



Macharia v HWM (Minor Suing Through the Father & Next Friend BMK) (Miscellaneous Civil Case E002 of 2024) [2024] KEHC 14795 (KLR) (21 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14795 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS CIVIL CASE E002 OF 2024
FN MUCHEMI, J
NOVEMBER 21, 2024**

BETWEEN

SAMUEL KANYINGI MACHARIA APPLICANT

AND

**HWM (MINOR SUING THROUGH THE FATHER & NEXT FRIEND
BMK) RESPONDENT**

RULING

Brief Facts

1. The application dated 15th January 2024 seeks for orders of leave to file an appeal out of time against the judgment in Gatundu CMCC No. E051 of 2021 delivered on 18th October 2023. The applicant further seeks for orders of stay of execution in respect of judgment delivered on 18th October 2023 pending the hearing and determination of the intended appeal.
2. The respondent opposed the application and filed a Replying Affidavit dated 25th April 2024.

Applicant's Case

3. The applicant states that judgment in Gatundu CMCC No. E051 of 2021 was delivered on 18th October 2023 whereas the Magistrate entered judgment in favour of the respondent and awarded general damages at a sum of Kshs. 250,000/- and Kshs. 3,550/- as special damages. Being aggrieved with the said judgment, the applicant is desirous to lodge an appeal against the said judgment but the statutory period within which to file an appeal already lapsed. The applicant states that upon delivery of the judgment, their advocates sought to obtain a copy of the judgment but their efforts were defeated as the court file was retained in the learned magistrate's chambers for more than two months. Thus the applicant avers that obtaining a copy of the judgment was largely impossible.



4. The applicant states that he has brought the application promptly and without unreasonable delay. Further, the applicant states that the decree is for a substantial sum of money and if paid to the respondent, he is apprehensive that he will not be able to recover the whole sum.
5. The applicant is apprehensive that the respondent will execute the decree at any moment which will render the intended appeal nugatory. The applicant further avers that he has an arguable appeal with overwhelming chances of success. Furthermore, no prejudice shall be suffered by the respondent which cannot be compensated by way of damages. The applicant states that insurer, Directline Assurance Company Limited is ready, willing and able to furnish the court with a bank guarantee from Family Bank as security for the due performance of the decree.

The Respondent's Case

6. The respondent opposes the application and states that she instituted the suit in Gatundu SPMCC No. E051 of 2021 to claim for general and special damages for injuries sustained in a road traffic accident while travelling as a passenger in the applicant's motor vehicle registration number KCW 618G along Flyover-Thika Road near Gakoe Shopping Centre. The suit was heard and determined on merit and judgment issued on 18th October 2023 whereby the trial court found the applicant 100% liable and awarded the respondent general damages at Kshs. 250,000/- and special damages at Kshs. 3,550/-.
7. The respondent states that the judgment date of 18th October 2023 was given on 9th August 2023 in the presence of both advocates on record for the parties.
8. The respondent avers that statutory period for filing the appeal expired on 17th November 2023. Furthermore the applicant has not presented a valid excuse why he sought to file the instant application over 2 months and 28 days after judgment was delivered.
9. The respondent states that the bank guarantee annexed by the applicant is addressed to Directline Assurance Company Limited and not to her. Thus it confers no security to her judgment and thus it is not a proper security for stay of execution. The respondent further avers that on 16th January 2024, this Honourable Court ordered that the applicant deposits the whole decretal sum in court within 30 days as a condition for stay of execution and in default, the stay orders stood vacated. As at 15th February 2024, the applicant had not provided her advocates on record with proof of deposit of the decretal sum to the court. Thus, the respondent argues that the stay orders lapsed automatically and she is at liberty to execute the decree in her favour.
10. The respondent states that litigation must come to an end and as the window for filing the appeal has closed and there is no valid excuse of why it should be re-opened, the matter ought to be closed.
11. Directions were issued that the application be canvassed by way of written submissions and from the record only the respondent complied by filing her submissions on 11th October 2024. The applicant on the other hand failed to comply with the time granted by the court.

