



**Mohammed v Awuor (Suing as a Legal Representative of the Estate of
Calvince Omondi Ojwang - Deceased) & another (Miscellaneous Civil Case
E019 of 2024) [2024] KEHC 15631 (KLR) (3 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15631 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
MISCELLANEOUS CIVIL CASE E019 OF 2024
KW KIARIE, J
DECEMBER 3, 2024**

BETWEEN

FAYUD YUSUF MOHAMMED APPLICANT

AND

**VIOLET AWUOR (SUING AS A LEGAL REPRESENTATIVE OF THE ESTATE
OF CALVINCE OMONDI OJWANG - DECEASED) 1ST RESPONDENT**

CIC GENERAL INSURANCE LIMITED 2ND RESPONDENT

RULING

1. The applicant herein moved the court through a Notice of Motion dated the 19th day of April 2024. It was brought under sections 3, 3A & 95 of the [Civil Procedure Act](#), Order 9 Rule 9, Order 22 Rule 22, Order 42 Rules 4 & 6 and Order 51 Rules 1 & 3 of the [Civil Procedure Rules](#). The applicant is seeking the following orders:
 - a. That this application be certified urgent, service be dispensed with thereof, and the same be heard ex parte in the first instance. [Spent]
 - b. That this honourable court be pleased to grant leave to the firm of S.K. Adagala and Company advocates to come on record in place of M/s Nyarige and Company advocates judgment having already been entered in Homabay CMCC No.041 of 2020 being *Violet Awuor (Suing as the legal representative of the estate of Calvince Omondi Ojwang (Deceased)) v Fayud Yusuf Mohamed & Anor* delivered on 12th May 2020. [sic]
 - c. That this honourable court be pleased to grant leave to the intended appellant/applicant to appeal out of time against the judgment of the honourable Trial Magistrate, in Homabay CMCC No.041 of 2020 being *Violet Awuor (Suing as the legal representative of the estate of*



Calvince Omondi Ojwang (Deceased) v Fayud Yusuf Mohammed & Anor delivered on 12th May 2020. [sic]

- d. That this honourable court be pleased to order a stay of execution of the judgment/decree issued by the honourable trial court on 12th May 2022 in Homabay CMCC No 041 of 2020 being *Violet Awuor (Suing as the legal representative of the estate of Calvince Omondi Ojwang (Deceased) v Fayud Yusuf Mohammed & Anor* pending the hearing and determination of this application.
 - e. That upon this honourable court be pleased to order a stay of advertisement, notification of sale by public auction and or any further dealings with the applicant's/intended appellant's attached motor vehicles and any other movable assets pending the hearing of the hearing and determination of the application herein.
 - f. That this honourable court be pleased to order the unconditional release of the unlawfully proclaimed and attached motor vehicles pending the hearing and determination of this application.
 - g. This honourable court be pleased to direct the applicant/intended appellant to deposit a bank guarantee for the entire decretal sum in court.
 - h. M/s Blegif Consult Auctioneers should be ordered to tax their costs before the taxing master.
 - i. That the application be heard inter partes on such date and time as this honourable court may direct.
 - j. That the costs of this application abide by the outcome of the appeal.
2. The application was premised on the following grounds:
- a. That judgment was delivered in Homabay CMCC No.41 of 2020 on the 12th day of May 2022 in the following terms:
 - i. Liability; 70:30 in favour of the respondent
 - ii. Pain and suffering; Ksh.30,000/-
 - iii. Loss of Expectation of life; kshs.100,000/-
 - iv. Loss of dependency; kshs.1,600,000/-
 - v. Special damages; Kshs.140,000/-
 - vi. Total; Ksh.1,870,000/- - less 30% = Kshs.1,309,000/-
 - vii. Costs and interests.
 - b. That as a result of the above, the respondents, through their advocates on record, have already proceeded with the process of execution against the intended appellant/applicant and are in the process of carting away the applicant/intended appellant's motor vehicles and other movable assets and thus the necessity for this court to promptly intervene as the auctioneers never effected service of the warrants of execution upon the applicant/intended appellant before proceeding with the execution.
 - c. The respondent advocates have already written to the intended appellant/applicant's advocates calling for the payment and indicating that should the same not be done, they would proceed and sell the intended appellant's attached movable assets.



