



REPUBLIC OF KENYA



**Wawira v Kyalo (Miscellaneous Civil Application E736 of 2022)
[2023] KEHC 21087 (KLR) (Civ) (21 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21087 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E736 OF 2022**

CW MEOLI, J

JULY 21, 2023

BETWEEN

CONSOLATA WAWIRA APPLICANT

AND

BETTY KYALO RESPONDENT

*(Being an application for leave to file an appeal out of the time
against the ruling in Nairobi Milimani CMCC No 3216 of 2020.)*

RULING

1. For determination is the motion dated November 18, 2022 by Consolata Wawira (hereafter the Applicant) primarily seeking leave to file an appeal out of the time against the ruling in Nairobi Milimani CMCC No 3216 of 2020 in favour of Betty Kyallo (hereafter the Respondent), and an order to stay proceedings in the said suit pending the hearing and determination of the intended appeal. The motion is expressed to be brought under Section 3A of the *Civil Procedure Act*. In arguing the motion however, the Applicant's counsel invoked section 79 G of the *Civil Procedure Act* and Order 42 Rule 6(6) of the *Civil Procedure Rules, inter alia*.
2. The grounds on the face of the motion are amplified in the supporting affidavit sworn by Applicant. The gist thereof is that the impugned ruling in Nairobi Milimani CMCC No 3216 of 2020 was delivered without notice on July 15, 2022 in absence of the parties; that her counsel thereafter prepared the memorandum of appeal and record of appeal for filing; that due to a glitch in the court e-filing system, confirmed by the Judiciary notice issued on August 24, 2022, he was unable to lodge the documents, which fact was communicated to counsel for the Respondent via email; and that no prejudice would befall the Respondent if the leave sought is granted.



3. She further asserts that the instant motion has been brought without delay and that the intended appeal has a high chance of success. Hence denial of the motion will result in the trial court concluding the lower court suit, rendering the intended appeal nugatory. She concludes by deposing that it is in the interest of justice that the court grants the orders sought because the failure to file the intended appeal in time was hindered by factors beyond her control.
4. The Respondent opposes the motion through the replying affidavit deposed by Mark Nduati, counsel having conduct of the matter on behalf of the Respondent. He confirms that the impugned ruling was delivered on July 15, 2022 and avers that stay of proceedings is grave judicial action which interferes with the right of the Respondent to prosecute her suit, impinges on the right to access to justice and right to be heard without delay. And that in this instance, the Applicant has not met the threshold to warrant an order to stay proceedings. Moreover, that the Applicant has not demonstrated that she has an arguable appeal with a high chance of success and that the same will be rendered nugatory if stay is denied.
5. Counsel further deposes that, the Applicant's allegation that she attempted to file the memorandum of appeal on 15.08.2022, is doubtful as the instant motion was filed more than two months later. That despite requesting for typed proceedings on 27.07.2022 and receiving the same within time, the Applicant waited until the last day possible, to purportedly upload her memorandum of appeal in the e-filing portal.
6. Counsel further contends that the Applicant has not attached a certificate of electronic evidence as is required under Section 65(8) as read with Section 78(A) of the *Evidence Act* in respect of the WhatsApp screen shots annexed to the support affidavit or adduced any evidence to prove that the purported WhatsApp number captured therein belongs to a Judiciary ICT Staff. And in any case, there are official channels available for communication with the Judiciary and that the only official notification on the e-filing downtime was issued on 24.08.2022. Hence the motion is without baseless and untenable. Counsel concludes by deposing that both the motion and intended appeal lack merit and ought to be dismissed with costs.
7. In rejoinder by way of a supplementary affidavit, the Applicant reiterates that the intended appeal raises triable issues and that the Respondent does not dispute receipt of the emails explaining the challenges her counsel had faced in filing the appeal. That the instant motion is not a delaying tactic and that she cannot be faulted for filing an appeal on the last possible day based on the reasonable belief of the stability of the judiciary e-filing system. Presenting more details on the e-filing downtime, the deponent asserted that the delay in filing the instant motion was not inordinate. Pointing out that the Respondent has not demonstrated the prejudice she stood to suffer if the motion was granted.
8. The motion was canvassed by way of written submissions. Counsel for the Applicant in addressing the prayer for leave cited the provisions of Article 48 & 50 of the *Constitution of Kenya*, Section 79G of the *Civil Procedure Act* and the decision in *County Executive of Kisumu v County Government of Kisumu & Others* [2017] eKLR to assert the right to be heard and the applicable principles which include demonstration of good and sufficient cause for not filing the appeal in time and explanation for delay. Counsel reiterated the material in the supporting affidavits in that regard.
9. He asserted that the appeal has a high chance of success as evinced by the draft memorandum of appeal and that the Respondent has not disclosed any prejudice that she will suffer if leave to appeal out of time is granted. On whether there was undue delay in filing the instant motion, counsel relied on the decisions in *Purity Kagendo Anampiu & Another v Nelie Mugambi & another* [2021] eKLR and *Kamlesh Mansukhalal Damji Pattni v Director of Public Prosecutions & 3 others* [2015] eKLR as cited



