



REPUBLIC OF KENYA



**Kendagor v Katam (Miscellaneous Civil Application
E24 of 2023) [2023] KEHC 20352 (KLR) (21 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20352 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CIVIL APPLICATION E24 OF 2023
JRA WANANDA, J
JULY 21, 2023**

BETWEEN

ROBERT CHIRCHIR KENDAGOR APPLICANT

AND

GLADYS JEROP KATAM RESPONDENT

RULING

1. The Application before Court is the Notice of Motion dated 8/2/2023 and filed by the Applicant on 9/2/2023. It seeks the following orders:
 - i. [.....] Spent.
 - ii. [.....] Spent.
 - iii. That this Honourable Court be pleased to extend time within which the Applicant can file an Appeal against the decree in in Iten SPM Civil Suit No. E015 of 2021, Gladys Jerop Katan v Robert Chirchir Kendagor.
 - iv. That upon granting the orders above, this Honourable Court be pleased to stay execution of the decree herein pending the hearing and determination of the intended appeal.
 - v. That the costs of the appeal be provided for.
2. The Application is filed through Messrs A. Mukira & Associates Advocates and is stated to be brought under “Order 79G, 3A, 1A *Civil Procedure Act*, Order 42 Rule 6 Civil Procedure Rules”. It is premised on the grounds stated on the face of the Application and is supported by the Affidavit sworn on 8/2/2023 by the Applicant, Robert Chirchir Kendagor.
3. In the Affidavit, the Applicant deponed that the Respondent instituted case number Iten SPM Civil Suit No. E015 of 2021 – Gladys Jerop Katam vs Robert Chirchir Kendagor pursuant to a road accident



involving a motor cycle and a motor vehicle and which occurred along Iten-Kabarnet road, the matter proceeded for hearing and parties filed their respective Submissions on 28/8/2022, upon such filing the Court proceeded on transfer but parties were informed that Judgment will be delivered on Notice, however after a long wait for notice for delivery of Judgment to issue, he was on 18/01/2022 called by his Advocate informing him that he had been served by the Respondent with a copy of Judgment delivered in the matter indicating that the same was delivered on 11/11/2022, both he and his Advocate were taken aback since no notice had been served for delivery of the Judgment, upon inquiry, his Advocate was informed that the files were sent back to the registry by the Magistrate upon writing of the Judgment and that no communication was relayed to the parties of such delivery, aggrieved by the Judgment, moreso the exorbitant quantum, the Applicant wishes to appeal against the same, however the time within which the appeal is to be filed has since lapsed hence filing of the current Application. Counsel added that the Appeal intended to be filed is meritorious with high chances of success, the Respondent has since embarked on enforcement of the Judgment and the Applicant stands to suffer irreparably if the Respondent proceeds with execution, the Applicant has been brought without unreasonable delay, he is ready and willing to abide by any orders that the Court may direct. The Applicant has then exhibited a copy of a Judgment supposedly of the lower Court suit but the same is evidently for a different and separate suit.

Respondent's Replying Affidavit

4. The Respondent opposed the Application vide her Replying Affidavit dated 6/3/2023 filed through Messrs Morgan Omusundi Law Firm Advocates. She deponed that the Application is incompetent, has not been brought in good faith, is fatally defective and is merely an academic exercise. She further deponed that the 30 days envisaged for and within which filing a Memorandum of Appeal was required lapsed on 30/01/2023, the Memorandum was filed on 9/02/2023 about 60 days from 30/11/2023, the period of 60 days is inordinate, the reason given for the delay is not plausible for this Court to exercise its jurisdiction in favour of the Applicant, neither the Notice of Appeal nor the letter requesting for typed proceedings has been served upon them, failure to serve the Notice and the letter is a violation of the rules of this Court thus rendering the instant Application an abuse of the process, upon delivery of the impugned Judgment, a copy of the same was soon thereafter sent to the Applicant's Advocate hence he was at all material times aware of the existence of the Judgment, the Respondent has not shown the prejudice that he stands to suffer if leave is not granted for him to file an appeal out of time,
5. Counsel added that the Applicant never deemed it right and justly to act accordingly despite being notified of the Judgment, the application has been filed as an afterthought since there has been an inordinate delay in filing it, the Judgment is a money decree and the Applicant has absolutely no right in law to prevent the Plaintiff from enjoying the fruits of the Judgment, the Respondent has long been waiting for the outcome of the suit to enable her sufficiently remedy her sufferings and injuries sustained from the accident, the Applicant has failed to disclose and demonstrate what substantial loss he will suffer should the orders sought be denied, should this Court deem it fit to grant the orders then the Court should order the Applicant to deposit the entire decretal sum together with costs and interest.

