



Mwaura & another v Kidui & another (As legal representatives of the Estate of the Late Esther Wanja Wambui) (Miscellaneous Civil Application E021 of 2022) [2023] KEHC 23438 (KLR) (12 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23438 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
MISCELLANEOUS CIVIL APPLICATION E021 OF 2022
AC MRIMA, J
OCTOBER 12, 2023**

BETWEEN

JOHN MUIRURI MWAURA 1ST APPLICANT

STEPHEN SIMIYU MILIMO 2ND APPLICANT

AND

ROSE WAMBUI KINUTHI 1ST RESPONDENT

DENNIS ZENAN KIDUI 2ND RESPONDENT

**AS LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE ESTHER
WANJA WAMBUI**

RULING

Introduction

1. This ruling relates to two applications. They are the Notice of Motion dated 19th May, 2022 and the Notice of Motion dated 31st March, 2023. Both applications were taken out by the Applicants herein.
2. The applications mainly sought two prayers being grant of leave to appeal out of time against the judgment in Kitale Chief Magistrates Civil Suit No. 418 of 2018 and a stay of execution of the said judgment, which was rendered on 29th March, 2022, pending the outcome of the twin applications.
3. The applications were opposed by the Respondents.

The Applications:

4. The application by way of Notice of Motion dated 19th May, 2022 (hereinafter referred to as ‘the first application’) sought the following orders: -



1. This application be certified as urgent and service of the same be dispensed with in the first instance.
 2. This Honourable court be pleased to grant a temporary order of stay of execution as against the judgment/decree in Kitale CMCC NO.418 OF 2018 delivered on 29/3/2022 pending the hearing of this application inter parties.
 3. This Honourable court be pleased to grant a temporary order of stay of execution as against the judgment/decree in Kitale CMCC NO.418 OF 2018 delivered on 29/3/2022 pending the hearing and final disposal and/or determination of the application herein.
 4. This Honourable court be pleased to grant leave to the applicant to file an appeal out of time against the whole judgment in Kitale CMCC NO.418 OF 2018: Dennis Zenan Kidui & Rose Wambui Kinuthia (Suing as the legal administrator of the Estate of the late Esther Wanja Wambui-dcd) Vs John Muiruri Mwaura And Stephen Simiyu Milimo.
 5. This Honourable court be pleased to grant a temporary order of stay of execution as against the judgment/decree in Kitale CMCC NO.418 OF 2018 delivered on 29/3/2022 pending the hearing and determination of the intended appeal.
 6. Costs of this application be provided for in the cause.
5. The application by way of Notice of Motion dated 31st March, 2023 (hereinafter referred to as ‘the second application’) sought the following orders: -
1. This application be certified as urgent and service of the same be dispensed with in the first instance.
 2. This Honourable court be pleased to grant a temporary order of stay of execution as against the judgment/decree in Kitale CMCC NO.418 OF 2018 delivered on 29/3/2022 pending the hearing of this application inter parties.
 3. This Honourable court be pleased to grant a temporary order of stay of execution against the judgment/decree in Kitale CMCC NO.418 OF 2018 and/or extend the interim orders of stay of execution against the judgment/decree in Kitale CMCC NO.418 OF 2018 granted herein on 16/6/2022 pending the inter parties hearing of the application dated 19th May, 2022.
 4. This Honourable court be pleased to grant a temporary order of stay of execution as against the judgment/decree in Kitale CMCC NO.418 OF 2018 pending the hearing and final disposal and/or determination of the application dated 19th May, 2022.
 5. This Honourable court do issue an order declaring the decree in Kitale CMCC NO.418 OF 2018 irregular and execution proceedings ensuing therefrom, illegal, null and void.
 6. Pursuant to grant of prayer number 5 herein above, the Honourable court be pleased to set aside in its entirety the decree and execution proceedings in Kitale CMCC NO.418 OF 2018.
 7. Costs of this application be provided for in the cause.
6. Both applications were supported by Affidavits sworn by the 1st Applicant herein, John Muiruri Mwaura. The 1st Applicant also filed a Supplementary Affidavit in further support to the applications.
7. Further, the Applicants filed written submissions. They submitted that the applications had met the threshold for grant of the orders sought and urged this Court to allow them.



The Responses:

9. In opposing the applications, the Respondents relied on Grounds of Opposition dated 14th April, 2023 and a Replying Affidavit of the 1st Respondent herein, Dennis Zenan Kidui. They also filed written submissions.
10. They prayed that the applications be dismissed.

