



**Manga v Onono (Miscellaneous Application E193 of 2023)
[2023] KEHC 23417 (KLR) (18 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23417 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION E193 OF 2023
DKN MAGARE, J
SEPTEMBER 18, 2023**

BETWEEN

VICTOR MUSAU MANGA APPLICANT

AND

SARAH ONONO RESPONDENT

RULING

1. The application seeks to leave to file an appeal out of time. The judgment was delivered on May 23, 2023. The reason given is that tau manga he applicant could not get t a copy of judgment in time. He state by the time he got the same time had lapsed.
2. The respondent filed a replying affidavit to the effect that the averments of the affidavit in support are false as Miss Nannungi was present when the judgment was read. She should have obtained the same.
3. The respondent did a breakdown of costs on June 30, 2023. The applicant replied on July 7, 2023 requesting for a breakdown and 30 days stay of execution. Only when the applicant wrote a letter threatening execution by July 24, 2023 did this application get filed.
4. The applicant did not disclose this part of the case and conduct. The applicant is supposed to have clean hands when dealing with this kind of matters. I have not seen a copy of the memorandum of appeal to enable the court note the seriousness of the appeal.
5. In “*Kyangaro v Kenya Commercial Bank Ltd & Another* (2004) 1 KLR 126 as cited in *Patrick Waweru Mwangi & Another v Housing Finance Co of Kenya Ltd* (2013) eKLR at page 145, the court stated as doth:

“ He that comes to equity must come with clean hands and must also do equity. The conduct of the plaintiff in this case betrays him. It does not endear him to equitable remedies. ... He who comes to equity must fulfill all or substantially all his outstanding obligations



before insisting on his rights. The plaintiff has not done that. Consequently, he has not done equity.”

6. In *Brenda Karanja v Mweki Dominic* [2021] eKLR, the court stated as doth:-

“The courts are duty bound to determine matters on a balance of probability whilst taking into consideration the facts and evidence that has been placed before them. In the case of *Arbutnot Express Services Limited v Manchester Outfitters Suiting Division Limited & Another* [1989] LLR 5515 (HCK) the court observed as follows:-

“The general principle of law is that as far as possible, the courts should lean in favour of the trial and determination of proceedings on merits. There are yet other principles viz that delay defeats equities and that he who comes to equity must come with clean hands. The court is duty bound to balance the application of all the principles by weighing one thing against another to see which way the balance tilts.”

7. The factors to consider in dealing with such an application is;

- a. The reason for delay.
- b. The length of delay.
- c. The animus of the applicant.
- d. The prejudice to the Respondent.

8. The plaintiff delayed for 2 months. The delay is not inordinate. It is reasonable. However, reasonable a delay is, it must be justified. The applicant does not have any plausible reason for delay. The judgment was delivered in the presence of all parties. The applicant sat on their rights until they were woken up by the respondent with the bill of costs. The respondents gave 15-days’ notice, which woke them up.

9. There is thus no reason for the delay. However short the delay he same must be explained. In the instant case, it is clear that the applicant is not entitled to an equitable order.

10. It is not necessary to go into the prejudice against the respondents after finding that there is no reason for delay. In any case the applicant is guilty of material non-disclosures.

11. The court notes that the application was not made in good faith. It was simply meant to forestall the applicant’s application for execution for judgment given way back in May 2023. In the circumstances I find mala fide on part of the applicant

12. It is unnecessary to deal with stay of execution in absence of an appeal. It is on quantum and not.

13. The consequence is that the application dated July 20, 2023 lacks merit and is dismissed with costs.

Determination

14. In the end I therefore direct as follows: -

- a. The application dated July 20, 2023 is dismissed with costs of 25,000/=
- b. The same be paid within 30 days in default execution to issue.
- c. This file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 18TH DAY OF SEPTEMBER 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**



KIZITO MAGARE

JUDGE

IN THE PRESENCE OF:-

ONDUSO FOR THE RESPONDENT

ARASA FOR THE APPLICANT

