



**Luchivya v Mwenesi & another (Miscellaneous Civil Application
E014 of 2024) [2024] KEHC 15855 (KLR) (6 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15855 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CIVIL APPLICATION E014 OF 2024**

AC BETT, J

DECEMBER 6, 2024

BETWEEN

GILES LAMECK LUCHIVYA APPLICANT

AND

ANNE MMBOGA MWENESI 1ST RESPONDENT

WATU NOMINEES COMPANY LTD 2ND RESPONDENT

RULING

1. Before me is a Notice of Motion dated 9th February 2024, brought under Order 42 Rule 1 & 2 of the [Civil Procedure Rules](#) and Section 3, 3A of the [Civil Procedure Act](#). The Applicant is mainly seeking for the following orders:
 - a. Spent
 - b. That leave be granted to the Applicant to file an Appeal out of time against the Judgement and Decree of Hon. Sylvia Wayodi, Adjudicator in Kakamega SCCCC/E135/2023 pending the hearing and determination of the intended Appeal.
 - c. That the honourable court do grant stay of execution of the Judgement or Decree delivered on 24th July 2023 pending the hearing and determination of the intended Appeal.
 - d. That the Memorandum of Appeal to be deemed as duly filed upon payment of the requisite fees.
 - e. That the costs of this application be in the cause.
2. The Application is premised on the grounds on the face of the Application. It is further supported by a Supporting Affidavit dated 9th February 2024 and sworn by the Applicant.



3. The 1st Respondent is opposed to the Application and in doing so, she relies on a Replying Affidavit dated 16th April 2024.

The Applicant's Case

4. The Applicant in his supporting affidavit states that he was never aware of the proceedings in the Small Claims Court since he was never served with either summons to enter appearance or any pleadings. He avers that he learnt of the existence of the proceedings on 23rd August 2023. He argues that he was never afforded any opportunity to defend the cause and that he proceeded to file an Application dated 30th August seeking to set aside the judgement entered against him but the same was dismissed.
5. The Applicant posits that he also sought to review the orders, through his counsel, on two occasions but they were again denied. He avers that he further sought to point out that the firm of Abok Odhiambo and Co. had at no point represented him but the Honourable Adjudicator Caroline Cheruiyot did not appreciate the evidence provided and she ruled the matter res judicata.
6. He advances that he ultimately preferred the appeal herein after being aggrieved by the proceedings and being condemned unheard. He states that it is in the wider interest of justice that the orders he is seeking are granted.

The Respondent's Case

7. The Respondent opposes this Application vide a Replying Affidavit she swore on 16th April 2024. She states that the Applicant became embroiled in the suit after he was introduced as a third party in the trial court proceedings by the 2nd Respondent who promptly served him but he failed to enter appearance and or file a response to the amended statement of claim. She averred that the matter proceeded and judgement was entered against the Applicant and a decree was subsequently issued.
8. She posited that the Applicant, being aggrieved by the judgement, filed an application dated 30th August where he sought for stay of execution and setting aside of the judgement dated 24th July 2023 but the same was dismissed as it was incompetent and lacked merit. She further averred that the Applicant sought orders to review, set aside and/ or vacate orders made on 4th December 2023 dismissing his application dated 30th August and the judgment dated 24th July 2023. She stated that the said application was then dismissed with costs vide a ruling dated 12th January 2024. She contended that the current application is an afterthought since it is aimed at denying the 1st Respondent the chance of enjoying the fruits of her judgement. She averred that considering she was the successful party, the Applicant ought to furnish security as the court may direct for the due performance of the decree, something that has not been fulfilled and is not likely to be fulfilled since the Applicant has not furnished any bank guarantee and is unlikely to offer the same.
9. She argued that the Applicant's Memorandum of Appeal attached to the Supporting Affidavit does not raise any reasonable grounds of appeal and this court ought to dismiss the instant application. She advanced that the Application was brought with unreasonable delay as the application has been filed 7 months after the delivery of the judgement without a good explanation. She stated that she will suffer prejudice if the extension is granted to file the appeal since the back and forth in court has led to financial constraints on her part despite having the judgement in her favour.
10. She posited that in the event this court is inclined to allow the appeal and/or grant stay of execution orders, the Applicant ought to be ordered to deposit the decretal sum of Kshs 226, 850/= plus costs and interests as at 24th May 2023, in a joint interest earning bank account in the names of the advocates of the parties.



