



**Saitoti & another v Karanja (Civil Appeal E412 of 2023)
[2024] KEHC 12328 (KLR) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12328 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E412 OF 2023
DO CHEPKWONY, J
OCTOBER 4, 2024**

BETWEEN

PIUS SAITOTI 1ST APPELLANT

STEPHEN KIMANI GICHERU 2ND APPELLANT

AND

JOHN KIBOI KARANJA RESPONDENT

RULING

1. What is before the court for determination is the Notice of Motion application dated 14th November, 2023 filed pursuant to Sections 3 and 3A, both of the [Civil Procedure Act](#) and Orders 22 (22), and 42 (4, 6 and 7), both of the [Civil Procedure Rules](#). The application seeks the following orders:
 - a. Spent.
 - b. That this Honourable Court be pleased to find that the Memorandum of Appeal being Kiambu HCCA No.....2023 filed out of time to have been filed within time.
 - c. That this Honourable court be pleased to find that the appeal is properly on record.
 - d. That this Honourable court be pleased to grant a stay of execution of the Judgment and/or Decree issued by the Honourable E. Ominde Chief Magistrate on 19th September 2023 pending the hearing and determination of this application.
 - e. That this Honourable court allow the applicants to furnish the court with security in the form of bank guarantee from Family Bank limited.
 - f. Spent.



2. The Application is based on the Supporting Affidavit of Kelvin Ngure sworn on the instant date and the grounds as set out on its face. The Applicants argue that the trial court delivered judgment against them to the tune of Kshs 3,127,376/= as general damages and Kshs 721,524/= as special damages.
3. Being aggrieved, the Applicants lodged the present appeal albeit out of time. According to the Appellants, the delay was contributed by the lengthy process of obtaining a copy of the Judgment contends that the delay was inadvertent as their advocates could not properly advise on the next step without a copy of the said Judgment.
4. The Applicants also argue that they have a strong arguable appeal with high chances of success, and are ready and willing to furnish the court with a bank guarantee as security. They further argue that the application had been filed without unreasonable delay and it will not occasion the Respondents any prejudice. They urged the court to allow it.
5. The Respondent opposed the application through the Replying Affidavit sworn by John Kiboi Karanja on 7th February, 2024, wherein he has averred that the application is meant to delay and frustrate him from realising the fruits of his Judgment since in his view the Memorandum of Appeal does not raise any triable issues but only seeks to waste the court's time.
6. The Respondent avers that the Judgment was delivered in the presence of both Counsel for the parties on 19th September, 2023 hence there was no reason why the Appellants filed the Memorandum of Appeal out of time. That, in any event, the Applicants have not adduced any evidence to show their efforts to obtain a copy of the Judgment. The Respondent challenges the assertion that there was delay in obtaining a copy of the Judgment in alleging that his advocate requested for the same vide a letter dated 26th September, 2023 and the copies thereof were supplied on 5th October, 2023. Thus according to the Respondent, the explanation for the delay is not satisfactory to warrant the exercise of this court's discretion to grant an extension of time as sought. The Respondent argues that the delay was purely occasioned by the Appellant's indolence.
7. The Respondent further argues that despite the Applicant obtaining court orders on 17th November, 2023 with respect to the present application, they did not serve the same to his advocates only until they were served with a demand notice dated 18th January, 2024. According to the Respondent, the Applicants have also not shown what loss they would suffer if the orders were denied. Additionally, the Memorandum of Appeal only seeks to challenge the quantum thereby admitting that the Respondent is entitled to some award. The Respondent further submitted that he requires further surgery to remove the metal plates implanted on him so that, should the court be inclined to allow the application then it would only be fair for it to direct the Applicants pay him half of the decretal sum.
8. The Respondent further submitted that his advocates have not applied for warrants of attachment or arrest and thus there is no imminent risk of execution. In his view, the bank guarantee will not be sufficient to cater for the award in the Judgment and costs of the case and thus seeks the court to order the decretal sum to be deposited in a joint interest earning account. In any event, the Respondent has persistently considered the application as a delay tactic meant to frustrate him from enjoying the fruits of the Judgment and seeks the same to be dismissed with costs.
9. The application was canvassed by way of written submissions which both parties have filed respectively and this court has read and considered the arguments raised therein in support and opposition of the prayers being sought.



