE WANJIRU MURIUKI RESPONDENT

AND

FELIX CHOMBA MURITHI THIRD PARTY

RULING

1. Following the trial of the personal injuries suit in the lower court, judgment was delivered on July 4, 2022, against the Applicants. The Respondent/Plaintiff was awarded as follows: General Damages of Kshs. 800,000/=; Future medical expenses Kshs. 150,000/=; Special Damages Kshs.10,240/= plus costs and interests of the suit. Liability was apportioned at 50% in favour of the Plaintiff as against the Respondent.
2. Dissatisfied, the applicants filed a notice of motion dated 18th November, 2022 seeking orders from this Court for:
 1. Leave to lodge an appeal and file a memorandum of appeal out of time against the judgment and decree of the Honourable, P.M Mugure, Principal Magistrate delivered on 4th July, 2022 in Wanguru CMCC 32 of 2016.



2. Stay of execution of the Judgment and/or Decree issued by Honourable, P.M Mugure, Principal Magistrate against the Applicants on 4th July,2022 pending the hearing and determination of this Application.
3. Stay of execution of the Judgment and/or Decree issued by Honourable, P.M Mugure, Principal Magistrate against the Applicants on 4th July, 2022 in Wanguru CMCC 32 of 2016 pending the hearing and determination of the intended appeal.
3. The application is premised on the grounds in the application, and in addition, the supporting affidavit of Joseph Mureithi Njeru in which he deposes substantially that:
 1. The Advocates on record received instructions from the Applicants after the lapse of 30 days to appeal the said judgment on quantum after further consultation as the award to the Respondent was high quantum comparable to the injuries sustained and the evidence adduced stated otherwise.
 2. The said advocates delayed to lodge a Memorandum of Appeal, as they were in the process of obtaining a copy of the judgment.
 3. That being aggrieved and dissatisfied with the said judgment, he instructed M/S Kimondo Gachoka & Company Advocates to appeal against the said judgment but delayed in communicating back to them about appealing the judgment as he was away dealing with family issues.
 4. He believes their appeal has a high chance of success as the Respondent did not deserve the quantum awarded as it was too high as compared to the injuries they suffered.
 5. The Respondent may levy execution against them and the same will render the appeal nugatory, resulting in irreparable loss and damage upon them.
 6. His insurer, Directline Assurance Company Limited is ready, willing and able to furnish the Court with a Bank Guarantee from DTB Bank as security to the Court.
4. In response the respondent filed grounds of opposition as follows:
 1. That under Section 79G of the Civil Procedure Act 2010 the Appellant appeal from a subordinate court to the High Court should have been filed within a period of thirty days from the date of the judgment.
 2. That under Section 79G of the Civil Procedure Act 2010 the appellant has not shown in the supporting affidavit that he had a good and sufficient cause for not filing the appeal in time but only shifts blame to the Court registry without proof.
 3. That under section 107 of the evidence Act CAP 80, the Appellant has not proved in his supporting affidavit by way of correspondence or any other relevant document that the Court registry delayed in issuing copy of the judgment.
 4. That under order 42 rule 6 of the Civil Procedure rules 2010 the alleged bank guarantee principal obligation does not extend to the present application as it is an expired document.
 5. That under order 42 rule 6 of the Civil Procedure rules 2010 the Court should direct the Appellant/Applicant to deposit the entire decretal sum to a joint interest earning account in the names of both the Appellant/Applicant and Respondent advocates.
5. Parties filed written submissions as directed by the court.



6. There are no submissions on record for the applicant.
7. The respondents submitted as follows: That Section 79G of the *Civil Procedure Act* is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. Section 79G requires that an appellant should file an appeal within 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.
8. Further the section allows an appeal to 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.
9. The respondent urges the Honourable Court to consider the said principles. He cites the case of Edith Gichungu Koine v Stephen Njagi Thoithi [2014] eKLR in which it was held that the court should be guided by, inter alia: the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance
10. The respondent submits that applicant has not provided sufficient reason, the delay was inordinate and inexcusable as it has not been sufficiently explained. The judgment in Wang'uru CMCC 32 of 2016 was delivered on 4th July 2022 and it has taken the applicants 4 months to appeal the judgment and no plausible reason has been raised as to the delay.
11. The respondent relies on the case of Paul Mutinda Musembi v Clement Arwings Obado & 2 others [2022] eKLR, where Justice Chitembwe held that,