Submissions

11. The court gave directions that the application be canvassed by way of written submissions and the counsel for both parties complied.
12. The Applicant's counsel filed submissions dated 29th February 2024 and submitted that an application to set aside judgement cannot succeed if no good or substantial reasons are given to justify the setting aside as it was decided in the case of *Departed Aseans Property Custodian Board v Issa Bakuya* Supreme Court of Uganda Civil Appeal No 18 of 1991.
13. They averred that improper service serves as a ground upon which the court can set aside a judgement. They posited that any judgement wrongly entered can be set aside by the discretion of the court to do substantial justice to the parties. They further asserted that it offends the rules of natural justice if a party is not allowed to defend themselves and orders are made by a body that is averse to him.
14. The Applicant's counsel submitted that Section 20 of the *Civil Procedure Act* requires that upon the institution of a suit, the defendant should be served in the prescribed manner in order to enter appearance and answer the claim. They further submitted that Order 5 rule 1, 6 and 8 of the *Civil Procedure Rules* set out the proper procedure of service but looking at the court record in the lower court, none of the guidelines in the *Civil Procedure Rules* were adhered to and the proceedings were a nullity from the get go since the rules of procedure were flaunted. It was advanced that Order 5 Rule 13 and 15 of the *Civil Procedure Rules* require that a person that has been served to sign acknowledgement of service on the Original Summons, and an Affidavit of Service to be filed as proof that service has been effected. They submitted that the Affidavit of Service should indicate the time and the manner in which the summons was served together with the name and the address (if any), identifying the person served and witnessing the delivery of the summons. They relied on the case of *Law Society of Kenya v Martin Day & 3 others* (2015) eKLR which expressed the same views.
15. They submitted that the proceedings conducted in the Appellant's absence were null and void rendering the Applicant condemned unheard and for that reason, the judgement and orders arising from the decision of Hon. Sylvia Wayodi, Adjudicator in Kakamega SCCCC/E135/2023 delivered on 24th July 2024 were a nullity and cannot be allowed to stand forthwith.
16. The 1st Respondent's counsel, vide submissions dated 16th April 2024, submitted that the court is clothed with the jurisdiction to extend time for lodging an appeal, if the party seeking such extension demonstrates sufficient reason for not lodging the appeal on time in accordance with Section 79G of the *Civil Procedure Act*.
17. It was posited that the reasons advanced by the Applicant as to why he delayed to file the appeal are not sufficient to warrant the extension of time he seeks for. The 1st Respondent's counsel submitted that the court needs to consider the period of delay, the reason for the delay, the arguability of the appeal, the degree of prejudice which could be suffered by the respondents if the extension is granted, the importance of compliance with time limits to the particular litigation and the effect, if any, on the administration of justice or public interest as it was highlighted in the case of *Samuel Mwaura Muthumi v Josephine Wanjiru Ngugi & another* (2018) eKLR.
18. They further argued that the draft Memorandum of Appeal does not raise any arguable issues. They averred that the instant application is an ingenious move by the Applicant to delay execution of the decree which is the only possible avenue left for the Respondents to realize their decree. They contented that the seven months delay in filing an appeal while attempting to pursue other means cannot be excused as having been an innocent delay and relied on the case of *Leo Sila Mutiso v Rose Hellen*



Wangari Mwangi (Civil Application No 255 of 1997) (Unreported) which enunciated the same views.

19. It was further argued that allowing the Applicant to file his appeal out of time and further allowing the parties to undergo a strenuous process of appeal right after dismissal of an application to have the same judgement set aside will be tantamount to allowing the Applicant to take advantage of the court processes to detriment the Respondent who will be deprived from enjoying the fruits of her judgement. The Respondent relied on the case of *M/S Portreitz Maternity v James Karanga Kabia* (Civil Appeal 63 of 1997) (Unreported) in support of their view.
20. On whether the court should stay execution, it was submitted that the Applicant must satisfy the criterion set out in Order 42 Rule 6 (2) of the *Civil Procedure Rules* before the court makes an order of stay of execution.
21. They advanced that the Applicant has not satisfied that he may incur substantial loss. They averred that the Applicant has not stated which substantial loss he is likely to suffer in the event that no order of stay of execution is made. They averred that the Applicant is not forthright on his financial status, which is a mystery how he will compensate the 1st Respondent if the appeal doesn't succeed. They argued that the court ought to balance the interests of both parties, considering which party's hardship will be greater and relied on the case of *African Safari Club Limited v Safe Rentals Limited* (2010) eKLR which expressed similar views. They further submitted that the Applicant will not suffer substantial loss and therefore there should be no order of stay of execution as he will not experience hardship in recovering the said amount should it be released to the Respondent pending the hearing and determination of the appeal. It was submitted that any allegation that the Applicant will suffer substantial loss is made in total disregard of the fact that owing to the ploys of the Applicant since the delivery of the now impugned judgement of 24th July 2023, the 1st Respondent has never been able to enjoy the benefits of the decretal sum awarded to her in the said judgement.
22. The 1st Respondent's counsel posited that the Applicant has not explained the reasons for the delay in filing the instant application and appeal. They averred that the delay of more than 200 days from the day the impugned judgement was delivered is an inordinate delay which has not been accorded sufficient explanation.
23. On whether it is necessary for the Applicant to offer security, it was submitted that as per the court records, the firm of Wabomba Masinde & Associates, who were acting for the 2nd Respondent, filed a certificate of service and indicated that the Applicant was duly served but the Applicant never entered appearance, filed a response to the statement of claim or followed up on the matter despite being well informed about it. They averred that the court should order the Applicant to deposit the decretal sum of Kshs 226,850/= plus costs and interests as at 24th May 2023 in a joint interest earning bank account in the names of the advocates for the parties in order to secure the 1st Respondent's right to enjoy the fruits of her judgement

Analysis

24. The two main issues arising for determination herein are: -
 - a. Whether the court should exercise its discretion to grant the Applicant leave to file his appeal out of time.
 - b. Whether the Applicant has met the prerequisite for grant of stay of execution pending appeal.



