



Kang'ara & another v Wambugu (Suing as the administrator of the Estate of Daniel Wambugu Maranga (Deceased) (Civil Appeal E057 of 2022) [2023] KEHC 2301 (KLR) (Civ) (16 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2301 (KLR)

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

CIVIL

CIVIL APPEAL E057 OF 2022

CW MEOLI, J

MARCH 16, 2023

BETWEEN

JOHN NDUKA KANG'ARA 1ST APPLICANT

CHESETO FREDRICK 2ND APPLICANT

AND

MOSES MARANGA WAMBUGU (SUING AS THE ADMINISTRATOR OF THE ESTATE OF DANIEL WAMBUGU MARANGA (DECEASED) RESPONDENT

RULING

1. The motion dated 25.02.2022 by John Ndua Kang'ara and Cheseto Fredrick (hereafter the 1st & 2nd Applicant/Applicants) is primarily seeking the admission of the memorandum of appeal out of time; stay of execution of the ruling delivered in Nairobi Milimani CMCC No. 3958 of 2013 in favour of Moses Maranga Wambugu (hereafter the Respondent) pending hearing and determination of the appeal; and stay of proceedings, including arrest of the judgment in Nairobi Milimani CMCC No. 3958 of 2013 pending hearing and determination of the appeal. The motion is expressed to be brought inter alia under section 1A, 1B & 3A of the Civil Procedure Act, order 22 rule 22 & order 51 rule 1 of the Civil Procedure Rules.
2. It is premised on grounds that the Applicants being dissatisfied with the ruling in Nairobi Milimani CMCC No. 3958 of 2013 have purposed to appeal and filed the memorandum of appeal out of time; that the appeal has a high chance of success; that the motion is brought without undue delay and in good faith; that counsel was unable to obtain proceedings and ruling of the lower court as the court file has a judgment date and is held in chambers; that the mistakes of counsel ought not be visited on the Applicants; that the Respondent will not be prejudiced in any way if the motion is allowed while the Applicants will suffer great injustice and prejudice if the motion is not allowed.



3. The motion was supported by the affidavit dated 25.02.2022 sworn by Anertia Salinder Gulenywa, counsel on record for behalf the Applicants. The gist of the counsel's affidavit is a restatement of prayers in the motion save for counsel's additional deposition that unless the motion is granted as prayed the Applicants stand to suffer irreparable loss and damage.
4. The Respondent opposes the motion by way of a replying affidavit dated 08.04.2022. He views the motion is frivolous, vexatious, bad in law, a non-starter and an utter abuse of the court process. He asserts that the motion is dilatory and an afterthought calculated to deny his enjoyment of the fruits of successful litigation. In conclusion, he states that litigation ought to come to an end.
5. The motion was canvassed by way of written submissions. Counsel for the Applicants relied on order 42 of the Civil Procedure Rules and the decisions in *Global Tours & Travels Ltd*, Nairobi H.C Winding Up Cause No. 43 of 2000, Judicial Commission of Inquiry into the Goldenberg Affair & 3 Others v Kilach [2003] KLR and Dennis Mogambi Mang'are v Attorney General & 3 Others [2012] eKLR in supporting the motion. She asserted that the memorandum of appeal raises issues that merit this court's consideration on appeal. Raising factual matters not contained in her affidavit, counsel cited the case of Butt v Rent Restriction Tribunal [1982] KLR 417, National Industrial Credit Bank Limited v Aquinas Francis Wasike & Another Nairobi Civil Application No. 238 of 2005 and others to argue that if stay of execution is not granted the intended appeal will be rendered nugatory and the Applicants will suffer irreparable loss and damage.
6. The Respondent did not file submissions and opted to rely on his affidavit material before this court.
7. The Court has considered the rival affidavit material and submissions made in respect of the motion. First, as a preliminary matter, it is apposite to point out that the so-called supporting affidavit sworn by counsel for the Applicants merely restates the reliefs on the face of the motion. Secondly, on the part of the Respondent rather than confine his affidavit material to the substantive issues for determination before this court opted instead to address some matters belonging to the appeal, which are not pertinent to the application at hand.
8. Moving on to the substance of the motion, the Applicants invoke the provisions of section 79G of the Civil Procedure Act (CPA) and order 42 rule 6 of the Civil Procedure Rules (CPR). The principles governing the grant of leave to appeal out of time are settled. The successful applicant must demonstrate "good and sufficient cause" for not filing the appeal in time. In Thuita Mwangi v Kenya Airways [2003] e KLR, the Court of Appeal while considering rule 4 of the Court of Appeal Rules which was in pari materia with 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 general 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 of the application is granted."
9. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court's discretion in his favor through the affidavit material. The court's observation is that the motion was poorly drafted and fails to summon pertinent material bringing it within the principles enunciated in the case of *Thuita Mwangi* (supra) . The onus was on the Applicants to swear an appropriate and fitting affidavit in support of the prayer for leave to appeal out of time rather than



assume that the court will act in a vacuum. Submissions cannot be used as a substitute for affidavit evidence as attempted here. In the absence of such material the prayer for leave must fail.

10. Regarding the prayer seeking stay of proceedings in the lower court, pending the intended appeal, it is evident on a plain reading of order 42 rule 6(1) of the CPR that such an order presupposes the existence of an appeal. The filing or late admission of an appeal is a condition precedent to the exercise of this court's appellate jurisdiction under order 42 rule 6 (1) of the Civil Procedure Rules. Although the provision does not expressly say so, this can be inferred from the rule. Further, an analogy can be drawn from order 42 rule 6 (4) of the Civil Procedure Rules which states that an appeal is deemed filed in the Court of Appeal when the notice of appeal has been given.
11. Equally, order 42 rule 6 (6) of the Civil Procedure Rules states:

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.” (Emphasis added).
12. In the absence of an appeal, the court would be acting in vacuo by considering the Applicants prayer for stay of proceedings pending what is essentially a still-born appeal, the prayer for leave for late admission of the memorandum of appeal having failed. The Court of Appeal in Abubaker Mohamed Al-Amin v Firdaus Siwa Somo [2018] eKLR while citing with approval the decision of the High Court in Rosalindi Wanjiku Macharia vs. James Kiingati Kimani (Suing as the Legal Representative of the Estate of Martin Muiruri (Deceased)) [2017] eKLR concurred and adopted the foregoing reasoning. The prayer must equally fail. In the result, the entire motion is found to be without merit and is dismissed with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 16TH DAY OF MARCH 2023.

C.MEOLI

JUDGE

In the presence of:

Ms. Gulenywa for the Applicants

Ms. Wambui for the Respondent

C/A: Carol

