Kiarie v Njihia (Miscellaneous Civil Application 35 of 2023)
[2023] KEHC 23093 (KLR) (6 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23093 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISCELLANEOUS CIVIL APPLICATION 35 OF 2023

JRA WANANDA, J

OCTOBER 6, 2023

BETWEEN

GRACE MUTHONI KIARIE ..... APPLICANT

AND

ANNE WANJIKU NJIHIA ..... RESPONDENT

RULING

1. The Application before Court is the Notice of Motion dated 24/02/2023 and filed by the Applicant on the same date. It seeks the following orders:

    a. [.....] Spent.

    b. That this Honourable Court be pleased to grant leave to extend the time for filing of the Appeal herein.

    c. That there be suspension of orders of committal to civil jail and consequential orders thereto of the Hon. Magistrate in – Eldoret Small Claims No. E324/2022 against the Appellant.

    d. That the Appellant be ordered to deposit a sum of Kshs 100,000/= or any sum that this Honourable Court might deem fit as security pending Appeal.

    e. That the Honourable Court be pleased to make such orders as it deems just and expedient to award under the circumstances.

    f. Costs of this Application be provided for.

2. The Application is filed through Messrs Kipkosgei & Co. Advocates and is brought under "Order 42 Rule 6 of the Civil Procedure Rules, Section 1A, 1B and 3A of the *Civil Procedure Act*". It is premised on the grounds stated on the face of the Application and is supported by the Affidavit sworn by the Applicant, Grace Muthoni Kiarie.

3. In the Affidavit, the Applicant deponed that the Eldoret Small Claims Court delivered its Judgment in Claim No. E324/2022 (Ann Wanjiku Njihia v Grace Muthoni) on 15/02/2023 against the Applicant (however the copy of the Judgment exhibited refers to 23/09/2022), she is aggrieved and dissatisfied with the Judgment and intends to Appeal, the delay to file the Appeal on time is not inordinate having been occasioned by failure of his Advocate on record by then to advise her that Judgment had been rendered, she only came to know about the Judgment when she was served with a Notice to Show Cause (NTSC), she was committed to civil jail on 21/02/2023, she has an arguable Appeal with high chances of success as shown by the draft Memorandum of Appeal, she is willing to deposit a sum of Kshs 100,000/= or any sum that this Court might deem fit as security pending hearing and determination of the Appeal, there is need for suspension of the committal to civil jail to allow her Appeal to be heard and determined since the same will be rendered nugatory if she continues to serve civil jail, in the interest of justice and to prevent the Appeal being rendered nugatory and an academic exercise the suspension of the committal to civil jail is necessary, it is an affront to justice since her family is suffering as she is the breadwinner of her three children aged 2 years, 8 years and 13 years. She then exhibited copies of the Judgment, NTSC and draft Memorandum of Appeal.

4. When the Application came before me ex parte under a Certificate of Urgency on 24/02/2023, I granted the Applicant interim bail of Kshs 100,000/- which upon depositing she was to be released from civil jail pending the inter partes hearing of the Application. From the file, I note that the said bail amount was indeed deposited in Court on 28/02/2023.

Respondent's Replying Affidavit

5. In opposing the Application, the Respondent swore the Replying Affidavit filed on 8/03/2023 through Messrs J.M. Kimani & Co. Advocates. She deponed that the Application is made late in the day, it is fatally and incurably defective, bereft of merit, the case before the Small Claims Court was heard with both parties testifying, the same was then fixed for Submissions and on 14/09/2022 fixed for Judgment for 20/09/2022 in the presence of both parties, Judgment was then delivered as scheduled, immediately upon delivery of Judgment the Respondent informed the Applicant who indicated that she wanted to dispose of a shop and offset the debt, the Applicant's allegation that she was not informed of the Judgment is a pure lie and has no factual basis, the Applicant was served with a NTSC on 26/01/2023 coming up on 7/02/2023, the Applicant then went to the Respondent's Advocates offices and floated a proposal for disposing a shop to settle the debt, the Respondent informed them that the story had been the same even before the matter was referred to Court and she therefore instructed the Advocates to recover the dues.

