



HMM (Suing Through His Mother and Next Friend MRC) v Ogallo (Miscellaneous Application E180 of 2023) [2023] KEHC 23446 (KLR) (6 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23446 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION E180 OF 2023
DKN MAGARE, J
OCTOBER 6, 2023**

BETWEEN

**HMM (SUING THROUGH HIS MOTHER AND NEXT FRIEND
MRC) APPLICANT**

AND

MAUREEN OGALO RESPONDENT

RULING

1. This is a ruling over a Miscellaneous Application dated June 22, 2023 and filed on June 26, 2023 seeking leave to appeal out of time. The application itself does not indicate from which decision the leave is to be given. However, from the annexures it is clear it is an appeal from the judgment of the Hon J Mutimba given on March 24, 2023 in Msambweni PMCC E066 of 2022.
2. The matter first came before Lady justice Wangari on July 5, 2023 who placed the matter on July 27, 2023 before me. She certified the matter as not urgent and fixed it for highlighting on July 27, 2023 after giving directions on replying affidavits and submissions.
3. The Respondent filed a replying affidavit dated July 19, 2023. She stated that the judgment as delivered in the presence of parties. Thereafter, it was immediately sent via email. They also state the intended appeal is frivolous.
4. The decision sought to be challenged was given in the presence of the parties. The respondent sought and was granted 30 days stay of execution at the time of delivery. The reason the Applicant gave was that he had sought a copy of judgment and there was a delay in being given the same. The second one was that there was a delay in receiving instructions to Appeal. The application is indicated to have been made without undue delay.
5. The Respondent begs to differ. He indicates that the judgment for Ksh 40,000 general damages and Ksh 7,550 as special damages was delivered in the presence of parties on March 24, 2023. It took



almost 4 months for the Application to be filed. The respondent paid the decretal sum and it is only upon being paid did the Applicants realize that the money is too little. The respondent sets out the chronology of events culminating to the filing of the impugned application.

Analysis

6. It is self-evidence that the judgment was available for the parties on the day of delivery or soon thereafter. The copies were not sought by the applicant given that the judgment was delivered in the presence of both parties. No letter was annexed seeking the judgment or paying for the same.
7. The Applicant bid his time till he was paid. It is then and only then, when filed the current application. The Applicant was under duty to show the reasons for delay. However short the period of delay, it must be explained. The court was not given a satisfactory explanation for the delay. There was no evidence of the need for the copy of judgment and the request for the same. A copy of judgment cannot be supplied through magic. The same ought to have been paid for. I note the judgment was already typed. It was thus available to make copies as soon as needed.
8. A copy of judgment is not necessary where the dispute is only in quantum. The matter will only be whether the award is so high or so low as to amount to an erroneous estimate of damages. Section 79 G of the [Civil Procedure Act](#) provides as doth: -

“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.”

9. A copy of judgment is not necessary at the time of filing the Memorandum of Appeal. In any case, the court below has not certified the time required for preparation and delivery of the judgment. The ground is thus neither plausible nor tenable.
10. The applicant failed to give a plausible reason for the delay. In the case of [John Martin Muchiri Mugo v British-American Insurance Company \(K\) Limited](#) [2018] eKLR, justice PJO Otieno, stated as doth: -

“From the narrative, the applicant allegedly became aware of the delivery of judgment on June 22, 2022. The Applicant sat on their rights till November, 2022 when they filed this application. There is no plausible explanation for the delay. I am thus not satisfied that there is explainable delay.

From the record, what seems to have woken the Applicant is the filing of the party and party bill of costs on August 30, 2022 and served on September 6, 2022 as per annexure JMM2 in the Respondent’s affidavit. It is not ease to drive out a party from the seat of justice. However, a party who watches the seat of Justice rained on and only wakes up when someone else wants to seat on it, he does not call for mercy but condemnation. Equity only aids the vigilant. The Applicants were totally indolent. There is not explanation for the long delay.”

11. The Applicant delayed for over 4 months. The delay may not be inordinate, but has not been explained. There is absolutely no evidence that judgment was applied for. Further, the issue of lack of instructions cannot be true. The advocate has not indicated when the sought the instructions they were waiting for.



A delay over proceedings can only occur where the same have been applied for. A delay of over months has not been explained and as such a delay is unexplained, inexcusable and inordinate.

12. Without a valid reason, this court has no jurisdiction to extend time. It is not manna to dish out. It is exercise of discretion. Unless the court is properly moved, it has no power to exercise discretion. It is not by whim but through judicious consideration that such an application is considered.
13. The factors to consider in dealing with such an application are: -
 - a. The length of delay.
 - b. The reason for delay.
 - c. The animus of the applicant.
 - d. The prejudice to the Respondent.
14. The Applicant has not explained the delay. It is my considered opinion that the 4 factors above are sequential. Therefore, one must fulfil each as you move to the next. If the delay is inordinate, it may not be necessary to go to the reason for delay. When the delay is reasonable, there must be a real and genuine reason for delay.
15. Where there is doubt, either way, the court can then exercise discretion one way or another. The court cannot find that the delay is inexcusable, inordinate and no reason is given and then, out of sheer whims and fiat, extend time. That makes litigation unpredictable and unending.
16. In our court system, delay is usually documented. Without documentation, it never happened. For example, a lost file where there is no record of follow up, is not lost. When applying for proceedings, they must first be as of necessity, a letter bespeaking the proceedings and payment of deposit. Without such, proceedings were never requested. The *raison d'être* for payment is to enable the court prioritize according to payment and only serious applicants for proceedings. Without payment, there are no proceedings being sought. Further, proceedings must be formally sought, even where the same were requested for in court, the registry must be moved and follow ups be done.
17. In this matter, the reasons for the delay are strange. Request for a copy of judgment was not made at all. There is therefore no explanation for not filing a Memorandum of Appeal. The absence of a copy of judgment is not available to the applicant.
18. For certification to be done, there must be a request for decree or judgment. Under section 2 of the *civil procedure act*, a decree is defined as doth: -

“decree” means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include—

- a. any adjudication from which an appeal lies as an appeal from an order; or
- b. any order of dismissal for default:

Provided that, for the purposes of appeal, “decree” includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;



Explanation. — A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.

19. An appeal can thus be made even if a formal decree had not been formally extracted. A decree includes a judgment. The only thing the Applicant could have done is to pay and collect the judgment, which was available from March 2023.
20. The Applicant delayed for over 4 months. The reason given is not genuine and has not been explained. In *Salome Alice Akinyi v Aridempta Veronica Ooko & another* [2019] eKLR, Justice J Kamau stated as follows regarding the issue of vigilance: -
 - “24. It is correct as the Respondents submitted that “equity aids the vigilant and not the indolent.” However, it was the view of this court that although the Applicant had delayed in filing her appeal, the delay of four (4) months in bringing the application seeking leave to file an application out of time was not inordinate.”
21. The Applicant has not acted in good faith, waiting to be paid before approaching this court. Given the circumstances of the case, It is not necessary to address the prejudice to the Respondent given that the delay is inexcusable, inordinate and unexplained.
22. This is a proper application to dismiss with costs.

Determination

23. In the circumstances I make the following orders: -
 - a. The Application dated June 22, 2023 lacks merit and is accordingly dismissed with costs of 10,000/=
 - b. The costs shall be paid within 30 days, in default execution to issue.
 - c. The file is closed.

DELIVERED, DATED AND AT MOMBASA ON THIS 6TH DAY OF OCTOBER 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Arasa for Respondent

Wanjiku for Applicant for Lijoodi