A. Whether the court should exercise its discretion to grant the Applicant leave to file his appeal out of time

25. 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.”

26. It is clear that an Applicant seeking to an extension of time should first satisfy the court that they had good and sufficient cause for not filing the appeal in time.

27. The court in the case of *Dilpack Kenya Limited v William Muthama Kitonyi* [2018] KEHC 4858 (KLR) while interpreting the meaning of ‘good and sufficient cause’ as envisioned in Section 79G of the *Civil Procedure Act* stated as follows:-

“Therefore, 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, since as was held in *Feroz Begum Qureshi and another v Maganbhai Patel and others* [1964] EA 633, there is no difference between the words “sufficient cause” and “good cause”. It was therefore held in *Daphne Parry v Murray Alexander Carson* [1963] EA 546 that though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.”

28. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat v IEBC and 7 others* [2014] eKLR expressed itself as follows on the extension of time: -

“Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it.”

29. Similarly, in the case of *Paul Musili Wambua v 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.”

30. In the instant application, judgement was delivered on 24th July 2023 and the current Application was filed on 15th February 2024. That is about 4 months outside the time limited for filing an appeal. The question is whether the delay is inordinate.
31. In considering what constitutes inordinate delay, the Court in *Cecilia Wanja Waweru v Jackson Wainaina Muiruri & another* [2014] eKLR held that:-
- “There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case. We are of the considered view that the learned Judge in considering the application, should have looked at the appellant’s conduct from the time the appeal was filed up to the date the application for reinstatement was filed.”
32. Looking into the circumstances of the delay occasioned in this case, the Applicant advances that the reason he did not file the Appeal on time is because he was pursuing alternative means of overturning the impugned judgement in the lower courts.
33. The Applicant has demonstrated that he filed an application dated 30th August 2023, after the impugned judgement was delivered, seeking to set aside the judgement entered against him but the same was dismissed. He also filed an application dated 15th December 2023 seeking a review of the impugned judgement but the same was dismissed vide a Ruling dated 12th January 2024. It is after his application seeking a review was dismissed that he opted to appeal to this court.
34. I find this to be a plausible reason for the delay that has been occasioned by the Applicant.
35. On the issue of arguability of the appeal, the Applicant has annexed a draft Memorandum of Appeal indicating the issues he intends to take up on appeal. In the case of *Atbuman Nusura Juma v Afwa Mohamed Ramadhan* [2016] eKLR, the court held that:-
- “Whether the intended appeal has merits or not is not an issue to be determined by a court when dealing with an application of this nature but by the court dealing with the merits of the appeal, that is why the requirement that the intended appeal be arguable is preferred with the word “possibly.”
36. Similarly, the court in the case of *Job Kiloch v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Riorio* [2015] eKLR defined triable issues as follows: -
- “A bona fide triable issue is any matter raised by the Defendant that would require further interrogation by the court during a full trial. The Black’s Law Dictionary defines the term “triable” as, subject or liable to judicial examination and trial”. It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.”
37. The court cannot at this point determine whether the appeal will succeed or not but upon a cursory glance at the Memorandum of Appeal, it does raise issues that are open for determination on appeal.
38. On the degree of prejudice to the Respondent if the Application is granted, I find that the 1st Respondent herein has not demonstrated the substantial loss she is likely to incur in the case that this application succeeds.



B. Whether the Applicant has met the prerequisite for grant of stay of execution pending appeal

39. On whether this court should grant a stay of execution pending the intended appeal, the Applicant has demonstrated that the impugned judgement was entered against him ex-parte. In his Supporting Affidavit, he claims that he was never served with the summons to enter appearance or any pleadings. The 1st Respondent avers that the Applicant was served but has furnished no proof to show that the Applicant was actually served.
40. On account of the fact that the Applicant maintains that he was not served and no proof of service has been furnished to the court, the court finds that the application for stay of execution is merited.

Determination

41. Flowing from my findings above, I allow the application dated 9th February 2024. I do hereby make the following orders:-
- a. Leave is granted to the Applicant to file appeal out of time against the judgment delivered in Kakamega SCCCC/E135/2023. The Applicant is directed to file and serve the Memorandum of Appeal within 14 days from the date of issuance of this order.
 - b. An order of stay of execution of the Judgment/decreed issued in Kakamega SCCCC/E135/2023 is hereby granted pending the hearing and determination of the intended appeal.
 - c. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 6TH DAY OF DECEMBER 2024.

A. C. BETT

JUDGE

In the presence of:

No appearance for Kiveu for the Applicant

Mr. Mbetera for the 1st Respondent

Court Assistant: Polycap

