



**Machika v Muhati & another (Miscellaneous Civil Application
157 of 2023) [2024] KEHC 14239 (KLR) (15 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14239 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CIVIL APPLICATION 157 OF 2023**

AC BETT, J

NOVEMBER 15, 2024

BETWEEN

PETER AYOYI MACHIKA APPLICANT

AND

SILAS AMWAYI MUHATI 1ST RESPONDENT

NASHON ODERA MUHATI ALIAS SOLOMONI 2ND RESPONDENT

RULING

1. By an application dated 20th September 2023 but filed in court on 24th October 2023, the Applicant sought the following orders:-
 - (i) That pending hearing and determination of this application, there be stay of Judgement in *Kakamega CMCC. NO. 19 OF 2018*.
 - (ii) That the leave be granted to the Applicant to file an appeal out of time in respect of the decision of the Kakamega Chief Magistrate Court by Hon. B. Ochieng – Chief Magistrate delivered on 20.07.2023.
 - (iii) That costs be provided for.
2. In his Affidavit in support of the application, the Applicant deponed that upon delivery of the Judgement, he applied for a certified copy of proceedings and Judgement which was yet to be supplied to him. He attached a copy of a letter dated 26th July 2023 and a cash receipt dated 2nd August 2023 in which he paid for the proceedings. He attributed the delay in filing the appeal to his inability to secure the copies of Judgement and proceedings on time.
3. In opposition of the application, filed grounds of opposition in which it stated that there was no merit in the application which was meant to delay the conclusion of the matter, that there was no intended appeal, that the application is misconceived, bad in law and an abuse of the process of the



court, that there exists no jurisdiction to stay proceedings or execution in the manner contemplated in the application and that the application does not meet the threshold.

4. The application was canvassed by written submissions with the Applicant acting in person.
5. I have carefully considered the parties submissions. The principles to be considered in exercising the court's discretion whether or not to enlarge time to file appeal were enunciated in the case of *First American Bank of Kenya Ltd v Gulab P. Shah & 2 others* [2002] 1 EA 65 where the Court of Appeal set them out as follows:-
 - 1) The explanation if any, for the delay.
 - 2) The merits of the contemplated action, whether the appeal is arguable deserving a day in court or whether it is frivolous and would only result in delay.
 - 3) Whether or not the Respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of the discretion in favour of the Applicant.
6. The power to enlarge time and to allow a party to file appeal out of time is specifically provided under Order 50 Rule 6 of the [Civil Procedure Rules](#) which states as follows:-

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.”
7. The Applicant has satisfied the court that the failure to file the appeal was due to the delay by the court in furnishing him with a copy of the proceedings and Judgement.
8. In his application, the Applicant has failed to set out the grounds of the intended appeal or to attach the draft memorandum of appeal. This failure goes to the root of the second condition that he must fulfil in order to persuade the court to exercise its discretion in his favour; that is to show that the intended appeal is arguable.
9. The Applicant has also failed to demonstrate that the Respondent can be adequately compensated in costs for any prejudice that may be suffered by the Respondent as a result of this court's jurisdiction.
10. The Court is bound by Article 159 (2) (a) and (d) of the [Constitution](#) which stipulates that:-

“In exercising judicial authority, the Courts and Tribunals shall be guided by inter alia, the following principles:-

 - (a) Justice shall be done to all, irrespective of status;
 -
 - (d) Justice shall be administered without undue regard to procedural technicalities.”
11. Guided by the aforesaid constitutional principles and Section 1A and 1B of the [Civil Procedure Act](#), the Court is required to place emphasis and focus on substantive justice other than technicalities and to promote the just, efficient and expeditious disposal of cases.



12. In the case of *David Bundi v Timothy Mwenda Muthee* [2022] eKLR the Court held as follows:-

“For courts will determine disputes on the merit and lean on the principle of natural justice which guide courts, that is, a party in a dispute must be given an opportunity to be heard.”

13. I have carefully considered the application which was filed by a layman who may not be in a position to fully appreciate the intricacies of legal procedure. The application falls short of the requisite conditions yes, but to dismiss it would be to deny the Applicant the opportunity to be heard merely because his status does not allow him to retain the services of an Advocate.

14. I have also considered the fact that the Applicant filed the application within two (2) months of lapse of the period allowed to file appeal as well as the fact that any prejudice likely to be suffered by the Respondent can be adequately compensated in monetary terms.

15. The decision whether or not to enlarge time to file appeal is discretionary. In *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 EA 231, the Court had this to say:-

“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 in general, the matters which this court takes into account in deciding whether to grant an extension of time are first, the length of the delay. Secondly, the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent if the application is granted.”

16. This being a discretionary exercise, the court is guided by the case of *Patel v E.A. Cargo Handling Services* [1974] EA 75 where the Court stated:-

“There are no limits or restrictions on the Judge’s discretion ... The main concern of the Court is to do justice to the parties and the Court will not impose conditions on itself or fetter the wide discretion given to it by the rules.”

17. With respect to the application for stay of execution pending appeal, there is no material placed before the court to warrant the orders sought. The grounds upon which an order of stay of execution pending appeal can be granted are provided under Order 42 Rule 1 and 2 of the *Civil Procedure Rules* as follows:-

“(1)

(i) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

(ii) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

(2) Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed.”



18. In his Affidavit in support of the application, the Applicant avers that this suit was dismissed thereby denying him special and general damages. In the circumstances, there is no judgement to stay. The Applicant avers that the Respondents have initiated execution by filing a bill of costs for taxation. The order of stay would be in respect to costs only as there was no positive order capable of being stayed by the court.
19. I have considered the Applicant's Affidavit and find that he has not demonstrated that he shall suffer substantial loss in absence of an order of stay of execution. What is in contention is party to party costs which being monetary, can be refunded to the Applicant in the event his appeal succeeds. In Kenya *National Highway Authority v Ahmednasir Maalim Abdullabi* [2020] eKLR cited by the Respondents, the court held as follows:-
- “It must be clear to an applicant seeking stay of execution that the law places a duty on him to demonstrate to the satisfaction of the court that he will suffer something special and that he may not be put back to the original position he was in before execution and, therefore, deserves exercise of the court's discretion in his favour.”
20. The Applicant has also not offered any security that he intends to furnish the court for the due performance of such decree as would ultimately ensue. The Applicant is also guilty of inordinate delay having filed the application on 24th October 2023, three months after the impugned judgement and one month after receiving taxation notice. The court finds that the application does not meet the threshold for the orders of stay of execution of the judgement and decree in *Kakamega CMCC. No. 19 of 2018*.
21. For the reasons stated herein, I am inclined to grant the Applicant leave to file appeal out of time. The Applicant shall file his appeal within thirty (30) days from the date hereof. However, the application for stay of execution is disallowed for want of sufficient grounds. The costs of this application shall be borne by the Applicant.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 15TH DAY OF NOVEMBER 2024.

A. C. BETT

JUDGE

In the presence of:

Applicant in person

Ms. Shitanda for the Respondent

Court Assistant: Polycap

