



**Oguta v Micheni & another (Miscellaneous Civil Application
E191 of 2024) [2024] KEHC 12909 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12909 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CIVIL APPLICATION E191 OF 2024
SM MOHOCHI, J
OCTOBER 24, 2024**

BETWEEN

WESLEY OGUTA APPLICANT

AND

JOAN GAKII MICHENI 1ST RESPONDENT

BECKY AMANI ODHIAMBO 2ND RESPONDENT

RULING

1. Before Court for determination is the Applicant's Notice of Motion Application dated 30th May, 2024 and filed on 31st May, 2024 brought under Article 159 (2) (d) of the Constitution, Sections 1, 1A, 1B, 3A, 79G and 95 of the Civil Procedure Act and Order 42 Rule 6(1) and (2) Order 51 Rule 1 of the Civil Procedure Rules seeking for orders that: -
 - a. Spent
 - b. This Honourable Court be pleased to grant the Applicant Leave to Appeal out of time in respect to the judgement/ decree delivered in Nakuru CMCC No. E009 of 2022 by Hon Priscah Nyota (Senior Principal Magistrate);
 - c. Spent
 - d. This Honourable Court be pleased to grant an order of Stay of Execution of judgement and/ or the decree delivered on or about 13th March, 2024 and all consequential orders arising therefrom pending the hearing and determination of the intended appeal;
 - e. This Honourable Court be pleased to issue an order for provision of Bank Guarantee of the entire decretal sum awarded by the Trial Court of KShs 3,998,163 only as security pending the hearing and determination of the intended appeal herein



- f. This Honourable Court be please to issue any other order as may deem just, appropriate and expedient in the interest of justice; and
 - g. Costs of this Application be provided for.
2. The grounds were premised on the face of the Application and the annexed Supporting Affidavit of Audrey Mwira Counsel for the Applicant and sworn on the same date.

Applicant's Case

3. It was the case of the Applicant's advocates that, following the delivery of judgement in favour of the Respondents on 13th March 2024 with a 30-day stay of execution, they informed their client Directline Assurance Limited of the terms of the judgement. While following up on payment of the claim the client instructed them to file an appeal but by the time they received instructions, the 30 days period set for lodging an appeal had since lapsed.
4. She averred that, as per the draft Memorandum of Appeal, the intended appeal raises numerous triable issues and points of law and therefore has high chances of succeeding. That the Applicant is exposed to execution and is apprehensive the Respondent will commence execution thereby rendering the intended appeal nugatory and the right of appeal will be injured if he is not granted leave to appeal out of time.
5. She argued that the Applicant stands to suffer irreparable loss and damage and that the Respondent's source of income is unknown, insufficient or undisclosed therefore, there is a high chance he may not be able to refund the decretal sum in the event the appeal succeeds.
6. It was deposed that the Applicant is ready and willing to furnish a bank guarantee from Family Bank for the entire decretal sum, and that, the Applicant was willing to abide by any terms and conditions imposed. It was further deposed that, it would be in the interest of justice, to grant the orders sought, as the Applicant's right to appeal would be protected.
7. That the Respondent will not be prejudiced in any way if the orders sought are granted and that, the application is made in good faith and without undue delay.
8. The Application is unopposed. The Application and Court directions were served on 20th July 2024 and the Affidavit of Service filed on 25th July, 2024.
9. Following the directions of 25th July, 2024, the Mention Notice was served on the Respondent on 30th July, 2024 and the Affidavit of Service filed on the same date. The Respondent did not also appear in Court when the matter came up for mention for directions. The Court thereafter directed that the Application shall be heard by way of written submissions. The Applicant filed his submissions through counsel on 19th August, 2024.

Applicant's Submissions

10. The Applicant raised only one issue in his submissions to wit whether the Application has merit. It was submitted that Section 79G of the *Civil Procedure Act* gives this Court the discretion to extend time for filing and appeal out of time and relied on the pronouncement in *Aviation Cargo Limited v St March Freight Service Ltd* and *Edith Gichugu Koine v Stephen Njagi Thoithi* [2014] eKLR where the Courts laid down the factors to be considered in considering an application seeking to file an appeal out of time.