6. The Respondent deponed further that on 7/02/2023 the matter was not listed and the NTSC was rescheduled to 15/02/2023, the Applicant did not appear in Court and the same was extended to 21/02/2023, on that date the Applicant was in Court and she was committed her to civil jail for 30 days with an alternative of paying at least Kshs 400,000/= by 24/02/2023, at no time during the hearing of the NTSC did the Applicant indicate that she was not aware of the Judgment or the amount due, upon her committal to civil jail, the Applicant tried to talk to the Respondent through third parties but the Respondent asked them to deal with her Advocates, from the foregoing, it is apparent that the Applicant was always aware of the Judgment and terms thereof, the instant Application was occasioned by the Applicant's committal to civil jail, the Respondent's Advocates later discovered that the Applicant had filed an Application seeking to set aside the committal to civil jail, in her Affidavit in support of the Application, the Applicant indicated that she had already instructed her Advocates to engage the Respondent's Advocates and get a payment mode for the decretal amount, from the

foregoing, it is evident that the intended Appeal is not genuine but an abuse of the Court process, it is made in bad faith in an attempt to frustrate the Respondent from enjoying the fruits of her Judgment.

7. The Respondent added that in any case the Application is fatally and incurably defective as it is filed by an Advocate who is not properly on record, the Application is also self-defeating in as far as it quotes sections on overriding objective yet it is made after inordinate delay thereby defeating the intentions of the Small Claims Court which ought to dispense with matters expeditiously, in an attempt to steal a match the Applicant's Advocates chose to serve the Respondent in person yet they were aware that she was represented by Advocates. the Application is moot and it should be stopped in its tracks immediately.

8. The Respondent then exhibited copies of various items including the Judgment, NTSC, printout of a Whatsap service of the NTSC, Cause List and the said Application filed before the Small Claims Court seeking the setting aside of the committal to civil jail.

Applicant's Further Affidavit

9. Upon being served with the Replying Affidavit, with leave of the Court, the Applicant filed a Further Affidavit on 4/05/2023. In the Affidavit, she denied negotiating with the Respondent as alleged and reiterated that she was not aware of the Judgment during that period and that she only became aware of it when she was served with the NTSC. She stated that her Advocate failed to inform her that he had previously appealed on time without her knowledge, the previous Advocate never used to update her, it is only after she had already filed the present Application that her previous Advocate informed her that there was a pending Appeal in the High Court which had been filed in time, it is that Appeal – Eldoret Civil Appeal No. 151 of 2002 that she now prays that this Court allows to be the Appeal that the present Application is pegged upon.

10. She then conceded that indeed an Application for stay was filed at the Small Claims Court by her current Advocates but stated that however the same was never served upon the Respondent, she has since withdrawn the Application, all this time her Advocate was taking instructions from prison so it was cumbersome. She then referred to the orders that I gave on 28/02/2023 allowing her interim release from civil jail on condition that she deposited a sum of Kshs 100,000/- and confirmed that she deposited the said amount and that she was duly released from prison.

11. The Applicant then exhibited copies of a Consent signed between her previous and present Advocates allowing the latter to come on record after Judgment, Memorandum of Appeal filed in the said Eldoret High Court Civil Appeal No. E151 of 2022 and Notice of Withdrawal of the Application seeking setting aside of the committal to civil jail and filed before the Small Claims Court.

Hearing of the Application

12. The Application was canvassed by way of written submissions. Pursuant to directions given, the Applicant filed her Submissions on 4/5/2023 while the Respondent filed on 19/05/2023.

Applicant's Submissions

13. Counsel for the Applicant cited Section 79G of the *Civil Procedure Act* and submitted that they are aware that the 30 days window within which the Applicant was mandated to file her Appeal has since lapsed, that the Applicant's only solace is Section 95 of the Act which provides for enlargement of time. He then cited the case of Edith Gichungu Koine vs Stephen Njagi Thoithi [2014] eKLR and submitted that the case provides the fundamental limbs that the Court ought to consider and satisfy itself when dealing with this kind of Application. On the period of delay, he submitted that the Court

delivered its Judgment on 23/09/2022 and the Application was filed on 24/02/2023, these are 124 days from the expiry of the stipulated 30 days. He cited the cases of Cecilia Wanja Waweru v Jackson Wainaina Muiruri & Another [2014] eKLR and Almas Hauliers Ltd v Abdulnasir Abukar Hassan [2017] eKLR and submitted that the 124 days cannot be termed as inordinate delay.

