



REPUBLIC OF KENYA



KENYA LAW
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**Mohamed v Mwambingu (Miscellaneous Application
E005 of 2022) [2023] KEHC 1694 (KLR) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1694 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
MISCELLANEOUS APPLICATION E005 OF 2022**

SM GITHINJI, J

MARCH 9, 2023

BETWEEN

FATUMA ABDI MOHAMED APPLICANT

AND

**KENNETH MAZOZO MWAMBINGU ALIAS KENNEDY MAZOZO
MWAMBINGU RESPONDENT**

RULING

1 The applicant herein has filed a notice of motion application brought under sections 3A, 79G and 95 of the *Civil Procedure Act*, order 2 rule 22, order 4 rule 6, order 50 rule 5 & order 51 rules 1 and 3 of the *Civil Procedure Rules* under certificate of urgency dated the June 21, 2022 seeking the following orders:

1. Spent.
2. That this honourable court be pleased to extend time and grant leave to the applicants to lodge a memorandum of appeal out of time against the judgment by Honourable E Kadima in suit No 53 of 2019.
3. That the annexed memorandum of appeal be deemed to be duly filed on time.
4. That this honourable court be pleased to stay execution of the judgment in Garsen Magistrate's Court civil suit No 53 of 2019 pending hearing and determination of the application.
5. That this honourable court be pleased to stay proceedings in the declaratory suit No CMCC E010 of 2022 Garsen Law Courts pending the hearing and determination of this application.
6. Spent.



7. That costs of this application be in the cause.

- 2 The application is supported by the grounds on the face of it as well as a supporting affidavit sworn by Nyabero Bokoo Brasiny on June 21, 2022. He deponed that Judgment was delivered against the applicants wherein the plaintiff was awarded general damages of Kshs 2,509,550/- and special damages plus costs and interests of the suit. He contends that the judgment was to be delivered on January 10, 2022 as was directed by the court but it was postponed to be delivered on notice but he received a demand letter from the respondent's advocate indicating that judgment had been delivered on March 10, 2022. That he received instructions from the appellant to appeal against that judgment within which time the time to file an appeal had already lapsed. He also asserted that the judgment is of a substantial amount and the applicants are apprehensive that if the respondent is paid he may deal with the same in a manner prejudicial to the applicant and if the intended appeal is successful, he might not be able to recover the same from the plaintiff/ respondent.
- 3 The application was opposed by the respondent through a replying affidavit sworn by Geoffrey Kilonzo on the July 13, 2022. He deponed that the applicant was served with the plaintiff's statement of costs which they acknowledged on March 4, 2022 proving that they were well aware of the judgment timeously. That the stay orders lapsed on April 10, 2022 and the applicant approached the court on June 21, 2022 and that the 70 days delay is an act of indolence and an abuse of the court process. That for an application for leave to appeal out of time to succeed, the applicant must satisfy the court that he had good and sufficient cause for not filing the appeal on time.
- 4 He asserted that the application has been filed after inordinate and unreasonable delay especially bearing in mind that the applicant was aware of the judgment and that no sufficient cause has been shown why the court should exercise its discretion in favour of the applicant. According to him, the court cannot stay proceedings in a suit that is not before it and, in any case, there is a final judgment in the declaratory suit. Further, that the present application has been filed as a reaction to the warrant issued in respect to the judgment in the declaratory suit and as such the application has been brought in bad faith.
- 5 The application was canvassed by way of written submissions. At the time of writing this ruling, only the respondent had filed his submissions. The respondent through his advocate Wambua Kilonzo & Co Advocates filed submissions on the November 6, 2022.

Disposition

- 6 This is an application for extension of time to appeal, an application for stay of execution of judgment or decree pending appeal, and an application for stay of proceedings in the declaratory suit No CMCC E010 of 2022 Garsen, pending the hearing and determination of this application.
- 7 Section 79G of the *Civil Procedure Act* provides:
- “ 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.”
- 8 It is not disputed that judgment in this matter was delivered on March 10, 2022 in favour of the plaintiff with a 30 days stay of execution. The applicant asserted that they were not aware of the judgment as



the same was to be delivered on notice. This however being far from the truth, the applicant has not disputed having being served with the judgment notice by the respondent which was received in their office on April 14, 2022. The notice made them aware of the said judgment.

- 9 The applicant's request to file an appeal out of time may only be accepted if she satisfies the court that she had good and sufficient cause for not filing the appeal on time. In *Charles Karanja Kiiru v Charles Githinji Muigwa* [2017] eKLR where the respondent had delayed for 41 days before filing an appeal and where the High court enlarged time to enable the respondent file an appeal out of time, the appellant aggrieved by the order enlarging time claimed that the learned judge erred in law and fact by exercising his discretion and extending time for filing an appeal out of time yet no sufficient cause had been offered to justify the delay. The Court of Appeal cited the decision in *Wanjiru Mwangi & another* [2015] eKLR and *APA Insurance Co Ltd v Michael Kinyanjui Muturi* [2016] eKLR in dismissing the appeal.
- 10 No doubt, the discretion of this court to enlarge time to file a late appeal is unfettered. However, that discretion must be exercised judiciously and not capriciously. On the material placed before me and supported by the above decisions, I am not satisfied that the applicant has demonstrated sufficient cause to invoke the jurisdiction of this court to enlarge time. Thus, I find no merit in the application herein and is dismissed with costs to the respondent.

RULING FOR GARSEN READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 9TH DAY OF MARCH, 2023.

S.M. GITHINJI

JUDGE

In the Presence of; -

Mr Kilonzo for Respondent

Mr Arasa for the Applicant