The Respondent's Submissions

12. The respondent relies on the case of Nicholas Kiptoo arap Korir Salat vs Independent Electoral Boundaries Commission & 7 Others [2014] eKLR and submits that the applicant has not met the criteria for extension of time. The respondent further submits that the applicant has failed to satisfactorily lay down the basis of their failure to file the appeal within the timeline set by the law. Instead the applicant has blamed the trial court for the delay without giving any evidence such as a letter requesting for judgment or any communication from the court confirming the file was before the Honourable Magistrate's chambers. Thus, the applicant has failed to explain to the satisfaction



of the court the delay of almost three months why the application was not filed within the statutory timelines provided by law.

13. The respondent further relies on the case of County Executive of Kisumu vs County Government of Kisumu & 8 Others [2017] eKLR and submits that the delay by the applicant is inordinate and inexcusable.
14. Relying on the cases of Stanley Kahoro Mwangi & 2 Others vs Kanyamwi Trading Company Limited [2015] eKLR; Diplack Kenya Limited vs William Muthama Kitonyi [2018] eKLR; Andrew Kiplagat Chemaringo vs Paul Kipkorir Kibet [2018] eKLR and Obadia Peter Kairaria vs Anderson Gitonga Justace & 2 Others [2020] eKLR, the respondent submits that the court cannot exercise its discretion for extension of time in the circumstances since the applicant has not placed any material before it to unlock its flow of discretionary favour.
15. The respondent argues that the applicant has not demonstrated that there are chances of success of the appeal as the annexed draft Memorandum of Appeal does not arise grounds with high chances of success. Thus, the respondent submits that the instant application is a dilatory tactic employed by the applicant to keep her from enjoying the fruits of her judgment in utter abuse of the court process.

The Law

Whether the court should exercise its discretion to grant the applicant leave to file his appeal out of time;

16. Section 79G of the [Civil Procedure Act](#) states:-

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 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.

17. It is clear from the wording of section 79G of the [Civil Procedure Act](#) that before the court considers extension of time, the applicant must satisfy the court that that he has good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of Diplack Kenya Limited vs William Muthama Kitonyi [2018]eKLR an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.
18. The Supreme Court in the case of Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that:-

“The underlying principles a court should consider in exercise of such discretion should include:-

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;



- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
 - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
 - f. Whether the application has been brought without undue delay.
19. Similarly in the case of Paul Musili Wambua vs Attorney General & 2 Others [2015]eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-
- “.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”
20. Judgment herein was delivered on 18th October 2023 and the applicant filed the current application on 15th January 2024. This is approximately Three (3) months outside the time limited for filing an appeal. The applicant has faulted the trial court for the delay in filing his appeal for the reason that the learned magistrate kept the court file in chambers for over two months after the delivery of the judgment. Upon perusal of the record, it is noted that the applicant has not annexed any evidence to show that he ever applied for a copy of the judgment or sent any correspondence to the executive officer requesting or following up on his request for a copy of the judgment.
21. Additionally, the applicant did not disclose the date he finally received the copy of judgment. The delay of three (3) months may not be inordinate but in the instant case, the applicant has not given any plausible explanation on the reasons for delay. Furthermore, I have perused the draft Memorandum of Appeal and noted that the grounds of appeal do not raise arguable points of law. Therefore without delving into the merits of the appeal, the intended appeal has limited chances of success. Accordingly, I find that the applicant has not established to the satisfaction of the court that he deserved orders for enlargement of time.
22. On 16th January 2024, this court granted interim orders for stay of execution in favour of the applicant on condition that he deposits the decretal sum in court within 30 days failure to which the orders stood vacated. On 6th March 2024, the applicant’s counsel told the court that he had deposited the decretal sum of Kshs. 342,935/- and would produce proof of the same on 8th May 2024. On 8th May 2024, the matter was mentioned but no evidence of deposit of security was produced and neither did such deposit reflect in the court CTS system. Thus the court vacated the orders of stay for lack of compliance by the applicant. Following the fact that the court has declined. The prayer for leave to file the appeal out of time having failed, the prayer for stay of execution also automatically fails since there is no existent appeal.
23. It is thus my considered view that the application dated 15th January 2024 lacks merit and is hereby dismissed with costs.



24. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 21st DAY OF NOVEMBER 2024.

F. MUCHEMI

JUDGE