- d. Upon delivering the judgment on 12th May 2022, the intended appellant/applicant's advocates followed up with their previous counsel to obtain copies of the proceedings. However, their previous counsel on record informed him that the same was still being typed. To date, they have only obtained a copy of the judgment.
- e. That the applicant/intended appellant holds the position that the trial magistrate court made an excessive award and that there was contrary evidence indicating that the applicant/intended appellant was not to blame for occasioning the accident herein.
- f. That further, the applicant/intended appellant holds the position that during the hearing of this matter, the respondent did not prove negligence against the applicants' intended appellants as the police abstract in court blamed the deceased for occasioning the accident herein.
- g. Unfortunately, the period within which an appeal can be filed has already lapsed. Therefore, the intended appellant/applicant's advocates have come to this honourable court seeking leave to appeal out of time.
- h. That the applicant/intended appellant is apprehensive that should execution proceed, they stand to suffer grievous irreparable loss, harm and prejudice, and the intended appeal, as well as the application herein seeking leave to appeal out of time, may be rendered nugatory.
- i. That, therefore, unless this application is certified urgent and heard immediately and the orders sought herein granted, the respondent, its employees, servants and/or agents may at any time cart away and sell the intended appellant appellants to substantial loss and damage.
- j. This application was made without unreasonable or undue delay.
- k. The application herein also seeks a stay of execution against the honourable trial court's judgment of 12th May 2024, pending the hearing and determination of the application and the intended appeal.
- l. That the intended appellants/applicants have an arguable appeal with high chances of success.
- m. That there is imminent danger of execution and the application and intended appeal herein will be rendered an academic exercise if the orders sought are not granted as the same will have been sold before the hearing of the application herein inter-parties.
- n. That the intended appellants/applicants are apprehensive that the respondent may proceed and sell the intended appellants/applicants' attached motor vehicle at any time.
- o. That the judgment/decree entered is of a substantial sum of money, and the applicant/intended appellant is apprehensive that if the respondent is paid the same, he may deal with the same in a manner prejudicial to them. If the appeal is successful, they might not be able to recover the same from the respondent.
- p. That the respondent has not disclosed nor furnished the court with any documentary evidence to prove her financial standing.
- q. That unless this application is heard and a stay of execution is granted, the applicant's arguable appeal will be rendered nugatory, and they will suffer irreparable loss and damage.
- r. That the applicant is ready, able and willing to deposit a bank guarantee in favour of the respondent from a reputable bank for the entire decretal sum plus costs and or deposit half the



decretal sum in court as a condition for a stay of execution to enable the applicant to pursue the intended appeal.

- s. That this application is made in good faith and will not occasion any prejudice to the respondent.
 - t. It is in the interest of justice that the application be granted.
 - u. Unless his matter is heard as a matter of urgency and prayers are sought to be granted, the intended appellants/applicants herein shall suffer irreparable harm and thereby defeat the purpose of this suit and render the same nugatory.
 - v. That the object of the said application may well be rendered nugatory if this court does not hear the matter on an urgent basis and grant the orders sought therein. The applicants will thus suffer substantial loss and irreparable harm once the respondent proceeds with execution and the applicants are successful on appeal.
 - w. This application has been done without any unreasonable delay.
3. The 1st respondent opposed the application on the following grounds:
- a. That the application for stay is overtaken by events.
 - b. That no notice of appeal was issued.
 - c. That the application is frivolous and vexatious for no plausible reason for the delay has been tendered.
4. The application for the law firm S.K. Adagala and Company Advocates to replace M/s Nyarige and Company Advocates has been submitted. A judgment has already been issued in Homa Bay CMCC No. 041 of 2020. This request was not opposed and cannot be, as a party has the right to be represented by an advocate of their choice. This prayer, before it is allowed, requires compliance with the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* provides:
- When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—
- (a) upon an application with notice to all the parties or
 - (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person, as the case may be.
5. The firm of M/s Nyarige and Company Advocates was served with the notice of change of advocates, and a signed consent has been attached to the application. I, therefore, allow the firm of S.K. Adagala and Company Advocates to come on record for the applicant.
6. The filing of an appeal in a civil suit is governed by the time frame provided under section 79G of the *Civil Procedure Act* 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. [Emphasis added]

7. The applicant sought to file a notice of appeal through a notice of motion dated the 19th day of April 2024. The impugned judgment was delivered on the 12th day of May 2022. This is almost two years. The applicant contends that his previous advocate on record misled him that the appeal had been lodged.
8. An applicant's request to file an appeal out of time may only be accepted if it satisfies the court that he had good and sufficient cause for not filing the appeal in time. The Supreme Court of Kenya in *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR restated the guiding principles as follows:
 - “(23) It is trite law that in an application for an extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The Court delineated the following as:

The under-lying principles that a Court should consider in exercise of such discretion:

 1. 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;
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 3. Whether the court should exercise the discretion to extend the time is a consideration to be made on a case to case basis;
 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
9. Contrary to the applicant's claim that he was unaware of the proceedings and that the judgment had been delivered, the record does not support this argument. His application includes his statement of defence from the trial court. Without the trial court proceedings, I would have expected an affidavit from the previous advocates on record to demonstrate that the matter advanced without their knowledge. However, this was not provided. Therefore, I cannot conclude that this was the case.
10. Reading through the applicant's supporting affidavit, it is evident that he was aware of the events from the date the judgment was pronounced to the execution process. He has not attached any correspondence to the previous advocates he is blaming, instructing them to file an appeal or seek a stay of execution. The delay is inordinate, and no sufficient explanation has been provided.



11. An application for a stay of execution is best dealt with by the trial court, which is seized of all the facts. It is well placed to interrogate whether the process of execution was conducted as provided for. An appellate court will only entertain such an application where the trial court has decided, but a party is unsatisfied. In the instant case, it was not demonstrated to have been the case.
12. The respondent has argued that the application for a stay is overtaken by events. This has not been demonstrated not to be the case.
13. It is abundantly clear that the applicant is guilty of undue delay; he only has himself to blame. Justice demands that cases must be concluded without undue delay.
14. The application is dismissed with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 3RD DAY OF DECEMBER 2024

KIARIE WAWERU KIARIE

JUDGE