Hearing of the Application

6. The Application was canvassed by way of written submissions. Pursuant to directions given, the Respondent filed her Submissions on 3/5/2023 while the Applicant filed on 4/05/2023.



Applicant's Submissions

7. Counsel for the Applicant submitted that the Applicant has good and sufficient reason as to why he was not able to file the Appeal within the stipulated time, the trial Magistrate in the matter at the subordinate Court proceeded on transfer and parties were informed that Judgment will be delivered on notice, however, Judgment was delivered on 11/11/2022 but no communication was conveyed to the parties, he found out about the Judgment when the Respondent served a taxation notice on 18/1/2023. He cited the case of *Mombasa County Government v Kenya Ferry Service & Another* [2019] eKLR and submitted that the Applicant is the deserving party since the cause of the delay was primarily the Court and not the parties, this is a just and reasonable cause since the Applicant moved with speed to file the application, from the annexed Judgment the coram clearly shows that no party was present during the delivery of the Judgment, the application has been brought without undue delay. He cited the case of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR and submitted that the delay is 2 months, the Applicant has annexed a draft Memorandum of Appeal which from the face of it has high chances of success, the Applicant shall suffer immense loss since the Respondent was ready to execute the Judgment,
8. In regard to stay of execution, Counsel cited the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 and submitted that the Applicant has demonstrated good reasons for granting stay of execution and that the Applicant has stated that he is ready to abide by the orders of this Court issued in allowing the stay of execution.

Respondent's Submission's

9. Counsel for the Respondent submitted that Section 79G of the *Civil Procedure Act* requires that every appeal from the subordinate Court to the High Court shall be filed within 30 days provided that an appeal can be admitted out of time if the Appellant satisfies the Court that they have a good reason for failure to file the same out of time. Counsel cited the case of *Charles N. Ngugi v ASL Credit Limited* [2022] eKLR and submitted that the Court while interpreting this Section observed that the phrase "an appeal may be admitted out of time" means that the intended Appeal ought to have been filed before or together with the Application seeking to appeal out of time, therefore ab initio, the Application is incompetent and ought to fail since the Applicant failed to file a substantive Appeal first, the Applicant has only annexed a draft Memorandum of Appeal but has not bothered to file it in Court. He also cited the case of *Evans Kiptoo v Reinhard Omwoyo* [2021] eKLR on the same point and in which the earlier case of *Gerald M'Limbine vs Joseph Kangangi* was quoted.
10. On whether there is sufficient cause for filing an appeal out of time, Counsel argued that an extension of time to lodge an appeal is not a right of a party but an equitable remedy that is available to a deserving party, the Applicant failed to demonstrate a good and sufficient cause for not filing the Appeal in time, the discretion to file an appeal out of time is not abundantly available but must be exercised sparingly and cautiously so as to avoid causing injustice/prejudice and/or inconvenience to a successful litigant who ought to enjoy the fruit of his Judgment, the Application offends the provisions of Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, the oxygen principle will not be realized/served if the Court allows the Application, the Applicant ought to be treated as an indolent party, the Applicant has neither offered any reasonable or excusable explanation as to why they failed to file the appeal within the statutory time, the only excuse being advanced by the Applicant is that Judgment herein to be delivered on notice which notice was not communicated, however, the Applicant has also failed to mention that they were served with a copy of the Judgment by the Respondent, the Applicant's Counsel ought to have taken further steps by physically attending the Court registry to follow up on the matter hence



the excuse offered must fail, in any event, the Applicant participated in the taxation which was after Judgment.

