



**Ouma v Katululu (Miscellaneous Civil Application E267 of 2022)
[2023] KEHC 3735 (KLR) (Civ) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3735 (KLR)

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

CIVIL

MISCELLANEOUS CIVIL APPLICATION E267 OF 2022

CW MEOLI, J

APRIL 20, 2023

BETWEEN

CHRISTOPHER OUMA APPLICANT

AND

DANSON MUTISO KATULULU RESPONDENT

RULING

1. For determination is the motion dated May 5, 2022 by Christopher Ouma (hereafter the Applicant) seeking leave to the Applicant to appeal out of time against the judgment in Nairobi Milimani CMCC No 9583 of 2018 and an order to stay execution of the judgment and decree in Nairobi Milimani CMCC No 9583 of 2018 pending the hearing and determination of the intended appeal. The motion is expressed to be brought inter alia under Section 3A, 79G & 95 of the *Civil Procedure Act* and Order 22 Rule 22, Order 42 Rule 6, and Order 51 Rule 1 & 3 of the *Civil Procedure Rules*.
2. The grounds on the face of the motion are amplified in the supporting affidavit sworn by Applicant. The gist of his affidavit is that judgment in Nairobi Milimani CMCC No 9583 of 2018 was delivered on November 19, 2021 in favour of Danson Mutiso Katululu (hereafter the Respondent) and thereafter his counsel made efforts to obtain a copy of the judgment but did not succeed before the expiry of 30 days for lodging appeal. That the lower court file was eventually traced on April 28, 2022. He goes on to depose that he is aggrieved with the judgment and the intended appeal is arguable, raising pertinent points of law and with an overwhelming chance of success. That the delay in filing the appeal was inadvertent, and not deliberate and the Applicant should not be penalized for the delay that is not so inordinate as to be inexcusable.
3. He asserts that unless stay of execution is granted, he will suffer injustice, and substantial loss should proceed with execution. There being a likelihood that he will be unable to recover the decretal amount if the same is paid over to the Respondent. That the Respondent will not suffer any prejudice or damage



- that is not capable of being compensated by an award of costs if the motion is allowed. In conclusion, he expresses willingness to furnish security for satisfaction of the entire decretal amount by way of bank guarantee if so directed by the court.
4. The Respondent opposed the motion through the replying affidavit dated June 7, 2022. He asserts that the Applicant's counsel was fully aware of the judgment terms as evinced by his advocates letter dated November 24, 2021 and received in their office on November 26, 2021. That no material has been tendered by the Applicant to confirm that the court file was missing or misplaced as such the delay is inordinate and unexplained. He contends that the intended appeal does not raise any arguable issues.
 5. In response to the Applicant's apprehension on substantial loss, he asserts that no material has been tendered to support the averment that he will be unable to refund the decretal sum and that he is a businessman and a person of means. He further dismissed the propriety of the proposed security of the bank guarantee whose validity runs until August 31, 2022. In conclusion, the court was urged to dismiss the motion whereas in the alternative if the court finds merit in the motion, to order for appropriate security as condition for stay of execution.
 6. The motion was canvassed by way of written submissions. Regarding the prayer for leave to appeal out of time, the Applicant's counsel anchored her submissions on the decision in [*Edith Gichugu Kione v Stephen Njagi Thuiti \[2014\] eKLR*](#). Reiterating the explanation for delay, counsel cited the decision in [*Amal Hauliers Limited v Abdulnasir Abukar Hassan \[2017\] eKLR*](#) to assert that the motion was filed at the earliest opportune time. He also cited the decision in [*Hellen Wanza Maeker v Bernard Njoroge Gathua & Another HCC Miscellaneous Application 286 of 2009*](#) to buttress the submission that the Applicant has given satisfactory reasons for failure to file the appeal on time.
 7. While calling to aid several decisions including [*Selestical Limited v Global Rock Development \[2015\] eKLR*](#) and [*Focin Motorcycles Co Ltd v Ann Wambui Wangui & Another \[2018\] eKLR*](#) counsel contended that the Respondent has not demonstrated the prejudice that he would suffer if the Applicant is allowed to file his appeal and provide security by way of a bank guarantee. It was further argued that the Respondent has not furnished the court with evidence of his means to refund any monies paid to him. The case of [*National Industrial Credit Bank Limited v Aquinas Francis Wasike & Another Nairobi Civil Application No 238 of 2005*](#) was cited on the issue. On the merits of the appeal counsel placed reliance on [*Athuman Nusura Juma v Afwa Mohamed Ramadhan, CA No 277 of 2015*](#) and [*Julius Kamau Kithaka v Waruguru Kithaka Nyaga & 2 Others CA No 14 of 2013*](#) to submit that the intended appeal raises arguable issues. The court was urged to allow the motion as prayed.
 8. On the part of the Respondent, counsel in addressing the prayer for leave to appeal out of time, argued that the Applicant has completely failed to explain the failure to file the appeal within stipulated time to persuade the court to exercise its discretion in his favour. Responding to the Applicant's submission on merits of the intended appeal counsel argued that the has a very low chances of success and that the Respondent having waited for the last 5 years will suffer prejudice if the enjoyment of the fruits of his judgment is delayed in the present circumstances.
 9. Addressing the prayer for stay of execution pending the intended appeal, counsel relied on the decision in [*Mohamed Seline t/a Choice Butchery v Nasserpuria Memon Jamat \[2013\] eKLR*](#) to contend that, the court ought to order provision of security and reiterated that Applicant has not demonstrated the Respondent's inability to refund the decretal sum if the same is paid out. The court was urged to dismiss the motion or in the alternative order provision of security as a condition for leave to appeal and stay of execution.
 10. The Court has considered the rival affidavit material and submissions in respect of the motion. Alongside the prayer for leave to appeal out of time, the Applicant has sought stay of execution pending