14. On the reason for delay, he submitted that the same was occasioned by the failure of her Advocate to advise her that Judgment had been rendered and that she only came to know about the same when she was served with a NTSC. She cited the case of Belinda Mural & 9 Others vs Amos Wainaina [1978] eKLR and Hamam Singh & Others vs Mistri [1971] EA 122 and added that Counsel who was previously representing her filed the said Eldoret High Court Civil Appeal No. E151 of 2022 on time but failed to notify the Applicant, as a result the Applicant filed this Application, had the previous Counsel notified her of the filed Appeal, this Application would not be before this Court.

15. On chances of the Appeal succeeding, Counsel submitted that the 12 grounds of Appeal listed raise pertinent issues for determination and an arguable Appeal is not one that necessarily has to succeed. He cited the case of Meru Misc Civil Application No. 5 of 2000 – Paul Njage Njeru v Karija K. Mugambi [2021] eKLR.

16. On the degree of prejudice to the Respondent if the Application is granted, Counsel submitted that the same will not be elephantine for the reasons that the Applicant has undertaken to deposit a sum of Kshs 100,000/- as security pending Appeal. He cited the case of Henry Sakwa Maloba v Bonface Papando Tsabuko [2020] eKLR.

Respondent's Submission

17. Counsel for the Respondent submitted that as to whether the Applicant has satisfied the grounds for extension of time, the answer is in the negative, Section 79G of the *Civil Procedure Act* provides that appeals should be filed within 30 days. On the guiding principles in an Application for extension of time to file an Appeal, he cited the case of Edith Gichugu Koine (supra) and submitted that whenever such an Application is before a Court, it should take into account inter alia, the period of delay, reasons for the delay and degree of prejudice to the Respondent if the Application is granted.

18. Counsel submitted that the Judgment was delivered way back on 23/09/2022 and the instant Application was filed on 24/02/2023 which is 5 months, considering that the Judgment emanates from the Small Claims Court whose sole purpose of creation is expeditious disposal of matters, a delay of more than 5 months is inordinate and inexcusable. He cited the case of Directline Assurance Company Limited v Salima Salim Hassan [2014] eKLR. He added that although the Applicant faults her previous Advocate for not notifying her of the Judgment, she does not mention the steps she took when she was served with a NTSC which clearly emanated from a Judgment, equity aids the vigilant, not the indolent, faulting the previous Advocate is not a sufficient reason. He then cited the case of Benson Mugo Kinyua v Peter Muriuki Kinyua [2014] eKLR. Counsel submitted further that the Respondent indicated that the Applicant expressed desire to negotiate and that it is the only logical explanation why she never moved Court in any way after being served with the NTSC, she was only jolted into action after being committed to civil jail, a clear indication that the Application is an afterthought. He added that the Applicant had a duty to follow up on her case and establish the outcome thereof. He cited the case of Bi-Mach Engineers Limited vs James Kahoro Mwangi [2011] eKLR.

19. Counsel further submitted that he who comes to equity must come with clean hands, the Applicant filed an Application dated 23/02/2023 in the Small Claims Court that has not been withdrawn as the Notice of Withdrawal purports to withdraw a non-existent Application dated 22/03/2023 not to

mention that the Notice was filed on 2/03/2023 after the Applicant obtained orders herein which is irregular, it follows therefore that the Applicant is advancing two conflicting positions, on one hand she wants to settle decretal amount as can be gathered from the Application before the Small Claims Court and on the other she wants to pursue Appeal albeit belatedly, this is a pure abuse of the Court process, not to mention serving the Respondent with the instant Application knowing well that the Respondent was represented by an Advocate which is not a sign of good faith, as regards the prejudice that the Respondent is likely to suffer, she is entitled to enjoy the fruits of the Judgment. He cited the case of Wachiuri Wahome v Festus Gatheru Wahome & 6 Others [2016] eKLR and submitted that the Applicant should not benefit from the Court's discretion on account of her lethargy. He added that in any case, the Application is moot in view of the admission that Eldoret HCCA No. E151 of 2022 had been filed in time.

