



**Mwzighe & another v MTK alias TKM (Minor suing through his father and next friend JKM) (Miscellaneous Civil Application 44 of 2023) [2024] KEHC 11996 (KLR) (8 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11996 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
MISCELLANEOUS CIVIL APPLICATION 44 OF 2023  
SM GITHINJI, J  
OCTOBER 8, 2024**

**BETWEEN**

**PHIDILIA MAWONDO MWAZIGHE ..... 1<sup>ST</sup> APPLICANT**

**NOEL NGONDA MWARONDO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**MTK ALIAS TKM (MINOR SUING THROUGH HIS FATHER AND NEXT FRIEND JKM) ..... RESPONDENT**

**RULING**

1. The Notice of Motion for determination is dated 24/5/2023. The motion is brought under the provisions of the *Civil Procedure Act* section 1A, 1B, 3, 3A, 79G and 95 thereon and Order 22 rule 22, Order 42 rule 6, Order 50 rule 6 and Order 51 rules 1 and 3 of the *Civil Procedure Rules*, 2010. The orders sought are: -
  1. Spent.
  2. That this honourable court be pleased to grant leave to the Applicant/Intended Appellant to appeal out of time against the judgment of the honourable magistrate resident magistrate in Mariakani Principal Magistrate Court Civil Suit No. E069 of 2021 and judgment delivered on 24.10.2022.
  3. That this honourable court be pleased to stay execution of the judgment and decree in Mariakani Principal Magistrate Court Civil Suit No. E069 of 2021 and judgment delivered on 24.10.2022 pending the hearing and determination of this application and the intended appeal therein.



4. That as a condition for stay of execution pending the hearing and determination of this appeal/intended appeal (as the case may be), the applicant/appellant be and is hereby ordered to provide/issue security for the entire decretal sum/amount in the form of a bank guarantee to be issued by Family Bank Limited or deposit the entire amount in joint account.
5. That the costs of this application abide the outcome of the intended appeal.
2. The application is premised on the grounds on the face of it and those in the supporting affidavits sworn by Nannungi Mariat and Phidilia Mwawondo Mwazighe sworn on 24/5/2023. The Applicant's case is that on 24/10/2020 judgment was entered against the Applicants in Mariakani PMCC No. E069 of 2021 in the sum of Kshs. 410, 206/- being an award for special and general damages.
3. That following delay in obtaining a copy of the judgment and instructions from the Applicants' insurance company involved, the Applicants were unable to file an appeal within the statutory period. The Applicants intention is to challenge liability and quantum and are apprehensive that the Respondents shall commence execution since they have threatened to do so via a letter dated 5/5/2023.
4. According to the Applicants, the decretal amount is substantial and may not be recoverable should the intended appeal succeed, since the Respondents have no known means. The Applicants alleged that they stand to suffer irreparable loss and damages should the orders not be granted. The Applicants are willing to provide security for the entire decretal sum in form of a bank guarantee, and they are certain that they have an arguable appeal with high chances of success. They exhibited a draft memorandum of appeal.
5. The Respondents did not file any response to the application. Both parties however filed their written submissions which I have carefully perused, and keenly considered.
6. There are two issues for determination; firstly, whether the Applicants should be granted leave to file an appeal out of time; and secondly, whether stay of execution of the judgment of the subordinate court should be granted.

### **Analysis and Determination**

7. The principles governing leave to appeal out of time are settled. In *Thuita Mwangi v Kenya Airways* [2003] eKLR, the Court of Appeal while considering Rule 4 of the *Court of Appeal Rules* which is similar to section 79G of the *Civil Procedure Act*, reiterated its decision in *Mutiso v Mwangi* [1997] KLR 630 as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that generally the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent if the application is granted.”
8. Similarly, the Supreme Court in the case of *Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time as follows:



The underlying principles a court should consider in exercise of such discretion include;

- “ 1. 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;
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 a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;
6. Whether the application has been brought without undue delay.”

9. From the above it is imperative that an applicant must demonstrate good and sufficient cause for not filing the appeal in time. In this case, the impugned judgment was delivered on 24/10/2022 and the application for extension of time lodged on 25/5/2023, approximately 6 months after the statutory time had lapsed. The Applicants’ explanation for the delay in filing the appeal is that they obtained a copy of the judgment late hence they were unable to obtain instructions from their insurer in good time. I have perused the documents exhibited by the Applicants, there is no evidence that they or their advocate made any efforts to obtain a copy of the judgment as claimed. I do not even see a certificate of delay to substantiate their allegations.
10. In the circumstances, I am not satisfied that the Applicants have demonstrated good and sufficient cause to warrant the court to exercise discretion in their favour. I decline to grant leave as prayed. Having said so, I find no basis to determine the second issue on stay of execution.
11. The outcome is that the notice of motion dated 24/5/2023 is unmerited, it is hereby dismissed with costs to the Respondent.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 8TH DAY OF OCTOBER, 2024.**

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**S.M. GITHINJI**

**JUDGE**

In the Absence of; -

1. Mr Nasanga for the Applicant
2. Mr Griffins for the Respondent.

Parties be notified.

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**S.M. GITHINJI**

**JUDGE**

**8/10/2024**