in *Charles Karanja Kiiru v Charles Gitbinji Muigwa* [2017] eKLR to argue that delay of three (3) months in the instant matter is not so inordinate as to prejudice the Respondent.

10. Concerning the prayer seeking stay of proceedings, counsel invoked the provisions of Order 42 Rule 6 (1) of the *Civil Procedure Rules* and the decision in *Lucy Waithera Kimanga & 2 Others v John Waiganjo Gichuri* [2015] eKLR on the applicable threshold reiterating the consequences of denial of the prayer contained in the supporting affidavits of the Applicant. The court was urged to allow the motion as prayed.
11. On the part of the Respondent, counsel in responding to the Applicant's submissions on leave argued as a preliminary issue that the instant motion is incompetent and ought to fail since the Applicant failed to file a substantive appeal first before seeking leave. That the absence of a filed memorandum of appeal on which to anchor the miscellaneous motion, renders the motion incompetent and liable for dismissal. The provisions of Section 79G of the *Civil Procedure Act* and the decision in *Evans Kiptoo v Reinhard Omwonyo Omwoyo* [2021] eKLR were called to aid in the foregoing regard.
12. Addressing the merits of the motion, counsel submitted that extension of time is an equitable remedy to a deserving party and that the Applicant herein has failed to demonstrate good and sufficient cause for her failure to file the memorandum of appeal in time. Counsel relying on the decision in *Mombasa County Government v Kenya Ferry Services & Anor* [2019] eKLR contended that as of July 27, 2022 the Applicant was aware of the decision of the lower court but waited until August 15, 2022 to lodge her appeal; that the notified downtime of the e-filing portal was on August 24, 2022 and not shown to be on August 15, 2022; that no sufficient explanation has been offered for filing the motion three months after August 15, 2022 and or when the e-filing portal was finally functional; and hence the motion is an abuse of the court process and waste precious judicial time. The case of *Union Insurance Co. of Kenya Ltd v Ramzan Abdul Dhanji* Civil Application No 179 of 1998 was cited here.
13. Counsel further asserted that the intended appeal did not raise any triable issues and the Respondent, dragged to court in 2020, will be prejudiced if the court grants the motion as the intended appeal will compound delay in concluding the matter. Responding to the Applicant's submissions on the prayer for stay of proceedings, counsel called to aid the decision *Re Global Tours & Travels Ltd* HCWC No 43 of 2000 as cited in *Peter Kariuki Mburu v Neema Shah* [2021] eKLR to submit that stay of proceedings is an equitable relief which, without a demonstration of an arguable appeal ought to be rejected. Counsel reiterated the duty of the court under the overriding objective in Section 1A and 1B of the *Civil Procedure Act* and urged that the motion be dismissed with costs.
14. The Court has considered the rival affidavit material and submissions in respect of the motion. Alongside the prayer for leave to appeal out of time, the Applicant has sought stay of proceedings pending hearing and determination of the intended appeal. It is evident on a plain reading of Order 42 Rule 6(1) of the *CPR*, that an order to stay proceedings pending hearing and determination of an appeal presupposes the existence of an appeal. The filing of an appeal is a condition precedent to the exercise of this court's appellate jurisdiction under Order 42 Rule 6 (1) of the *Civil Procedure Rules*. Although the provision does not expressly say so, this can be inferred from the rule. Further, an analogy can be drawn from Order 42 Rule 6 (4) of the *Civil Procedure Rules* which states that an appeal is deemed filed in the Court of Appeal when the notice of appeal has been given. Equally, Order 42 Rule 6 (6) of the *Civil Procedure Rules* states:

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such



terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.” (Emphasis added).

15. It would seem therefore that the invocation of the jurisdiction of this court under Order 42 Rule 6 (1) or 6 (6) of the *Civil Procedure Rules* must be preceded by the filing of an appeal, or compliance with the procedure for filing an appeal, in this case a memorandum of appeal (See Order 42 Rule 1 of the *Civil Procedure Rules*). Thus, where a party specifically seeks stay of proceedings pending hearing and determination of an appeal not yet filed, the court may be acting in vacuo by considering the Applicant’s prayer for stay of proceedings pending a non-existent appeal.
16. The Court of Appeal in *Abubaker Mohamed Al-Amin v Firdaus Siwa Somo* [2018] eKLR while citing with approval the decision of the High Court in *Rosalindi Wanjiku Macharia vs. James Kiingati Kimani (Suing as the Legal Representative of the Estate of Martin Muiruri (Deceased))* [2017] eKLR concurred and adopted the reasoning that stay of execution pending appeal must be preceded by a filed appeal. It is the court’s reasoned opinion that this dictum applies mutatis mutandis when the prayer for consideration is stay of proceedings pending appeal. See also *Equity Bank v Westlink MBO Limited* [2013] eKLR and *Balozi Housing Co-operative Society Limited v Captain Francis E. K. Hinga* [2012] eKLR.
17. Order 42 Rule 1 of the *CPR* provides that an appeal to the High Court shall be in the form of a memorandum of appeal. In this case, an appeal is yet to be filed and therefore, there is no basis upon which this court could exercise its appellate jurisdiction under the said provision in a miscellaneous matter. If the Applicant desired to seek an order to stay proceedings alongside the prayer for the late admission of their appeal, they ought to have first filed the memorandum of appeal in a proper appeal and the relevant application. The foregoing notwithstanding, it is not lost on the court that pursuant to Section 3A of the Civil Procedure Rules the court in exercise of its inherent power may stay proceedings in deserving situations or where the ends of justice so require. That said, the court will address the matter of stay of proceedings later in this ruling.
18. Turning now to the prayer seeking leave to appeal out of time, a preliminary issue raised by the Respondent challenges the competency of the motion for failure to file the memorandum of appeal before seeking leave. The power of the court to enlarge the time for filing an appeal out of time is expressly donated by Section 79G, as well as generally, by Section 95 of the *Civil Procedure Act*. 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.”
19. This court has held on many occasions that the words that “an appeal may be admitted out of time” in Section 79G, appears to admit both retrospective and prospective application. So that leave under the Section may be sought before or after a memorandum of appeal is filed. The court having taken the liberty of perusing the Respondent’s persuasive authority, *Evans Kiptoo (supra)*, is not persuaded by the Respondent’s argument that the instant motion is incompetent. As such the Respondent’s objection to the competency of the motion is not well taken.
20. That said, the principles governing leave to appeal out of time are settled. The successful applicant must demonstrate “good and sufficient cause” for not filing the appeal in time. In *Thuita Mwangi v*



Kenya Airways [2003] e KLR, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in pari materia with Section 79G of the Civil Procedure Act, reiterated its decision in Mutiso v Mwangi [1997] KLR 630 as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

21. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court’s discretion in his favor. The Supreme Court in the case of Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The Court stated inter alia that:

“(T)he underlying principles a court should consider in exercise of such discretion include;

1. Extension of time is not a right of any 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 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 Respondent if the extension is granted;
6. Whether the application has been brought without undue delay.
7.”