20. On substantial loss, Counsel submitted that this is a money decree and the Applicant has not questioned the Respondent's capacity to refund decretal dues in the event the Appeal is successful, her concern is deprivation of liberty by committal to civil jail which is not proof of substantial loss as it is one of the recognized methods of execution process. He cited the case of Ruth Wanjiku Mwangi v Nancy Muthoni Nyaruai [2020] eKLR and submitted that although the Applicant states that her children will suffer, there is no shred of evidence that such children even exist, if she pays the decretal sum she will not be put in civil jail. He cited the case of Justus Kyalo Musyoka v John Kivungo [2019] eKLR.

21. As to whether the Applicant has met the conditions for stay, Counsel submitted that the answer is in the negative, there is delay which is inordinate and inaction of Counsel is inexcusable as it is the duty of the client to follow up her case. He cited the case of Makini School Limited & Another v Benedetta Mose Kyengo [2021] eKLR. As regards security, Counsel submitted that the Applicant seeks to make a mockery of justice by offering Kshs 100,000/= which is not even a fraction of the decretal sum and is thus not sufficient to ensure performance of the decree.

22. In conclusion, Counsel submitted that since all 3 conditions have to be met before the order of stay is granted, the Application must fail. He cited the case of Joseph Odide Walome v David Mbadi Akello [2022] eKLR. He added that the draft Memorandum of Appeal alleged to have been filed on time seeks to challenge the decision of a Magistrate and not Adjudicator of the Small Claims Court, not to mention faulting the Court on factual issues yet the *Small Claims Court Act* allows appeal purely on matters of law as per Section 38 thereof, whereas the Applicant attached a consent allegedly allowing her current Advocates to come on record in Eldoret HCCA No. 151 of 2022, no such consent has been exhibited allowing the Advocates to come on record in place of Kamau Lagat & Co. Advocates in the Small Claims Court case, without an express order of Court allowing the current Advocates to come on record, the Application is built on quicksand and it must fail. He cited the case of Peter Kamau Ngugi & Another v Grace Akinyi Oloo & Another [2021] eKLR and referred to Order 9 Rules 9 and 10 of the Civil Procedure Rules.

Analysis and Determination

23. I have considered the Application, Affidavits, Submissions and authorities filed.

24. Prayer (a) of the Application before the Court seeks extension of time to file an Appeal out of time. Regarding this prayer, the Applicant has now conceded that subsequent to filing this Application, she discovered that in fact her previous Advocates had filed an Appeal within the required timelines but allegedly without her knowledge. She revealed that the same is Eldoret High Court Civil Appeal No. 151 of 2022 and even exhibited a copy of the Memorandum of Appeal filed therein. In the

circumstances, the prayer for extension of time to file an Appeal out of time is clearly now overtaken by events. I will therefore not dwell on this prayer as it is now otiose.

25. On its part, prayer (b) as framed seeks that "there be suspension of orders of committal to civil jail and consequential orders thereto .....". The prayer does not therefore expressly seek stay of execution pending Appeal. However, since the Application is also brought under Order 42 Rule 6 of the Civil Procedure Rules, I will give the Applicant the benefit of doubt and read the prayer as being for stay of execution pending Appeal, including stay or suspension of the committal to civil jail.

26. I will also accept the Applicant's submission that in light of the discovery that the said Eldoret High Court Civil Appeal No. 151 of 2022 had actually been filed, for the purposes of the present Application, the said Appeal be treated as the "pending Appeal" in respect to which the prayer for stay of execution and/or suspension of the committal to civil jail relates.

27. In the circumstances, I find that the issues that now remain for determination to be the following

    i. Whether the Applicant's Advocates herein are properly on record.

    ii. Whether an order of stay of execution pending appeal should issue.

28. I now proceed to analyze the said Issues.

i. Whether the Applicant's Advocates herein are properly on record

29. As aforesaid, the Application was filed on 24/02/2023. The Respondent argues that the Application is fatally and incurably defective because it is filed by an Advocate who is not properly on record. In response, the Applicant exhibited a copy of a Consent filed at the Small Claims Court on 22/02/2023, signed by her previous Advocates, Kamau Lagat & Co. and her present Advocates, Kipkosgei & Co. Advocates allowing the latter to come on record after Judgment. In a rejoinder, the Respondent submitted that the consent is not accompanied by an order from the Small Claims Court allowing the current law firm to come on record.