11. In regard to stay of execution, Counsel cited Order 42 Rule 6(2) of the Civil Procedure Rules and *Butt v Rent* (Supra) and submitted that other than merely alleging that he will suffer substantial loss, the Applicant has not proved the nature of substantial loss that he will suffer if the orders sought are not granted, therefore the Court has no basis upon which to assess the risk or loss or if any. He then cited the Case of *Andrew Kuria Njuguna vs Rose Kuria* (Nairobi Civil Case 224 of 2001 (unreported) in which the case of *Antoine Ndiaye v African Virtual University* [2015] eKLR was cited, and argued that the Applicant's remedy, if any, lies squarely on his Advocates and it is not for the Respondent to shoulder the consequences of the negligence of the Applicant's Advocate.

Analysis and Determination

12. I have considered the Application, Affidavits, Submissions and authorities filed. I find that the issues that arise for determination to be the following:

- a. Whether leave to file appeal out of time should be granted.
- b. Whether an order of stay of execution pending appeal should issue.

13. I now proceed to analyze the Issues.

14. 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.”

15. On the principles that should guide the Court in Applications for extension of time to appeal out of time, the Court of Appeal in the case of *Edith Gichugu Koine v Stephen Njagi Thoithi* [2014] eKLR stated as follows:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but not 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.”

16. Further, the decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion and must be exercised judiciously just like any other exercise of discretion.

17. Regarding the length of delay, it is evident from the Pleadings on record that the Judgment that the Applicant is seeking to appeal against was delivered on 11/11/2022. The 30 days period for filing an Appeal therefore lapsed on or about 11/12/2022. The instant Application was then filed on the 9/2/2023. The period of delay as computed from the date of lapse of time is therefore about 2 months. The Applicant alleges that he only learnt of the delivery of the Judgment on 18/1/2023 when his Counsel were served with a copy of the Judgment, together with a taxation notice by the Respondent's Counsel. The Applicant contends that the trial Magistrate went on transfer and thus the Judgment



was to be delivered on notice. The Applicant maintains that however no such notice was served. He states that he is aggrieved by the Judgment and wishes to appeal.

18. I note that the Respondent has not disputed that the Judgment was to be delivered on notice. She has also not disputed that no such notice was served and that neither of the parties was in Court when the Judgment was delivered. I can therefore safely presume that both parties, the Respondent included, were not aware of the delivery of the Judgment and that both only learnt of the same after it had already been delivered.
19. The Respondent depones in her Replying Affidavit that upon delivery of the Judgment, a copy thereof was soon thereafter forwarded to the Applicant's Advocate. She does not however disclose who effected such service, in what manner and on which date. She has also not exhibited any forwarding letter or any document to prove such service.
20. On his part, the Respondent's Counsel has in his Submissions stated that the Applicant participated in the taxation of costs which was after the Judgment. I note that this allegation was not made in the Respondent's Affidavit and was only introduced for the first time in the Submissions. I will not therefore seriously consider it. In any event, there is no disclosure on when such taxation of costs took place and whether it was before or after the filing of the present Application or whether it was before or after 18/1/2023, the date when the Applicant alleges to have learnt of the Judgment.
21. In the circumstances, I find that the allegation by the Applicant that he only learnt of the Judgment on or about 18/1/2023 when his Advocate was served with the taxation notice remains unchallenged. In my view the delay is not inordinate bearing in mind that the Judgment was delivered in the absence of the parties.
22. The other period that is material and ought to be considered is the period between the date when the Applicant alleges to have learnt of the Judgment (18/1/2023) and the date when he filed the present Application (9/02/2023). I note that this period is about 21 days. Similarly, my view is that this delay, too, is not inordinate in light of the preliminaries and considerations that come into play before one finalizes an Application for filing in Court.
23. The Supreme Court, while handling a Application for extension of time in Civil Application No. 3 of 2016 - County Executive of Kisumu –vs- County Government of Kisumu & 7 Others held as follows: -