See also County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] eKLR.

22. There is no dispute that the impugned decision of the lower court was delivered on 15.07.2022. The Applicant’s assertions that it was delivered without notice and in absence of the parties, was not disputed by the Respondent. The court, on perusing the certified copy of the proceedings and ruling (annexure CW-2 & CW-4) confirms that the impugned ruling had been scheduled for delivery on 08.07.2022 but was delivered on 15.07.2022 in the absence of the respective parties. Nonetheless, it appears that as of 27.07.2022 the Applicant was aware of the delivery on 15.07.2022 and wrote a letter (annexure CW-5) to the court requesting a copy of typed proceedings and the ruling.
23. The Applicant asserts however that her counsel having prepared the memorandum of appeal and record of appeal for filing, was unable due to a glitch in the e-filing system, as evidenced by the Judiciary notice (annexure CW-9) issued by the court on 24.08.2022, to file the documents. The Applicant



exhibited screen shots as annexure CW-8 being communication with an identified number purportedly belonging to a judiciary staff to support the system glitch argument.

24. The latter annexure was challenged by the Respondent on grounds that the Applicant has not attached a certificate of electronic evidence as is required under Section 65(8) as read with Section 78(A) of the *Evidence Act* in that regard or provided evidence that the purported WhatsApp number captured therein belongs to a Judiciary ICT Staff. All considered, the court is not satisfied with the bona fides of the disputed annexure and not much weight should be attached thereto regarding downtime of the e-filing system specifically on August 15, 2022.
25. However, the email dated August 15, 2022 (annexure CW-7) and annexure CW-9, a notice issued by the Judiciary on August 24, 2022, demonstrate downtime with the e-filing system around that period. Whether the said downtime was the real cause of the delay here is a different matter. Because the Applicant has not fully addressed the fact that the instant motion was not filed until November 21, 2022, some three months after mid-August 2022. This, despite annexure CW-9 providing an alternative procedure for filing time-bound pleadings as follows: -

“We are experiencing a downtime on our e-filing and case tracking system. The technical team is working around the clock to ensure full system restoration.

In the meantime, to ensure minimal service disruption, we are reverting to the guidelines on manual operation during system downtime issued by the Chief Registrar of the Judiciary dated 23rd December 2020.

For application under certificate of urgency and time bound pleadings, forward the same through the respective court stations email address and to automationdeputyregistrar@court.go.ke for processing.” (sic)

26. The Applicant did not offer an explanation on the delay in filing the intended appeal or application at least from August 24, 2022 to November 21, 2022 despite her counsel having been keen to do so at least from his email of August 15, 2022. It is settled that the period of delay as well as explanation thereof are key considerations in an application of this nature. A party seeking extension of time must not be seen to presume on the Court’s discretion. While a court ought not to entertain an indolent or dilatory litigant, it will not ordinarily visit the mistake of counsel on the innocent litigant. Here, it seems that counsel may have failed to act promptly and the alleged downtime in the material period could well be a convenient excuse.
27. Apaloo, J.A. (as he then was) famously stated in *Phillip Kiptoo Chemwolo and 3 Anor. v Augustine Kubede* [[1986] eKLR:-

“I think a distinguished equity judge has said:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merit.”

I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of parties and not for the purpose of imposing discipline....”



12. In its later decision the Court of Appeal in *Tana and Athi Rivers Development Authority v Jeremiah Kimigbo Mwakio & 3 Others*, [2015] eKLR no doubt adverted to the overriding objective in section 1A and 1B of the *Civil Procedure Act* made the following remarks:

“From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel’s duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side...”

28. Overall, the explanation given by the Applicant appears unconvincing. Nevertheless, the delay herein is not inordinate. It would be a travesty of justice for the court to drive the Applicant from the seat of justice for what appears to be omissions of her counsel. Besides, it does not seem that the Respondent will suffer prejudice that cannot be compensated through costs if the motion is allowed.