Analysis:

11. This Court has carefully considered the applications and the responses together with the written submissions and the decisions referred to by the parties. The Court is grateful to Counsel for the on-point submissions and decisions referred to.
12. As the applications seeks two main prayers, that is the leave to appeal out of time and stay of proceedings, this Court will, in the first instance, deal with the aspect of leave.

Leave to appeal:

13. The power of the High Court to inter alia extend time for filing an appeal from a judgment of a subordinate Court is donated by Section 79G of the [Civil Procedure Act](#), Cap. 21 of the Laws of Kenya.
14. The provision states as follows: -

79G. Time for filing appeals from subordinate courts:

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. Courts have over time developed the legal principles guiding the issue of extension of time.
16. The Court of Appeal in *Thuita Mwangi vs. Kenya Airways* [2003] eKLR stated as follows in respect to the matter: -

Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance, in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, (Civil Application No Nai 255 of 1997) (unreported), the Court expressed itself thus:

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 generally 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 [the arguability test]; and fourthly, the degree of prejudice to the Respondent of the application is granted.”



17. And, in *Velji Shahmad vs. Shamji Bros. and Popatlal Karman & Co.* [1957] EA 438, the High Court expressed itself as follows: -

In the interests of the public the court ought to take care that appeals are brought before it in proper time and before the proper court or registry and when a judgement has been pronounced and the time for appeal has elapsed without an appeal the successful party has a vested right to the judgement which ought, except under very special circumstances, to be made effectual. And the Legislature intended that appeals from judgements should be brought within the prescribed time and no extension of time should be granted except under very special circumstances.”

18. The guiding law on extension of time was finally settled by the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR. The Apex Court derived the following underlying principles which a Court should consider: -

- i. 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;
- ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
- iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
- v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
- vi. Whether the application has been brought without undue delay; and
- vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

19. Having restated the law, this Court will now apply it to the circumstances of this case.

20. One of the cardinal legal factors discussed above is the arguability of the appeal. In *Samuel Mwaura Muthumbi vs. Josephine Wanjiru Ngugi & Another* (2018) eKLR, the Court had the following to say about the said factor: -

16. Of course, all the Applicants have to show at this stage is arguability – not high probability of success. At this point, the Applicant is not required to persuade the appellate Court that the intended or filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal; a demonstration that the Applicant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict.....

21. This Court has intently relooked into the Draft Memorandum of Appeal annexed to the first application. The Applicants intend to only challenge the award of damages.

22. In the first application, the Applicants also annexed a copy of the correspondence between their instant Counsel [as instructed by the insurer of the motor vehicle] and the insurance company [being the insurer]. It is a letter dated 1st April, 2022. The letter notified the insurance company of the impugned judgment. It was also not on a without prejudice basis.



23. The letter under reference further contained the instant Advocates' legal position on the impugned judgment. The Advocates were categorical that the trial Court had considered all the relevant factors in making the awards given that the deceased was a Nurse employed in the County Government and with a monthly salary of Kshs. 62,230/=. The Advocates firmly advised the insurance company to settle the judgment in full.
24. The Applicants, however, did not favour any response to the letter that resulted to the filing of the applications.
25. The above position viewed against the intended appeal on the awards affirms the position that the Applicants themselves have demonstrated that the appeal is not arguable. Therefore, the intended appeal must have been preferred for reasons other than a genuine indictment of the judgment. In fact, the Applicants are, so to say, fighting a cause they do not believe in.
26. It is on the basis of the foregoing that this Court finds and hold that the aspect of leave to appeal out of time cannot stand the legal test of the arguability of the intended appeal. There being no intended arguable appeal, the quest for leave suffers a false start.
27. The above finding, therefore, subsumes all the other legal considerations on the aspect of leave to appeal out of time.
28. With the above finding, the prayer for leave to appeal out of time fails.
29. Consequently, a consideration of the issue of stay of execution of the judgment cannot be maintained given that leave to appeal has been declined. This Court opts to end the discussion at this point in time.
30. Deriving from the foregoing, the final following orders do hereby issue: -
 - a. The Notice of Motion dated 19th May, 2022 and the Notice of Motion dated 31st March, 2023 are hereby dismissed with costs.
 - b. The orders of stay of execution of the judgment in Kitale Chief Magistrates Civil Suit No. 418 of 2018 granted on 3rd April, 2023 are hereby set-aside and vacated.
 - c. This file is marked as Closed.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 12TH DAY OF OCTOBER, 2023.

A. C. MRIMA

JUDGE

Ruling No. 1 delivered virtually and in the presence of: -

No appearance for Miss. Opinde, Learned Counsel for the Applicants.

No appearance for Mr. Barongo, Learned Counsel for the Respondents.

Regina/Chemutai – Court Assistants.

