



REPUBLIC OF KENYA



**Ntongai v Mutuma (Miscellaneous Application E068 of 2022)
[2023] KEHC 810 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 810 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS APPLICATION E068 OF 2022
TW CHERERE, J
FEBRUARY 9, 2023**

BETWEEN

SHADRACK NTONGAI APPLICANT

AND

JOSHUA MUTUMA RESPONDENT

(Arising from the judgment delivered on April 14, 2022 in Maua CMCC No 51 of 2019.)

RULING

1. By a judgment dated April 14, 2022, the trial court in Maua CMCC No 51 of 2019 entered judgment for the Respondent for KES 300,000/- general damages and KES 5,000/- special damages.
2. By a notice of motion dated November 14, 2022 supported by Applicant's affidavit sworn on November 14, 2022, Applicant seeks leave to appeal on the grounds that instructions to appeal was not given to counsel in good time. He avers he has an appeal with high chances of success and his insurer is willing to provide a bank guarantee.
3. By his replying affidavit sworn on December 9, 2022, Joshua Mutuma (Respondent) avers that Applicant has not demonstrated that it is likely to suffer substantial loss if the decretal sum is paid.

Determination

4. I have considered the application herein and the response thereto and the Issue for determination is whether the Applicant has met the threshold for enlargement of time to appeal out of time and for stay pending appeal.
5. The impugned ruling herein was delivered on April 14, 2022 and the instant application was filed on November 14, 2022 about 6 months after delivery of the impugned judgment. Under Section 79G of [Civil Procedure Act](#), an appeal from a subordinate court to the High Court should be filed within a



period of 30 days from the date of the decree or order appealed against provided that an appeal shall 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.

6. Having approached the court 6 months after the impugned judgment was delivered, the onus is on the Applicant to demonstrate that the delay was reasonable, justified and that the Respondents will not suffer any prejudice if the order is not granted.
7. In the instant case, the excuse given is that the Applicant did not instruct his advocate on time. As to the reason he did not instruct in time but fails to explain why he failed to do so.
8. What amounts to unreasonable delay will depend on the individual circumstances of each case. In the case of *Jaber Mohsen Ali and Anor v Priscillah Boit and another* E and L No 200 of 2012 (2014) eKLR the court held that;

“..... a delay of one month and 4 days was unreasonable given that the court had given 30 days’ time line for the applicant to vacate the disputed land.

9. From what is stated hereinabove, I find that the delay of 6 months has not been explained. The foregoing notwithstanding, it should be the court’s last resort to deny a party a chance to ventilate its case up to the highest available appellate level and should not be denied that chance when the delay has not been shown to cause any prejudice to the Respondent.
10. From the foregoing, the notice of motion dated November 14, 2022 is allowed in the following terms:
11. It is hereby ordered:
 1. Applicant is granted leave to appeal the judgment in Maua CMCC No 51 of 2019
 2. Appeal shall be filed within 30 days from today’s date
 3. There shall be a Stay of execution of judgment in Maua CMCC No 51 of 2019 pending the hearing and determination of the intended appeal on condition that:
 - a. Applicant shall pay the Respondent KES 150,000/- within 14 days from today’s date
 - b. Applicant shall deposit the balance of the decretal sum into court within 14 days from today
 4. Mention on March 17, 2023 to confirm compliance with these orders
 5. Costs shall abide the outcome of the intended appeal

DELIVERED IN MERU THIS 09TH DAY OF FEBRUARY 2023.

WAMAE. T. W. CHERERE

JUDGE

Appearances:

Court Assistant - Mr. Kinoti

For applicant - Ms. Hyimo for Kimondo Gachoka & Co Advocates

For respondent - Mr. Riaga for Mutembei & Kimathi & Co. Advocates