the hearing and determination of the intended appeal. It is evident on a plain reading of Order 42 Rule 6(1) of the CPR, that an order to stay execution pending appeal presupposes the existence of an appeal. The filing 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. 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.'

11. It would seem therefore that the invocation of the jurisdiction of this court under Order 42 Rule 6 (1) or 6 (6) of the Civil Procedure Rules must be preceded by the filing of an appeal, or compliance with the procedure for filing an appeal, in this case a memorandum of appeal (See Order 42 Rule 1 of the Civil Procedure Rules). Until the memorandum of appeal is filed, the court may be acting in vacuo by considering the Applicant's prayer for stay of execution pending a non-existent appeal. 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.
12. Earlier, the Court of Appeal in the case of [Equity Bank -Vs- Westlink MBO Limited \[2013\] eKLR](#) while commenting on Rule 5 (2) (b) of the Court of Appeal Rules, whose wording is substantially similar to Order 42 Rule 6 (1) of the Civil Procedure Rules, and on Order 42 Rule 6 (6) of Civil Procedure Rules, left no room for doubt that an application for stay of execution pending appeal could only be entertained before it after the filing of an appeal or a Notice of Intended Appeal. (See also [Balози Housing Co-operative Society Limited -Vs- Captain Francis EK Hinga \[2012\] eKLR](#)).
13. Order 42 Rule 1 of the CPR provides that an appeal to the High Court shall be in the form of a memorandum of appeal. In this case, an appeal is yet to be filed and therefore, there is no basis upon which this court could exercise its appellate jurisdiction under the said provision in a miscellaneous matter. If the Applicant desired to seek an order to stay execution alongside the prayer for the late admission of their appeal, they ought to have first filed the memorandum of appeal in a proper appeal and the relevant application. In my considered view, the words that 'an appeal may be admitted out of time' in Section 79G, appears to admit both retrospective and prospective applications. So that leave under the Section may be sought before or after a memorandum of appeal is filed.
14. However, it may be more prudent for a party who also seeks stay of execution in the same motion for leave to appeal out of time to have filed the memorandum of appeal in advance. In the circumstances, the prayer seeking a stay of execution of the judgment in Nairobi Milimani CMCC No 9583 of 2018 pending hearing and determination of the intended appeal has no legal anchor and cannot be entertained.
15. Turning now to the prayer seeking leave to appeal out of time, the power of the Court to enlarge time for filing an appeal out of time is expressly donated by Section 79G, as well as generally, by Section 95 of the [Civil Procedure Act](#). Section 79G of the [Civil Procedure Act](#) provides that:

' 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.'

