



REPUBLIC OF KENYA



KENYA LAW
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**Abdalla & another v Ndungu (Miscellaneous Application
40 of 2022) [2023] KEHC 17432 (KLR) (13 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 17432 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS APPLICATION 40 OF 2022
SM GITHINJI, J
FEBRUARY 13, 2023**

BETWEEN

IBRAHIM SAID ABDALLA 1ST APPELLANT

SHABAN JUMA SHABAN 2ND APPELLANT

AND

**JOHN KANGETHE NDUNGU ALIAS JOHN NDUNGU
NGETHE RESPONDENT**

RULING

1. The Applicant herein filed a Notice of Motion under Order 22 rule 22, Order 42 Rules 4 and 6, Order 51 Rules 1 and 3; under Certificate of Urgency dated the June 16, 2022 seeking the following orders:
 1. Spent.
 2. That this Honourable Court be pleased to order a stay of execution of the Judgment of Honourable Julie Oseko delivered on March 3, 2022 in Civil Suit No E46 of 2020 Malindi Magistrate Court pending the hearing and determination of this application.
 3. That the Honourable Court be pleased to grant the applicant leave to file appeal against the judgment of Honourable Julie Oseko delivered on March 3, 2022 in Civil Suit No E46 of 2020 Malindi Magistrate Court out of time.
 4. That the attached Memorandum of Appeal be deemed as duly filed upon payment of Court fees.
 5. That the application be heard inter parties on such date and time as this Honourable Court may direct.



6. That the costs of this application abide the outcome of the appeal.
2. The application is supported by the grounds on the face of it and the supporting affidavit of Kelvin Nguni sworn on the June 16, 2022. In his affidavit, he deponed that the applicants only managed to obtain a copy of Judgment on June 6, 2022 as Hon Oseko was in the process of retiring thereby making tracing of the physical file hard. He also deponed that judgment was delivered on March 3, 2022 in favour of the Plaintiff with 100% liability in favour of the Plaintiff and Kshs 1,000,000/- being an award for damages plus costs and interest at court fees. He asserted that they have since lodged an appeal out of time against the Judgment which appeal he asserted has a high chance of success.
3. The Respondent filed a Replying Affidavit sworn by Geoffrey Kilonzo on the July 15, 2022. He stated that on March 11, 2022 he sent a letter forwarding the Judgment and tabulating costs which was duly received by the Applicant's Advocate on the same day. That the above fact show that the Applicant was aware of the Judgment and hence has not shown sufficient cause for the delay. He deposed that the Applicant was granted 30 days stay of execution which expired on April 3, 2022 while the current application was filed on June 16, 2022 and according to him, this amounts to an act of indolence and an abuse of the court process. He also deponed that the file was always available at the Registry after judgment was delivered and if at all the file was missing, the applicant should have attached a letter addressed to the Registry about that concern.
4. He asserted that the applicant is seeking the court's discretion for leave to appeal out of time, which discretion is fettered and it is incumbent upon the applicant to justify the delay in making the application and to raise any extenuating circumstance that would enable the court to exercise its discretion in his favour. According to him, the application and the intended appeal are a reaction to the declaratory suit that was filed on June 9, 2022 and is meant to frustrate the said suit. He also asserted that this application is an afterthought meant to enable the applicant obtain a further stay of execution to the detriment of the Respondent.
5. The application was canvassed by way of written submissions but is worthy to note that the Applicant did not file submissions to support his very own application. The Respondent through the firm of Wambua Kilonzo & Co Advocates filed submissions on the December 6, 2022. Counsel submitted that judgment was delivered on March 3, 2022 and served upon the parties through email on the same day and that the Respondent further served the applicant with a letter forwarding costs on March 11, 2022. He also submitted that there is no provision requiring the appellant to first obtain copies of judgment in order to file a Memorandum of Appeal. It is therefore not true that the applicant was not aware of the Judgment as has been alleged. Counsel also submitted that the applicant has not shown sufficient cause for not filing the appeal on time and as such, the provisions of Section 79G of the *Civil Procedure Act* have not been met.
6. He relied on the case of *Thuita Mwangi v Kenya Airways Ltd [2003] eKLR* submitting that it is incumbent upon the applicant to explain whether there are any extenuating circumstances that can enable the court to exercise its discretion in his favour. It is also his submission that this is a case of mere inaction and the same ought not to be visited upon the Respondent and relied on the case of *Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR*.
7. Further, he submitted that Article 159 of the *Constitution* is clear that justice ought to be administered without undue delay as was held in the case of *Dickson Miriti Kamonde vs Kenya Commercial Bank Ltd [2006] eKLR*. That under Order 42 rule 6, no stay ought to be granted where there is no appeal hence the prayer for stay pending appeal is incompetent and bad in law.



Disposition

8. This court has considered the application, the response and the submissions by the Respondent.
9. What this court is being called upon to determine is whether the applicant has set out a case to warrant extension of time to file an appeal, and whether this court should issue an order for stay of execution of the Judgment in Malindi Civil Suit No E46 of 2020.
10. The Applicant alleges that they only became aware of the Judgment in the lower court matter on June 6, 2022. That is far from the truth as the Respondent has attached a copy of a letter forwarding the judgment and tabulation of costs which was received on the March 11, 2022 by the appellant/applicant.
11. Under Section 79G of the *Civil Procedure Act*, the time for filing an appeal from judgment of the subordinate court to the High court is 30 days. The section provides as follows;

' 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 a good and sufficient cause for not filing the appeal in time.'
12. In dealing with an application for extension of time, the court ought to take into account several factors as was observed by Odek JJA in *Edith Gichungu Koine v Stephen Njagi Thoitithi [2014] eKLR* where the court said that:

' Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but no limited to, 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, amongst others.'
13. I have carefully analyzed the reasons advanced by the applicant for the delay, and in my view they don't hold water. I agree with the Respondent that the application is simply a reaction to the declaratory suit that was filed on June 9, 2022. Ideally, the discretion of this court to enlarge time for filing of a late appeal is unfettered; However, that discretion must be exercised judiciously and not capriciously. Similarly, the ultimate goal and purpose of the justice system is to hear and determine disputes on merit. Ordinarily, no person who has approached the court seeking an opportunity to ventilate their grievances should be locked out unless for a good reason.
14. Generally, inordinate delay is never in the interest of justice. The Respondent is looking forward to enjoy the fruits of his judgment. His right to do so should not be denied on flimsy grounds. It is for the reason I find the application unmerited and is dismissed with costs to the Respondent.

RULING READ, SIGNED AND DELIVERED VIRTUALLY THIS 13TH DAY OF FEBRUARY, 2023.

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S.M. GITHINJI

JUDGE



In the Presence of; -

- 1. Mr Nyabero for the Applicant**
- 2. Ms Nyambuto for the Respondent**