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“(23) It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the court. Further, this court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The court delineated the following as: -

“the underlying principles that a court should consider in exercise of such discretion:

- 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.
24. I appreciate that in holding as it did, the Supreme Court was dealing with Rules 32 and 53 of the Supreme Court Rules which are not applicable in the instant matter whose basis is Section 79G of the Civil Procedure Rules, the holding nevertheless lays down the general principles to be applied in Applications for extension of time no matter the statutory basis.
25. Upon applying the above principles to the facts of this case, I find that the Applicant has tendered sufficient explanation as to why there was delay in filing the Appeal within time. I believe therefore that the interest of justice would be served by granting the Applicant leave to appeal out of time.
26. I am aware that Counsel for the Respondent submitted that the use of the phrase “an appeal may be admitted out of time” in Section 79G of the *Civil Procedure Act* means that the intended Appeal ought to have been filed before or together with the Application seeking to appeal out of time and that therefore ab initio, the Application is incompetent and ought to fail. He argued that the Applicant failed to file a substantive Appeal first and only exhibited a draft Memorandum of Appeal which he never bothered to file it in Court. He cited the cases of Charles N. Ngugi v ASL Credit Limited [2022] eKLR, Evans Kiptoo v Reinhard Omwoyo [2021] eKLR and Gerald M’Limbine vs Joseph Kangangi.
27. I have perused the said High Court authorities and agree that they advance the position taken by the Respondent’s Counsel. However, I am yet to come across a decision of the Court of Appeal or the Supreme Court which are the two Court higher in hierarchy over the High Court and whose decisions would be binding on this Court. Being decisions of the High Court and thus a Court of concurrent jurisdiction, I am allowed to depart from the reasoning therein and which I hereby do.
28. I depart from the findings in the said decisions because in my view, the said findings are a result of interpretation of the proviso to Section 79G, not a result of the express wording of the Section. Since Section 79G does not expressly state that an Appeal must first have been filed before Section 79G can apply, I form the view that the interpretation of the said Section must not be read in isolation but with other provisions of the law. The interpretation must also take into account of the spirit and intention of the law.
29. The overriding objective in civil litigation is a policy issue which the Court invokes to obviate hardship, expense, delay and to focus on substantive justice. Apart from the Court’s inherent powers recognized under Section 3A of the *Civil Procedure Act*, the introduction of Sections 1A and 1B of the *Civil Procedure Act*, as read with Article 159(2)(d) of *the Constitution* of Kenya, 2010, changed the way in which Courts operate. I believe that by introducing the overriding objective principle in litigation, the Court is now mandated to consider aspects like the delay likely to be occasioned and the cost and prejudice to the parties when called upon to summarily reject actions. In short, the Court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159(2)(d) of *the Constitution* also makes it clear that the Court ought to render justice between the parties without undue regard to technicalities of procedure. Of course, this does not mean that procedural lapses should always be ignored. What it means is that the Court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party before sending away a litigant from the seat of justice without hearing him on merits. This is how is a Court is enjoined to exercise its judicial discretion.



30. In my opinion, Section 79G ought to be read together with the provisions of Section 95 of the [Civil Procedure Act](#) and also Order 50 Rule 6 of the Civil Procedure Rules. Section 95 of the Act provides as follows:

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

31. On its part, Order 50 of the Civil Procedure Rules provides that:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed”

32. I therefore find that the Applicant’s act of seeking leave to file an Appeal before filing the Appeal itself is not an irregularity nor a defect. I therefore still reiterate that the interest of justice would be served by granting the Applicant leave to appeal out of time.