“...where is delay which is admitted. I am far from being convinced that the delay in filing the instant application has been convincingly explained. It therefore matters not that the intended appeal is arguable; or that no prejudice will be suffered by the respondent. The delay is inexcusable and the court's discretion cannot be exercised in favour of the applicant. The upshot is that I find no merit in the applicant's application dated 26th July, 2021 and the same is hereby dismissed with costs to the respondent.”
12. In addition, the respondent relies on the case of Serephen Nyasani Menge v Rispah Onsase [2018]eKLR wherein Mutungi, J found that even where he could not dismiss the application to appeal out of time on grounds that the applicant had filed a review the appeal would still be dismissed on grounds that no sufficient cause has been demonstrated.
13. The respondent submits that the applicant filed the application to appeal out of time four months after the delivery of judgment in Wang'uru CMCC 32 of 2016 and the period of delay has not been explained. The failure to file the appeal within the specified period does not constitute a mistake or inadvertence by his advocate but the delay has not been explained sufficiently and is inexcusable.
14. Finally, the applicant argues that, in the unlikely event that the application is allowed, then the respondent should be paid half of the decretal amount together with costs, and the other half be deposited in a joint interest earning account.

Issues for Determination

1. Whether leave to appeal out of time should be granted.
2. Whether stay of execution should be granted.



Analysis and Determination

Whether leave to appeal out of time should be granted

15. The application seeks orders for enlargement of time to enable them to file the appeal out of time. With this comes stay of execution pending the hearing and determination of the matter. They depose that the intended appeal is arguable, has high chances of success and this court has unfettered discretion in granting leave to file an appeal out of time.
16. Section 79G of the *Civil Procedure Act* is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. Section 79G of the *Civil Procedure Act* provides the timeframe for filing an appeal:

“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. In *Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others* [2015] eKLR, the Supreme Court held that the discretion to extend time is indeed unfettered. However, it is incumbent upon the applicant to explain the reasons for delay in making the application for extension of time, and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.
18. The applicants contend that the delay in filing the said appeal was on account of inadvertence owing to the time taken to consider various opinions and get the requisite administrative approvals before deciding to appeal the judgment.
19. The applicants also state that the delay in lodging a Memorandum of Appeal was occasioned by the need for communication between the applicant and their advocates in ascertaining the options available with regard to the judgment.
20. The respondent submit that that the applicant has not provided sufficient reason for the delay, which is was inordinate and inexcusable. That the delay has not been sufficiently explained. The judgment in *Wang'uru CMCC 32 of 2016* was delivered on 4th July 2022 and it took the applicants 4 months to appeal the judgment and no plausible reason has been raised as to the delay.
21. The delay on the part of the applicants to file the appeal is 5 months. Was that period reasonable or reasonably explained?
22. The court does not consider the delay to be reasonable given that the explanation for the delay discloses mere dilatoriness on the part of the applicants. They say that they gave their advocates instructions after considering whether or not to appeal. This was long after the delivery of the judgment. No delay is attributed to obtaining the court record, or inability to obtain legal counsel.
23. Nevertheless, in order not to lock out the applicants from the seat of justice, this court will allow extension of time on strict conditions



Whether stay of execution should be granted

24. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides:

“No order for stay of execution shall be made under sub rule (1) unless—

- a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

25. The Applicants submit that they will be prejudiced if this court was to deny them orders for stay of execution as the Respondent is likely to obtain warrants of attachment. They also state that they are willing to furnish a bank guarantee for the whole decretal amount.

26. The respondent submit that they should be paid half of the decretal amount together with costs and the other half be deposited in a joint interest earning account.

27. On the issue of security for performance of the decree, it was held by Gikonyo J in *Absalom Dova v Tarbo Transporters* [2013] eKLR as follows:

“I observe that liability was agreed by consent of the parties. The only aspect of the case that is in dispute is the quantum of damages. Both parties' rights must be safeguarded. Avert; substantial loss from befalling the Applicant; and a total trodden over the Respondent's prima facie right to the fruits of his judgment. In the circumstances, I order that half of the decretal sum to be paid to the Respondent, and the other half to be deposited in a joint account in the names of the advocates within 30 days from the date of this ruling. This is sufficient security for the performance of the decree herein in accordance with Order 42 Rule 6 of the CPR.

Disposition

28. In light of the foregoing, the court hereby allows the application upon the following conditions:

- a. The applicants are granted leave to file the appeal out of time.
- b. The applicants must file their record of appeal within forty-five (45) days from the date hereof.
- c. The applicants shall secure the full decretal sum by
 - i. Depositing 50% thereof into court, and
 - ii. 50% thereof to the respondent through the Respondent's counsel.
- d. In the event of failure to comply with any of the conditions herein, execution may proceed.
- e. Costs shall abide the outcome of the appeal.
- c. Orders accordingly.

DATED AT KERUGOYA THIS 17TH DAY OF OCTOBER, 2024

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R. MWONGO

JUDGE

Delivered in the presence of:

1. Kipngetich holding brief for Kanini for Applicant
2. Huka holding brief for Kebongo for Respondent
3. Court Assistant, Murage

