



**Dindigwa v Gona (Miscellaneous Civil Application 50 of 2022)  
[2023] KEHC 21313 (KLR) (12 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21313 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
MISCELLANEOUS CIVIL APPLICATION 50 OF 2022**

**SM GITHINJI, J**

**JULY 12, 2023**

**BETWEEN**

**STEPHEN KARISA DINDIGWA ..... APPLICANT**

**AND**

**FURAHA KITSAO GONA ..... RESPONDENT**

**RULING**

**CORAM:** Hon. Justice S. M. Githinji

Kimondo Gachoka & Co. Advocates for the Applicant.

Wambua Kilonzo & Co. Advocates for the Respondent.

1. The applicant herein has filed a notice of motion application brought under sections 3 and 3A of the [Civil Procedure Act](#), order 22 rule 22, order 42 rules 4 and 6, & order 51 rules 1 and 3 of the [Civil Procedure Rules](#) under certificate of urgency dated the July 18, 2022 seeking the following orders:
  1. Spent.
  2. That this honourable court be pleased to order a stay of execution of the judgment of Honourable Julie Oseko delivered on April 21, 2022 in civil suit No E129 of 2021 Malindi pending the hearing and determination of this application and the intended appeal.
  3. That the honourable court be pleased to grant the applicant leave to file appeal against the judgment of Honourable Julie Oseko delivered on April 21, 2022 in civil suit No E129 of 2021 Malindi out of time.
  4. That the attached memorandum of appeal be deemed as duly filed upon payment of court fees.
  5. That the application be heard inter parties on such date and time as this honourable court may direct.



6. That the costs of this application abide the outcome of the appeal.
2. The application is supported by the affidavit sworn by Kelvin Ngure on July 18, 2022. He deposed that that the applicants only managed to obtain a copy of judgment on July 7, 2022 as Hon Oseko was in the process of retiring thereby making tracing of the physical file hard. He also deposed that judgment was delivered on April 24, 2022 in favour of the plaintiff with 100% liability in favour of the plaintiff and Kshs 902,550/- being an award for damages plus costs and interest at court rates. He asserted that they have since lodged an appeal out of time against the judgment which appeal he asserted has a high chance of success.
3. The respondent in response filed a replying affidavit sworn by Geoffrey Kilonzo on the August 2, 2022. He stated that on May 6, 2022 he sent a letter forwarding the judgment and tabulating costs which was duly received by the applicant's advocate on the same day. That the above facts show that the applicant was aware of the judgment and hence has not shown sufficient cause for the delay. He deposed that the applicant was granted 30 days stay of execution which expired on May 21, 2022 while the current application was filed on July 18, 2022 and according to him, this amounts to an act of indolence and an abuse of the court process. He also deposed that the file was always available at the Registry after judgment was delivered and if at all the file was missing, the applicant should have attached a letter addressed to the Registry about that concern.
4. He asserted that the applicant is seeking the court's discretion for leave to appeal out of time which discretion to extend time is fettered and it is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. According to him, this application and the intended appeal is a reaction to the declaratory suit that was filed on July 7, 2022 and is meant to frustrate the declaratory suit. He also asserted that this application is an afterthought meant to enable the applicant obtain a further stay of execution to the detriment of the respondent.

## Disposition

5. This court has considered the application, the response as well as the submissions by both counsels.
6. What this court is being called upon to determine is whether the applicant has set out a case to warrant extension of time to file an appeal out of time and whether this court should issue an order for stay of execution of the judgment in Malindi civil suit No E129 of 2021.
7. The applicant alleges that they only became aware of the judgment in the lower court matter on July 7, 2022 for the reasons they have stated in their affidavit. That is far from the truth because the respondent has attached a copy of a letter forwarding the judgment and tabulation of costs which was received on 6.5. 2022 by the appellant/applicant.
8. Under section 79G of the *Civil Procedure Act*, the time for filing an appeal from judgment of the subordinate court to the High Court is 30 days. The section provides as follows;

“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 a good and sufficient cause for not filing the appeal in time.”



9. In dealing with an application for extension of time before a court, the court ought to take into account several factors as was observed by Odek JJA in *Edith Gichungu Koine v Stephen Njagi Thoithi* (2014) eKLR where the court observed:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

10. I have perused and carefully analyzed the reasons that have been advanced by the applicant for the delay in filing the application and in my view the reasons are not sufficient. I agree with the respondent that this application is only a reaction to the declaratory suit that was filed on July 7, 2022. This court is not persuaded by the reasons and arguments that have been advanced by the applicant. Ideally, the discretion of this court to enlarge time for filing of a late appeal is unfettered. However, that discretion must be exercised judiciously and not capriciously. Similarly, the ultimate goal and purpose of the justice system is to hear and determine disputes fully. In the end, I am not persuaded by the reasons that have been advanced by the applicant and as such the prayer is dismissed.

11. For a court to order a stay of execution which amount to denying a successful party, even temporary the terms of the decree of his or her judgment, the applicant must pass the hurdle on sufficient cause, substantial loss, appeal being rendered nugatory, and existence of compelling circumstances. The principles guiding the grant of stay of execution pending appeal are well settled. These principles are as expressly set out under order 42 rule 6 of the *Civil Procedure Rules*.

12. Given the denial for leave to appeal out of time, the prayer for stay of execution pending appeal lacks foundation or legs on which to stand on and is therefore equally dismissed. Costs goes to the respondent.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 12<sup>TH</sup> DAY OF JULY, 2023.**

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**S.M. GITHINJI**

**JUDGE**

**In the Presence of; -**

1. Mr Kilonzo for the Respondent

2. Mr Mirembe for the Applicant