Whether an order of stay of execution pending appeal should issue

33. As regards stay of execution pending hearing and determination of an Appeal, the principles guiding grant thereof are well settled. In this respect, Order 42 Rule 6(2) of the Civil Procedure Rules provides as follows:

“No order for stay of execution shall be made under sub rule (1) unless—

- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

34. The Applicant states that he is aggrieved by the trial Court’s Judgment which he argues exposes him to suffer irreparable harm as the Respondent has already embarked on the execution process. Although the Applicant has not provided security for due performance, he states that he is ready and willing to comply with any conditions that this Court may impose as a condition for being granted the orders of stay of execution. The Respondent on the other hand contends that the only reason why the Applicant is seeking stay is to deny her from enjoying the fruits of her Judgment.

35. The duty of the court is, as far as possible, to balance the interests of the parties. This would require, in my view, safeguarding the interests of the decree holder to the decretal sum, but also ensuring that should the appeal succeed, it will not have been rendered nugatory by earlier payment to a party who is unable to repay the decretal sum. Both the Applicant and the Respondent have relied on the decision



of the Court of Appeal in *Butt v Rent Restriction Tribunal* [1982] KLR 417 which gave guidance on how the Court should exercise discretion. It held as follows:

- “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

36. Although, unlike in the Court of Appeal Rules, Order 42 Rule 6 of the Civil Procedure Rules does not include arguability of an intended Appeal or strength thereof or chances of its success as a requirement, I have nevertheless perused the draft Memorandum of Appeal and my assessment is that it raises arguable points for determination. It cannot be termed as being frivolous. On this point, I stand guided by the holding in the case of *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others* [2013] eKLR where the Court of Appeal held as follows:

“...On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised ... An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous...”

37. I note that the Respondent has not made any averments or place any material before the Court in respect to her ability to refund the decretal sum should it be paid to her and subsequently the Appeal succeeds.
38. Again, upon considering the applicable principles to the facts of this case, I arrive at the finding that the interest of justice demand that there be a stay of execution pending appeal.
39. However, it is only fair that, as a condition for granting the stay of execution, the Applicant should deposit the decretal sum as security. The copy of the lower Court Judgment exhibited is the wrong one since it is evidently for a different suit. Since no decree or Certificate of Costs have been exhibited, I also cannot ascertain the total decretal sum. However, when addressing me in Court, the Counsels were in agreement that the Judgment amount awarded by the lower Court was Kshs 456,650/-. I will therefore round off the figure to a sum of Kshs 500,000/- to cater for costs and interest and order that the Applicant deposits that amount as security and as a condition for grant of the stay of execution.



Final Orders

40. In the end, I allow the Application dated 8/2/2023 in the following terms:
- i. Leave is granted to the applicant to file appeal out of time to challenge the Judgment delivered in Iten SPM Civil Suit No. E015 of 2021, Gladys Jerop Katan v Robert Chirchir Kendagor
 - ii. The Applicant shall lodge the Appeal by filing and serving the Memorandum of Appeal within fourteen (14) days from the date hereof.
 - iii. Execution of the Judgment/decree in Iten SPM Civil Suit No. E015 of 2021, Gladys Jerop Katan V Robert Chirchir Kendagor is hereby stayed pending the hearing and determination of the appeal to be filed.
 - iv. As a condition for granting the stay of execution, the Applicant shall deposit a sum of Kshs 500,000/= in an interest earning bank account to be opened in the joint names of the two parties' Advocates/law firms on record herein, within forty-five (45) days from the date hereof.
 - v. In default by the Applicant to comply with order (ii) above, the leave to file appeal out of time shall stand vacated unless otherwise extended by this Court.
 - vi. In default by the Applicant to comply with order (iv) above, the orders of stay of execution shall lapse and the Respondent shall be at liberty to execute.
 - vii. The Applicant shall bear the costs of this Application

DELIVERED, DATED AND SIGNED AT ELDORET THIS 21ST DAY OF JULY 2023

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WANANDA J. R. ANURO

JUDGE

