



**Gikonyo v Okonjo (Suing as the Administratrix and Legal Representative  
of the Estate of Wilson Onduto Athiany - Deceased) (Miscellaneous  
Application 5 of 2022) [2023] KEHC 21308 (KLR) (20 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21308 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
MISCELLANEOUS APPLICATION 5 OF 2022  
SM GITHINJI, J  
JULY 20, 2023**

**BETWEEN**

**SIMON GIKONYO ..... APPLICANT**

**AND**

**JUDITH ACHIENG OKONJO (SUING AS THE ADMINISTRATRIX AND  
LEGAL REPRESENTATIVE OF THE ESTATE OF WILSON ONDUTO  
ATHIANY - DECEASED) ..... RESPONDENT**

**RULING**

1. The Applicant herein has filed a Notice of Motion dated January 24, 2022 seeking the following orders;
  1. Spent.
  2. That this Honourable Court be pleased to stay the execution of the judgment and decree in Kilifi Magistrate Court Civil Suit No 124 of 2017 pending the hearing and determination of this application and the intended appeal.
  3. That this honourable Court be pleased to grant leave to the Applicant/intended Appellant to appeal out of time against the Ruling of the Honourable Magistrate SD Sitati in Kilifi Magistrate Court Civil Suit No 124 of 2017 delivered on April 28, 2021.
  4. That this honourable court do issue an order for security to be secured by the Applicant's insurer for not more than the statutory limit of Kshs 3,000,000/- as prescribed by CAP 405 and the same be secured by a bank guarantee in favour of this Honourable Court.
  5. Costs of this application be in the cause.



2. The application was supported by the affidavit sworn by Castro Momanyi on the same day. He deposed that on August 19, 2020, they received instructions from the Applicant's insurer to enter appearance and set aside an ex-parte judgment in Kilifi CMCC No 124 of 2017 that was entered on September 18, 2019. That vide a ruling delivered on April 28, 2020, the application was dismissed. Counsel asserted that he was away from the office for paternity leave and later contracted COVID 19 and had proceeded for isolation and treatment for a period of four weeks and that he inadvertently forgot to follow up on the file after returning back to the office. He also stated that he only transmitted the Ruling to the Client in December and became aware of the lapse in following up on the said Ruling.
3. The Respondent in Response filed a Replying Affidavit sworn by Nyachiro Robert Arati on February 22, 2022. He deposed that the entire application is tailored to deny the respondents the fruits of judgment delivered way back in 2019. That it is not true that the appellant was not aware of the case as has been alleged as interlocutory judgment was entered after the appellant was served with summons to enter appearance by way of substituted service to his address being PO BOX 4051 NAKURU and that the appellant has not disputed the said service. He also deposed that when the matter came up for ruling, counsel was duly represented and in addition, counsel has not provided any documentary evidence of the COVID 19 allegations that he stated.

### **Analysis and Determination**

4. This court has considered the application dated January 24, 2022, the response as well the submissions by counsel for the applicant. What is for determination in my view is whether this court ought to grant an order of stay of execution in Kilifi Civil Suit No. 124 of 2017 and whether the applicant is entitled to leave to appeal out of time against the Ruling in Kilifi Civil Suit No 124 of 2017 delivered on April 28, 2021.

Order 42 Rule 6 of the [Civil Procedure Rules](#) provides a set of conditions to be met by an applicant for an order of a stay of execution.

5. Firstly, the application should have been filed without undue delay. Secondly, the applicant is required to show that if stay is denied he stands to suffer substantial loss. Thirdly, if there is no stay of execution or an order of injunction the intended appeal would be rendered nugatory. Fourthly, that the order of stay given should have a consequential order on security for due performance of the decree.

In the case of *Global Tours & Trailys WC 43 of 2000 (UR)* the test was outlined by the Court as follows:

' Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion, it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay the Court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case. The prima facie merits of the intended appeal in the sense of not whether, it will probably succeed or not but whether, it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously.'

6. I have taken into account the competing interests of the parties in this application and I do find it in want of merit as the applicant did not establish the substantial loss they will stand to suffer if the stay is not granted and the delay in initiating the appeal is inordinate.



7. I now turn to the request for enlargement of time to appeal. Section 75 G *Civil Procedure Act* (Cap 21) is relevant and it states as follows –

' 75G. 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. In *United Arab Emirates v Abdelgna far & others [1995] IRLR* the test in exercising the discretion to extend time was stated in the following passage:

' In the light of the guidance combined in these authorities, it is possible to state with reasonable precision, the principles, which govern the exercise of the Appeal Tribunals discretion to extend time and to identify those factors regarded as relevant:

(i). The grant or refusal of an extension of time is a matter of judicial discretion to be exercised not subjectively or at whim or by rigid rule of thumb, but in a principled manner in accordance with reason and justice. The exercise of the discretion is a matter of weighing and balancing all the relevant factors which appear from the material before the appeal tribunal. The result of an exercise of a discretion is not dictated to any set factor. Discretions are not packaged programmed responses.'

9. The counsel for the applicant in an attempt to explain the delay stated in his affidavit that when he was away the matter came up for Ruling; he was away from the office for paternity leave and later contracted COVID 19 and had proceeded for isolation and treatment for a period of four weeks and that he inadvertently forgot to follow up on the file after returning back to the office. In my view, the explanation given herein by the Applicant on the reasons for the delay in filing appeal are not convincing as one wonders whether the counsel was the only advocate in the firm, and if he was whether he could not have instructed another advocate to hold his brief.

10. In the end, I find no justification for granting the orders sought by the applicant in the application dated January 24, 2022. The outcome is that the said application is dismissed with costs to the Respondent for want of merit.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 20<sup>TH</sup> DAY OF JULY, 2023.**

.....

**S.M. GITHINJI**

**JUDGE**

**In the Presence of; -**

PARA 1.

Mr Mirembe for the Applicant

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