



**Okwema v Were & another (Miscellaneous Application
E015 of 2022) [2023] KEHC 19030 (KLR) (19 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19030 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
MISCELLANEOUS APPLICATION E015 OF 2022**

**WM MUSYOKA, J
JUNE 19, 2023**

BETWEEN

ELIAKIM OMBATI OKWEMA APPLICANT

AND

ROLANDS OKELLO WERE 1ST RESPONDENT

OCHIENG SIMON 2ND RESPONDENT

RULING

1. I am called upon to determine a Motion, dated February 7, 2022. It seeks 2 principal orders: stay of execution and leave to file appeal out of time. The judgment at the trial court, in Busia CMCCC No. E177 of 2021, was delivered on 3rd November 2021. The affidavit in support is sworn by the Advocate for the applicant, who states that the applicant was informed of the judgment, vide a letter dated November 4, 2021, but he did not give instructions for filing appeal until 1st February 2022, by which time the time for filing appeal had expired.
2. There is a reply, vide an affidavit sworn on February 1, 2022. It is averred that no sufficient cause has been shown to allow extension of time, and that the decree has been settled in full.
3. The application was canvassed by way of written submissions. I have read through the submissions placed on record by both sides, and I have noted the arguments made.
4. The more important prayer is that for leave to file appeal out of time. Such leave is granted at the discretion of the court, based on the circumstances. The applicant in this case is Eliakim Ombati Okemwa, at least from the filings. He did not swear any affidavit. There is no indication as to whether he was made aware of the judgment, and whether he has given instructions for the filing of an appeal against the judgment against him.



5. The affidavit, sworn in support of the application, is by the Advocate for the applicant. In the documents attached to the supporting affidavit, the Advocate exhibits correspondence between him and an insurance company. There is no correspondence with the applicant himself. I suppose that the insurance company was the insurer of the applicant, and it was addressed in the spirit of subrogation, and it was perhaps the instructing client. In that affidavit, the Advocate does not explain the delay in filing appeal. Indeed, the Advocate would not even be the right person to explain such delay, for it was not him to appeal. This is one of those cases where an Advocate ought to refrain from swearing affidavits on behalf of their clients, particularly on issues that are not within his knowledge. The Advocate could only explain that he did inform the client of the outcome of the matter, a day after delivery of the judgment, but he was not competent to explain what the client did with that information, and why the client delayed instructing him to file appeal. Only the client could give that explanation. The Advocate has not offered any in his affidavit. There is no affidavit from the applicant or the client, and, therefore, there is no explanation from that side. The correspondence exhibited does not help, for it does not breathe a word as to what might have caused the delay.
6. A number of cases have been cited, on the factors taken into consideration in exercising discretion to grant leave to appeal out of time. The explanation of the delay is lumped together with other considerations, but it is really the primary consideration, the rest are secondary. The starting point should be with explaining why the applicant was unable to file appeal within the time allowed. The others can only bolster that explanation. Where the delay is unexplained, the other considerations, ideally, ought not to even come into play. In *Dilpack Kenya Limited vs. William Muthama Kitonyi* [2018] eKLR (Odunga, J), it was observed that:

“ ... If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred ...”
7. The judgment herein was delivered on November 3, 2021, and the Advocate wrote a letter to the insurance company on November 4, 2021, to communicate about the delivery, and to advise on the need to file appeal. There is no confirmation from the applicant, or the insurance company, as to whether that letter was received, and if it was, when, and why no action was taken on it within the timelines. It appears that it was the Advocate, who has sworn the affidavit in support, who reached out to the insurance company, by way of follow up, and it was after that that instructions to file appeal out of time were given.
8. Grant of leave to appeal out of time is not automatic, merely on the basis that the time for filing appeal has ran out. Sufficient or good cause must be shown. The primary consideration would be explanation of the delay. It is the explanation of the delay that would unlock the exercise of the discretion. Without any explanation, there would be no just or sufficient cause, and there would be no basis for exercise of discretion in favour of the applicant.
9. I find no merit at all in the application, dated February 7, 2022, and I hereby dismiss it, with costs. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 19TH DAY OF JUNE 2023

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.



Appearances

Mr. Wangoda, instructed by LG Menezes & Company, Advocates for the applicant.

Ms. Anono, instructed by Mukisu & Company Advocates for the respondents.