30. In regard to the above, Order 9 Rule 9 of the Civil Procedure Rules provides as follows:

> "When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—
>
> (a) upon an application with notice to all the parties; or
>
> (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

31. In my view, the requirement of Order 9 Rule 9 is meant to apply where a new Advocate comes on record after Judgment in the same proceedings, suit or action, not an ancillary action, no matter how much related they might be. In my understanding, a separate Miscellaneous Application such as the present one or even an Appeal is a different "action" distinct from the initial suit from which it arises. Since these different "actions" are filed and canvassed in different distinct Courts, a party can well have one Advocate acting for him in the initial suit and after Judgment, instruct a separate Advocate to act for him in the Miscellaneous Application such as the present one or in an Appeal despite these ancillary actions arising from the initial suit. Order Order 9 Rule 9 does not apply in such scenario.

32. For this position, I refer to the decision of Hon. Lady Justice R. Ngetich made in Peter Chere Kiiru v Charles Mulanda Manyelo [2019] eKLR in which she held as follows:

> " 14. The issue here is whether Advocates who were not on record in the original suit is required to seek leave to file appeal. Is an appeal to be treated as separate from original suit or it is a continuation.
>
> 15. Ordinarily whether an Advocate has been on record in original suit or not will not file appeal without instructions from his client. Instructions initially given are to file original suit. If a party is aggrieved with court's determination in original suit, he/she will decide as to whether to appeal or not. An advocate cannot just file an appeal on behalf of his former client without his instructions, as alluded to by counsels, Order 9 Rule 9 of the Civil Procedure Rules 2010, is intended to prevent mischievous litigants form denying Advocates who have acted for a party to conclusion their remuneration. Costs are awarded to parties both in the lower court and Appeal if they succeed. Instruction fee is one of the items to be assessed in a bill of costs in both original suit and appeal.
>
> 16. My view is that the fact that instructions to file suit in original suit and appeal have to be given by the client, it makes them distinct suits; and a party is at liberty to either continue with Advocate who acted in lower suit or engage another for the appeal. No prejudice will be occasioned to an Advocate who acted in the lower suit as the appellate court will made orders in respect to costs of the appeal.
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> 17. That aside, the respondent has not demonstrated to the court how allowing a new advocate to act for the respondent in the appeal is prejudicial to the appellant. Order 9 rule 9 was intended to protect Advocates who acted in the original suit and as observed above; their entitlement to costs in the original suit will not be affected by the new Advocate prosecuting the appeal.

33. The same position has been reiterated in various other cases, for instance, by Hon. Lady Justice R. Sitati in Stanley Mugambi & Another vs John Kiraithe [2005] eKLR and by Hon. Justice S.M. Kibunja in Ezekiel Kiprono Lamai v Lawrence Kibor Nganai [2020] eKLR. The Court of Appeal also held in the same manner in Mary Nchekei Paul vs Francis Mundia Ruga [2019] eKLR, even though it was dealing with an Application under Rule 4 of the Court of Appeal Rules which however is, for all intents and purposes, similar to Order 9 Rule 9 of the Civil Procedure Rules.

34. In any case, my view is that filing of a consent signed by both the outgoing and the incoming Advocate was sufficient and a Court order adopting the consent was not mandatory. For this view, I refer to the decision of Hon. Justice B. M. Eboso made in the case of Serah Wanjiru Kung'u v Peter Munyua Kimani [2021] eKLR where he stated:

> " 13. The above framework was introduced in the Civil Procedure Rules to deal with disruptive changes that litigants and advocates used to effect, often for the purpose of unfairly dislodging previous advocates without settling their costs. The provision on filing a consent between the outgoing and the incoming law firms was intended to ease the process of effecting change of advocates post-judgment. In my view, once the consent is executed and filed and a notice of

change is filed, the new law firm is properly on record. The adoption of the consent as an order of the Court is merely intended to make the Court record clear for avoidance of doubt..."

35. In the circumstances, I find that the firm of Kipkosgei & Co. Advocates is properly on record in this matter and accordingly, overrule the objection raised on this ground.

ii. Whether an order of stay of execution pending appeal should issue

36. The principles guiding grant of stay of execution pending Appeal 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."