11. The Applicant submitted that there was justifiable course shown for not appealing within time which was the delay in receiving instructions by their primary client and relied on the Supreme Court case of *Nicholas Kiptoo Korir Arap Salat v IEBC & Others* [2014] eKLR. The Applicant contended that once instructions were received, the Memorandum of Appeal was filed together with the instant application and according to the Applicant the period of delay was less than a month thus not inordinate.
12. The Applicant on the other hand has submitted that the delay in filing the appeal should not be visited upon an innocent litigant and relied on the cases of *Belinda Murai & 9 others v Amon Wainaina* [1978] eKLR and *Haman Singh & Others v Mistri* [1971] EA 122 where the Courts held that mistake of a legal adviser may be considered as sufficient cause.
13. Finally, it was submitted that the Respondent will not be prejudiced if the application is allowed since in the spirit of good faith and to show that the Applicant is desirous about prosecuting the matter, a proposal with a bank guarantee has been presented. Accordingly, justice is a two-way traffic and the Applicant should not be locked out of the right to be heard while relying on *Kamlesh Mansukhalal Damki Patni v Director of Public Prosecution & 3 Others* [2015] eKLR.

Analysis and Determination

14. Having considered the material placed before Court the only issue for determination is whether the Application is merited. The principles guiding the grant of an order to file appeal out of time and the grant of orders for stay of execution pending appeal are well settled.
15. As regard extending time to file an Appeal out of time, Judgment in Nakuru CMCC No. E009 of 2022 was delivered on 13th March 2024 and the statutory period for filing an appeal lapsed on or about 13th April, 2024. The application was filed on 31st May, 2024 which is 47 days after the statutory period for filing an appeal.
16. Counsel submitted and relied on the Supreme Court Case in *Nicholas Kiptoo Korir arap Salat v IEBC & Others* [*supra*] where the Court set out the guiding principles applicable when dealing with such an application the Court stated 4th that: -
 - 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."



17. Further, Section 79G of the *Civil Procedure Act* provides that an appeal may be admitted out of time if the Applicant provides a good and sufficient cause for not filing the appeal in time to the satisfaction of the Court.
18. The Applicant has to satisfy the Court why he deserves the exercise of discretion, since what is been sought is not a right but an equitable remedy. The Applicant counsel submitted that the delay in filing the Appeal was attributed to delay in receiving instructions by their primary client Directline Insurance Company and that the delay was for less than a month and not inordinate.
19. The award was not a small amount. The Applicant was represented by counsel throughout trial. It is not convincing that from the time judgement was delivered on 13th March, 2024, it took the client more than two months to give instructions to file an appeal. Furthermore, the Trial Court gave the Applicant a 30 day of execution. If the Applicant was desirous they would have utilized that period.
20. Further, Counsel also submitted that delay in filing the appeal should not be visited upon an innocent litigant and relied on authorities that held that mistake of a legal adviser may be considered as sufficient cause. The mistake of Counsel has not been explained or even brought out. I am not convinced that an indolent litigant who took too long in giving instructions is innocent.
21. It goes without saying that every case is different but this is not one of the cases where the exercise of discretion to extend time is considered. The reason for the delay has not been explained satisfactorily.
22. Even if the Court were to exercise leniency and apply its discretion, looking at what is sought at Prayer No. (e), on the security proposed, Clause 2 of the Bank Guarantee dated 6th July, 2023 provided that the guarantee is for twelve (12) months. The same is expired and past its best. Upon expiry counsel should have provided a guarantee specific to this case. No renewal agreement has been provided.
23. The Applicant contended that since the Application is unopposed the Respondent will not suffer prejudice. Despite the Respondent not filing a response to the Application, weighing the rights of each party, the scales of justice do not tilt in favour of the Applicant, the Respondent stands to suffer great prejudice under the circumstances.
24. Therefore, having found that the Applicant is not deserving of the order to extension of time to file appeal out of time the rest of the prayers sought equally also fail. For avoidance of doubt, the temporary orders of stay granted cannot also sustain.
25. The Application dated 30th May, 2024 therefore lacks merit and is dismissed. There shall be no orders as to costs.

SIGNED, DATED AND DELIVERED VIA TEAMS PLATFORM AT NAKURU ON THIS 24TH DAY OF OCTOBER, 2024

MOHOCHI S.M

JUDGE