29. Concerning the arguability of the intended appeal, the court, having perused the grounds in the draft memorandum of appeal, is satisfied that they raise issues worthy of consideration on appeal. That said, based on the language employed in *Mutiso* (*supra*) the requirement touching on the viability of the intended appeal, is neither mandatory nor stringently applied in an application of this nature. The Court of Appeal in *Vishva* (*supra*) stated that “an arguable appeal need not (be one that will) succeed so long as it raises a bona fide issue for determination by the Court.”

30. In *Vishva*’s case (*supra*), the Court emphasized the right of appeal in the following terms:

“Turning to the request to allow the applicant to exercise his now undoubted constitutionally underpinned right of appeal, the position is.... crystalized in the case of *Richard Ncharpi Leiyagu v IEBC & 2 Others* (*supra*); *Mbaki & Others v Macharia & Another* [2005] 2EA 206; and the Tanzanian case of *Abbas Sherally & Another vs. Abdul Fazaiboy*, Civil Application No 33 of 2003; for the holding inter alia that:

- (i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;
- (ii) the right to be heard is a valued right; and
- (iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice;...”

31. In the circumstances of this case, the court is persuaded that to facilitate the Applicant’s undisputed right of appeal leave ought to be granted to the Applicant to file her appeal out of time. Leave is therefore granted to the Applicant to file her appeal within 14 days of today’s date.

32. Regarding the prayer for stay of proceedings pending the intended appeal, as earlier observed, it is more prudent for a party seeking such prayer and to enlarge time for appealing, to have first filed the memorandum of appeal. However, in deserving situations, the court may invoke its inherent discretion under Section 3A of the *Civil Procedure Rules* to meet the ends of justice and or to avert abuse of the court process. Ringera, J (as he then was) *In Re Global Tours & Travel Ltd* Nairobi HCCC No 43 of



2000 (UR) spelt out the applicable considerations in determining an application for stay of proceedings as follows: -

“As I understand the law, 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...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 or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, 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 expeditiously.”

33. Thus, meeting the ends of justice and the need to avoid unnecessary proliferation of proceedings, which needlessly dissipate the court’s limited time resource, are key considerations in an application of this nature. The Court of Appeal in *Raymond Ruto & 5 Others v Stephen Kibowen* [2021] eKLR exhorted that: -

“We acknowledge at the outset, that a court will sparingly and only in exceptional circumstances will it grant an order to stay of proceedings which essentially is an interruption of the other parties right to conduct their hearing....

“The learned authors of; Halsbury’s Law of England, 4th Edition. Vol. 37 page 330 and 332, have also given some principles to bring to bear while considering whether or not a court should stay proceedings as follows: -

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases...”

34. As held in *Osbo Chemicals Ltd v Tabitha Wanjiru Mwaniki* [2018] eKLR the court bears the duty imposed by Section 1B & 1A of the *Civil Procedure Act*, to further the overriding objective in Section 1 of the *Civil Procedure Act* which states:

“ 1A

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate, the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act;
- (2) The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in sub-section (1);
- (3) A party to civil proceedings or an Advocate for such a party is under a duty to assist the court to further the overriding objective



of the Act, and to that effect, to participate in the process of the court and to comply with the directions and orders of the court.”

35. Applying all the above considerations to the facts of this case, and bearing in mind status of proceedings in the lower court, the court feels assured and is prepared to invoke its inherent discretion in favour of the Applicant by granting the prayer for stay of proceedings pending appeal, but subject to the condition that the appeal shall be fully prosecuted within 6 (six) months’ of today’s date failing which, the stay order shall automatically lapse and the Respondent be at liberty to proceed with the suit in the lower court. The costs of the motion are awarded to the Respondent in any event.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 21ST DAY OF JULY, 2023.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Ms. Kamau

For the Respondent: Ms. Letuya h/b for Mr. Nduati

C/A: Carol