Analysis and Determination

10. Having considered the application, the affidavits in support and rebuttal of the same alongside the submissions filed on behalf of the parties, this court is persuaded that only two issues crystallize for determination namely:-
- a. Whether the court should exercise its discretion to grant the Applicant leave to file the appeal out of time.
 - b. Whether the orders of execution pending appeal should issue.

Whether to extend time to file an appeal

11. Under Section 79G of the *Civil Procedure Act*, a party may be granted leave to file an appeal out of time, if he satisfies the court that he has good reasons for not filing the appeal within the time provided by law. The said Section provides as follows:-

“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.”

12. In considering the guiding principles in an application for extension of time, the court in the case of *Edith Gichungu Koine v Stephen Njagi Thoitbi* [2014]eKLR held as follows:-

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

13. These factors were also discussed by the Court of Appeal in the case of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR, where the superior court outlined the factors to consider in an application for extension of time as follows:-

- i) The period of delay;
- ii) The reason for the delay;
- iii) The arguability of the appeal;
- iv) The degree of prejudice which could be suffered by the if Respondent the extension is granted;
- v) The importance of compliance with time limits to the particular litigation or issue; and
- vi) The effect if any on the administration of justice or public interest if any is involved.”

14. Taking cue from the above decided cases, it is clearly put that in an application for extension of time, the whole period of delay should satisfactorily be explained to the Court. From the reading of Section



- 79G, the matters which a court should take into account in deciding whether to grant an extension of time are also reiterated in other cases as summarized above, being; the length of the delay; the reason for the delay; the chances of the Appeal succeeding if the application is granted; and the degree of prejudice to the Respondent if the application is granted.
15. However, these factors notwithstanding, whether or not to extend time for filing an appeal is an exercise of this court's discretion which should be based on reasons and not on whims or caprice.
 16. Applying those principles in this particular case, the Judgment by the trial court which is subject to the intended appeal was delivered on the 19th September, 2023. The Application herein was filed on 16th November, 2023 which is fifty-eight (58) days after the delivery of the said Judgment. Since Section 79G reproduced above prescribes thirty (30) days as the period for filing an appeal, this means that the instant application was filed twenty-eight (28) days out of the legally prescribed timelines for filing an Appeal.
 17. The Appellants allege that this delay was caused by their inability to obtain certified copies of the Judgment in time although the Respondent challenged this assertion stating that the copies of the judgment were available as early as on the 5th October, 2023 before the timelines for filing the appeal had lapsed. While the court acknowledges that delayed supply of certified proceedings can constitute sufficient cause for extending timelines, the Applicant must adduce evidence to demonstrate that they diligently pursued the proceedings. Thus, the burden lies on the Applicant to prove that they made genuine efforts to obtain the proceedings within a reasonable time frame and that the delay was beyond their control.
 18. In the case of *Dilpack Kenya Limited v William Muthama Kitonyi* 120181 eKLR, the Court of Appeal held that it is the duty of the applicant to show that they took reasonable steps to obtain certified copies of the proceedings and judgment. If an applicant fails to provide evidence of follow-up letters or reminders to the court, the court may decline the application for extension of time.
 19. Similarly, in the case of *Kenyan's for Peace with Truth & Justice (KPTJ) v Attorney General & Another* 120191 eKLR, the court emphasized that a party seeking leave to file an appeal out of time must demonstrate the efforts made to obtain the necessary documents, failing which, the delay will not be considered excusable.
 20. In the present case, while the Applicant claims that the delay in filing the appeal was caused by the court's failure to provide certified copy of the Judgment, no evidence has been adduced to show that the applicant actively pursued the certified copy of the Judgment. There are no copies of correspondence, reminders, or applications to the court that would indicate or demonstrate any genuine attempt to show that the Appellants actively and timeously followed with the court to obtain a copy of the Judgment. The absence of such evidence leads this court to the conclusion that the delay may have been partly due to the applicant's own inaction, hence the delay or default on the part of the Applicant has not been satisfactorily explained.
 21. However, I have considered the draft Memorandum of Appeal dated 14th November, 2023 which is annexed to the application. The grounds on its face insinuate that the Applicants intends to appeal against the finding on quantum by the trial court. The Respondent on the other hand is amenable to the court allowing the application but on condition that half of the decretal sum is paid to him. This court is inclined to allow the application on such conditions that would balance the competing interests of the Parties, being the exercise of the Applicants to appeal as against that of the Respondent's enjoyment of the fruits of Judgment made in his favour.



