



**Mutuku v Tendeza (Miscellaneous Application 14 of 2022)
[2023] KEHC 18007 (KLR) (16 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18007 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS APPLICATION 14 OF 2022**

SM GITHINJI, J

MAY 16, 2023

BETWEEN

MANFRED WAMBUA MUTUKU APPLICANT

AND

MICHAEL TENDEZA RESPONDENT

RULING

1. The Applicant herein has filed a Notice of Motion application brought under Sections 1A, 1B, 3, 3A, 79G and 95 of the Civil Procedure Act, Order 22 rule 22, Order 42 Rule 6, Order 50 Rule 6 & Order 51 Rules 1 and 3 of the Civil Procedure Rules under Certificate of Urgency dated the 16th day of February, 2022 seeking the following orders:
 1. Spent.
 2. Spent.
 3. Spent.
 4. That this Honourable court be pleased to grant leave to the Applicant/intended Appellant to appeal out of time against the Judgment of Honourable NC Adalo delivered on November 16, 2021.
 5. That this Honourable court allow the Applicant/ Intended Appellant to furnish the court with security in the form of a Bank Guarantee from Family Bank.
 6. That the costs of this Application abide the outcome of the intended Appeal.
2. The Application is supported by the grounds on the face of it as well as an affidavit sworn by Biasha Khalifa on the February 18, 2022. He deponed that Judgment was delivered against the applicant on November 16, 2021 for Kshs 800,000/- in general damages and Kshs 83,550/- in special damages plus



costs and interests of the suit. In order to succeed in the present application, the applicant contended that he is ready, able and willing to furnish reasonable security in the form of a Bank Guarantee. He also deponed that he stands to suffer prejudice and irreparable substantial loss as there is a likelihood that he will not recover the decretal amount if it is paid over to the Respondent and the appeal succeeds.

3. In Response, there is a Replying affidavit sworn by Joel Mwanzia Mutuku on the April 21, 2022. He deponed that after the delivery of judgment, the applicant's counsel engaged his advocate in out of court negotiations on a mode of payment of the decretal amount, only for the applicant to file the present application after the 30 days had expired within which period the defendant ought to have filed his appeal. He asserted that the applicant has not given any good reason for the delay in filing the appeal within the stipulated time and according to him, the application is only meant to delay him from enjoying the fruits of his judgment. He contends that the applicant has equally not demonstrated to the court the kind of substantial loss that may result as a result of payment of the decretal sum. It is also his contention that the application was filed more than 3 months after the judgment was delivered which delay cannot be excused.
4. The application was canvassed by way of written submissions, the applicant filed submissions on the March 13, 2023 while the Respondent had filed his on the 8th day of February, 2023. This court has duly considered the submissions by both counsels as well as the authorities attached thereto.

Disposition

5. 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 execution in CMCC 375 of 2019 Mariakani pending the hearing and determination of this application.
6. First, I begin with the application for leave to file an appeal out of time. In essence in approaching the High Court for an appeal any such litigant has 30 days as provided under Section 79(G) of the [Civil Procedure Act](#), to lodge the appeal.
7. The Court in exercising its discretion is guided by the provisions of Section 79 (G) of the [Civil Procedure Act](#). In [Karny Zabarya & Another v Shalom](#) Levi CA No 80 of 2018 Koome JA stated:

In considering whether to grant leave to a litigant to file his or her appeal out of time, the Court will have regard to factors such as: "length of the delay involved, the reason for the delay, the possible prejudice if any, that each party stands to suffer depending on how the Court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate it's dispute; against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity."
8. An analysis of the record and evidence shows that the judgment in the trial court was delivered on November 16, 2021 and the present application was made 3 months later on the February 18, 2022. The applicant contends that the delay in making the application was occasioned by the fact that the 30-days period lapsed when the offices had been closed for the festive season thereby posing a challenge in getting instructions from his client. The applicant's prayer to file the appeal out of time can only be accepted if he satisfies the court that he had good and sufficient cause for not filing the appeal in time. The supreme court of Kenya sitting at Kisumu in the case of [County Executive of Kisumu vs County Government of Kisumu & others](#) (2017) eKLR while relying on its decision in the case of [Nicholas](#)



Kiptoo Arap Korir Salat v IEBC & 7 others Application No 16 of 2014 (2014) eKLR the Hon Judges reiterated the considerations to be made in such a case to be as follows:

1. Extension of time is not a right of a 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 on 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 respondents if the extension is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
9. It is my considered view that failure to obtain instructions from a client during festive season constitute sufficient ground on which exercise of discretion may be granted in favour of the applicant to allow an extension to file an appeal out of time, so long as the delay is not inordinate.
10. Regarding stay of execution, Order 42 Rule 6 of the Civil Procedure Rules governs the conditions to be met by an applicant seeking stay of execution of the Judgment. It provides that the application must be filed without undue delay. At the hearing of the application, it must be demonstrated that the applicant stands to suffer substantial loss if the order of stay is denied, and that the Court considering the application does factor security for due performance of the decree.
11. I have taken into account the competing interests of the parties in this application and I do find that the applicant is entitled to pursue his appeal. In the circumstances of the case, the applicant is hereby ordered to deposit the entire decretal sum in a joint interest earning account of both advocates in the next 30 days from today’s date and in the event of noncompliance with the condition on deposit of security for due performance of the decree, stay of execution orders will lapse leaving the Judgment eligible for execution. Costs of the application to abide the outcome of the appeal.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 16TH DAY OF MAY, 2023.

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S.M. GITHINJI

JUDGE

In the Presence of; -

1. Mr Ngaira for the Respondent
2. Firm of Kimondo Gachoka is for the Applicant (absent).