37. From the foregoing, it is clear that an applicant for stay of execution pending appeal must satisfy the above conditions, namely, (a) that he will suffer substantial loss unless the order is granted, (b) the Application has been made without unreasonable delay, and (c) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given (see the decision of Hon. Justice F. Gikonyo in Antoine Ndiaye v African Virtual University [2015] eKLR).

38. As to what encompasses "substantial loss", Hon. Justice F. Gikonyo, again, in James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, stated as follows:

> " No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

39. The Applicant submits that she is aggrieved by the trial Court's Judgment which she argues exposes her to irreparable harm since she has already been committed to civil jail. She states that she is ready and willing to deposit a sum of Kshs 100,000/- or any sum that this Court might deem fit as security pending Appeal as a condition for being granted the orders. 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.

40. On substantial loss and whether the Appeal will be rendered nugatory if the stay is not granted, I note that the decretal sum stated in the NTSC is Kshs 800,300/-. The Respondent has deponed that while committing the Applicant to civil jail, the Small Claims Court gave the Applicant the alternative of paying at least Kshs 400,000/- upon which she was to be released. Although the Applicant said nothing

about this reported portion of the order, I also note that she did not deny it. I therefore presume this to have been the true position. Considering that there is a valid Judgment against the Applicant, I find this alternative to have been very reasonable. Strangely however, instead of complying with this alternative order, the Applicant chose to run to this Court while giving no explanation whatsoever on why she could not take advantage of the alternative order already granted to her. Serving the civil jail therefore seems to be the Applicant's own preference and the Applicant cannot use it to allege substantial loss.

41. In any event, the Applicant has not even alleged that the Respondent does not possess the ability to refund the decretal sum should it be paid to the Respondent and subsequently the Appeal succeeds. I therefore find that the Applicant has not demonstrated that she will suffer substantial loss if the order of stay is not granted.

42. On whether the Application has been brought without unreasonable delay, it is not in dispute that the Judgment was delivered on 20/09/2022. The present Application was then filed on 24/02/2023, a period of 5 months after the Judgment. The Applicant alleges that she delayed to file the Application because her Advocate never informed her of the delivery of the Judgment.

43. While dealing with a similar scenario in Habo Agencies Limited vs. Wilfred Odhiambo Musingo (2015) eKLR, although in an Application seeking for extension of time to file an Appeal, sitting as a single Judge of the Court of Appeal, Hon. Justice P. Waki stated as follows:

> " It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel".

44. Similarly, in Noorlands Limited v Kenya Power & Lighting Company Limited [2021] eKLR, while allowing an Application to strike out a Notice of Appeal on the ground of delay to prosecute the intended Appeal, the Court of Appeal held as follows:

> " 7. In the present case, however, quite apart from the fact that the advocates for the respondent, Kiarie Kariuki & Company advocate, have not themselves explained what transpired, the respondent itself appears to have made absolutely no effort to follow up with its advocates to establish the status of the matter for an inordinately long time. .....

45. Further, in Bi-Mach Engineers Limited vs. James Kahoro Mwangi [2011] eKLR, Hon. Justice P. Waki, again sitting as a single Judge of the Court of Appeal, stated as follows:

> " The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocate..."

46. In the present case, the Applicant has not denied the Respondent's statement that the Applicant was present in Court together with her Advocate when the Judgment date of 20/09/2022 was fixed. I therefore again presume this to be the true position. In the circumstances, can the Applicant's explanation that she delayed in filing the Application simply because her Advocate did not inform her of the delivery of the Judgment be accepted? In light of the authorities cited above, I am not prepared to

accept this lame excuse, for that indeed is what it is, an excuse. I decline it since there is no explanation as to why, having being personally present in Court when the Judgment date was fixed, the Applicant did not herself follow-up to find out whether the Judgment was actually delivered as scheduled. I therefore agree with the Respondent's Counsel that "equity aids the vigilant, not the indolent".