22. This court has time and again considered that under Sections IA, 1B, & 3 of the *Civil Procedure Act* as well as Article 159 of the *Constitution*, which mandates it to expeditiously do justice to parties before it. In this court's view, justice would be seen to have been done if the Applicants are allowed to proceed with the appeal while at the same time, it ensures that the Plaintiff enjoys fruits of his Judgment by ordering that part payment of the decretal sum be made to him.
23. On the second issue, whether the stay of execution should be granted, Order 42 Rule 6(i) of the *Civil Procedure Rules, 2010* stipulates the conditions in which the stay may be granted. It provides that in an application for stay, the Applicant must satisfy the court that he/she stands to suffer substantial loss if stay is not granted and that the application had been filed without unreasonable delay. The applicant must also show that he was willing to offer such security as may be ordered by the court.
24. On the issue of substantial loss, in their submissions, the Applicants have argued that the Respondent is of unknown means so that if the decretal sum is paid, then the Applicants may be unable recover the same in case the appeal is successful. In regard to that fear, the difficulty to recover the decretal sum should the appeal succeed has not been demonstrated since the Respondent has not given an answer or rebuttal thereof. In the decision in the case of *Kenya Shell Ltd v Kibiru* [1956] KLR 410, the Court of Appeal pointed out that if an Applicant alleges difficulties in the recovery of the decretal sum it rests on the respondent to show that he would be able to effect a refund in the event the appeal succeeds. The Respondent herein having failed to do so, the court is satisfied that Applicants are likely to suffer substantial loss.
25. Secondly, noting that the Applicants have offered to avail security in form of a bank guarantee for due performance of the decree, this court has considered that the grant for stay of execution pending appeal is discretionary and should be exercised in manner that balances the interest of the Applicants with those of the Respondent. In that case even the order for the security for the due performance of a decree, as required under Order 42 Rule 6 of the *Civil Procedure Rules*, is at the discretion of the court. The court is required to assess the adequacy and appropriateness of the proposed security, and thus, it is not for the appellant to dictate the terms of such security. In the case of *Focin Motorcycle Co. Limited v Ann Wambui Wangui & Another* f20181 eKER, the court emphasized that the nature and form of security to be furnished is a matter to be determined by the court based on the specific circumstances of the case.
26. In this case, the appellant cannot preempt the court's decision by unilaterally offering a bank guarantee as it is for the court to determine the appropriate security once the application is filed. In the circumstances of this case, this court is persuaded that the appropriate security would be for the Appellants paying the Respondent the sum of Kshs.1,000,000/= of the decretal sum awarded by the trial court while the remaining amount of Kshs.2,848,800/= is deposited in an escrow interest earning account to be opened and held by the advocates for both parties herein pending the hearing and determination of the appeal.
27. In the upshot, the application dated 15th November, 2023 is allowed in terms of the following orders:-
 - a. The time for filing the intended appeal be and is hereby extended for further thirty (30) days from the date of this ruling.
 - b. That an order of stay of execution be and is hereby issued staying the execution of the Judgment and or Decree issued by Hon. E. Ominde on 19th September, 2023 pending the hearing and determination of the intended appeal but on the condition that the Applicants do pay the sum of Kshs.1,000,000/= of the decretal sum awarded by the trial court to the Respondent and the remaining balance amount of Kshs.2,848,900/= be deposited in a joint interest earning



account to be opened in the names of the advocates on record for the parties within thirty (30) days from the date of this ruling.

- c. In default, the stay orders granted shall automatically lapse.
- d. Costs of this application shall be in the cause.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 4TH DAY OF OCTOBER, 2024.

D. O. CHEPKWONY

JUDGE