16. The principles governing 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] eKLR*, 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.'

17. 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. The Supreme Court in the case of Nicholas Kiptoo Korir Arap (supra) enunciated the principles applicable in an application for leave to appeal out of time. The Court stated inter alia that:

' (T)he 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 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.
7. .'

See also *County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] eKLR*.

18. There is no dispute that the judgment of the lower court was delivered on November 19, 2021. After the judgment was delivered, the Applicant asserts that counsel did not obtain a copy of the judgment until April 28, 2022. From the Respondent's material it appears that the two counsel engaged in correspondence post judgment marked annexure DMK 1 and DMK 2. Resting with the latter letter



from the Applicant that offered to settle the costs once properly tabulated. The Applicant thereafter requested for a copy of the said judgment vide its letter dated January 25, 2022 'Annexure CO-1'.

19. Evidently, whether in attendance or not, the Applicant's counsel was aware of the judgment as of November 26, 2021 but it was only on January 25, 2022 that the Applicant proceeded to request for a copy of the judgment. The delay in filing the appeal is more than four (4) months and the reason advanced is that counsel was unable to obtain a copy of the judgment in time to lodge the appeal. It is settled that the period of delay as well as explanation thereof are key considerations in an application of this nature.
20. The Court of Appeal in *Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 Others [2019] eKLR* addressed the question of delay as follows:-

' The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained, hence a plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There have to be valid and clear reasons, upon which discretion can be favourably exercisable.
21. The explanation given by the Applicants' counsel appears limp. It appears contradictory for a party aware of the terms of judgment and expressing willingness to settle costs to assert an intention to appeal the same judgment. The conduct of the Applicant's advocate does not evince such intention and it seems that the decision to appeal came as an afterthought two months after judgment. Secondly, there is no evidence to support the Applicant's claim that the court file in the lower court was missing, occasioning further delay. This court agrees with the Respondent that no plausible explanation has been proffered for the Applicant waiting until January 25, 2022 to request a copy of the judgment and for the failure to file a memorandum of appeal on time. Furthermore, the Applicant has not been candid with the court; rather than admitting his own tardiness he has blamed the lower court without tendering any proof of how the court failed him.
22. In my view, the delay herein is inordinate in the circumstances of the case and has not been satisfactorily explained. A party seeking extension of time must not be seen to presume on the Court's discretion and the court agrees with the Respondent that the Applicants have not demonstrated 'good and sufficient cause'. Clearly, the Respondent stands to be prejudiced if the motion, apparently brought by the seemingly reluctant intended appellant, is allowed. While the Applicant's constitutional right to be heard on appeal cannot be gainsaid, the right is not absolute and must be balanced against the Respondent's entitlement to have his case determined expeditiously. The Respondent ought not to be made to pay the price for the disclosed indolent and indecisive conduct on the part of the Applicant.
23. At a time when courts are deluged with heavy caseloads, it is incumbent on litigants to make prompt decisions regarding their cases and act on them with equal promptness. A party who drags his feet while scanning and selecting his options in litigation while ignoring relevant statutory timelines does so at his own risk. In the circumstances, the court is of the view that the justice of the matter lies in dismissing the motion dated May 5, 2022 with costs to the Respondent. It is so ordered.

DELIVERED AND SIGNED ELECTRONICALLY IN NAIROBI ON THIS 20TH DAY OF APRIL 2023.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: N/A



For the Respondent: N/A

C/A: Carol