47. I also take cognisance of the Respondent's statements that after entry of Judgment, she informed the Applicant of the same, that in response, the Applicant indicated that she wanted to dispose of a shop and offset the debt, that subsequently upon being served with the NTSC in January 2023, the Applicant went to the Respondent's Advocates offices and floated the same proposal for disposing a shop to settle the debt, that at no time during the hearing of the NTSC did the Applicant indicate that she was not aware of the Judgment or the amount due. Although the Applicant has denied these allegations, I am inclined to believe the Respondent noting my earlier finding that the Applicant has not been candid nor truthful. I am therefore satisfied that the Applicant was always aware of the Judgment and terms thereof but simply chose not to act until when she was committed to civil jail.

48. More importantly, it is evident that before filing the present Application, the Applicant had already in March 2023, filed an Application before the Small Claims Court seeking the setting aside of the committal to civil jail. Although it is apparent that this Application was never served upon the Respondent, it is apparent that at the time that she filed the present Application, the Applicant had a parallel Application pending before the Small Claims Court and, unknown to me, this was the position even when I granted the Applicant interim orders temporarily releasing her from civil jail. The Applicant did not even make this material disclosure to the Court and it is the Respondent who revealed it and even supplied a copy of the Application. Although the Applicant claims that her then Advocate filed the Application before the Small Claims Court without her knowledge, that cannot be true since the copy supplied contains her Affidavit, duly sworn and signed by her, in support of the Application. Once again therefore, the Applicant is proved to be untruthful.

49. Although the Applicant submits that she has now withdrawn the said Application filed before the Small Claims Court, I agree with the Respondent's Counsel that the Notice of Withdrawal exhibited refers to an Application dated 22/02/2023 yet from the copy of the Application supplied to this Court, the date thereof is 23/02/2023. It is therefore debatable whether indeed the Application has been withdrawn.

50. What is also interesting is that in her Affidavit in support of the Application before the Small Claims Court, the Applicant deponed that she had instructed her Advocates to engage the Respondent's Advocates and procure a schedule for settlement of the decretal amount. I therefore also agree with the Respondent's Counsel that the Applicant is advancing two conflicting positions since in the Application before this Court, she is seeking leave to file an Appeal out of time and stay pending Appeal, two totally different positions.

51. I also note that in the said Application before the Small Claims Court, contrary to what she has alleged before this Court, nowhere did the Applicant even remotely indicate that she was not aware of the Judgment. This again bolsters my finding that the present Application is wholly based on deliberate untruths since in this Court, the ground is basically that she was not aware of the Judgment.

52. Finally, I may mention that although Order 42 Rule 6 of the Civil Procedure Rules does not expressly include arguability of an intended Appeal or strength thereof or chances of its success as a requirement, it is still, in my view, necessary to generally interrogate, albeit just on the surface, whether the grounds of Appeal being preferred make any legal sense. I have therefore perused the 14 grounds preferred in the Memorandum of Appeal filed in Eldoret Civil Appeal No. 151 of 2022 and my observation is that,

apart from perhaps only one or two grounds, the rest of the grounds upon which the trial Court is faulted are basically alleged errors on findings of fact. Is this even allowed under the applicable law?

53. On this point, Section 38(1) of the *Small Claims Court Act* No. 2 of 2016 provides as follows:

> " A person aggrieved by the decision or an order of the court may appeal against the decision or order to the High Court on matters of law."

54. It is therefore clear that the only points of law can be raised in an Appeal against a decision of the Small Claims Court. To this end, I have serious doubts over the strength of the said Appeal.

55. For the foregoing reasons, I believe that I have said enough to indicate that the present Application has no merit and must be dismissed.

Final Orders

56. In the end, I make the following orders:

    i. The Application dated 24/02/2023 is hereby dismissed with costs to the Respondent.

    ii. The interim order releasing the Applicant from civil jail is hereby vacated and/or cancelled.

    iii. Unless therefore the Applicant settles the decretal sum due, she will be re-arrested and returned to civil jail to serve the remainder of the period imposed as per the orders given in Eldoret Small Claims Court Case No. E324 of 2022.

    iv. The parties shall be at liberty to move the Court appropriately in respect of the fate of the amount of Kshs 100,000/- deposited by the Applicant in Court as a condition for the bail/ bond temporarily releasing her from civil jail.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 6TH DAY OF OCTOBER 2023

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WANANDA J. R. ANURO

JUDGE