



Mohammed v Owade (Suing as a Legal Representative of the Estate of Rodgers Otieno Owade - Deceased) & another; Blegif Consult Auctioneers (Interested Party) (Miscellaneous Civil Case E022 of 2024) [2024] KEHC 15549 (KLR) (3 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15549 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
MISCELLANEOUS CIVIL CASE E022 OF 2024
KW KIARIE, J
DECEMBER 3, 2024**

BETWEEN

FAYUD YUSUF MOHAMMED APPLICANT

AND

JOHN OGOLA OWADE (SUING AS A LEGAL REPRESENTATIVE OF THE ESTATE OF RODGERS OTIENO OWADE - DECEASED) 1ST RESPONDENT

CIC GENERAL INSURANCE LIMITED 2ND RESPONDENT

AND

BLEGIF CONSULT AUCTIONEERS INTERESTED PARTY

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.
 - 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 Nancy Nyarige and Company advocates judgment having already been entered in Homabay CMCC No.040 OF 2020 being John Ogola Owade (Suing as the legal representative of the estate of Rodgers Otieno Owade (deceased)) vs 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.040 of 2020 being Rodgers Otieno Owade (deceased) vs 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/decreed issued by the honourable trial court on 12th May 2022 in Homabay CMCC No 040 of 2020 being John Ogola Owade (Suing as the legal representative of the estate of Rodgers Otieno Owade (deceased) vs Fayud Yusuf Mohammed & Anor Delivered in the following terms;
 - i. Pain and suffering; Ksh.30,000/-
 - ii. Loss of Expectation of life; kshs.100,000/-
 - iii. Loss of dependency; kshs.1,600,000/-
 - iv. Special damages; Kshs.140,000/-
 - v. Total; Ksh.1,870,000/- less 50% = Kshs.935,000/-

Pending the hearing and determination of this application.

- e. That upon this honourable court be pleased to order a stay of advertainment, notification of sale by public auction, transfer and or any further dealings with the unlawful attached and carted away motor vehicles registration number KCH 600N, KBV 436W, /ZD 235, KBM 769B, KCC 336J, and 2 shipping containers pending the hearing and determination of the application herein.
- f. That this honourable court be pleased to order unconditional release of unlawfully proclaimed and attached motor vehicle registration No. KCH600N, KBV436W/ZD 2435, KBM 769B, KCC336J and two shipping containers 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. That the said auctioneer's M/s Belgif Auctioneers be summoned to court to give an account of the execution process and the whereabouts of the attached and carted away motor vehicles Reg. Nos. KCH 600N, KBV 436W/ZD 2435, KBM 769B, KCC 336J and two shipping containers.
- i. M/s Belgif Consult Auctioneers should be ordered to tax their costs before the taxing master.
- j. That the application be heard inter partes on such dates and time as this honourable court may direct.
- k. 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.040 of 2020 John Ogola Owade (suing as the legal representative of the estate of Odgers Otieno Owade (deceased) vs Fayud Yusuf and Anor on the 12th day of May 2022 in the following terms;
 - vi. Liability 50:50 in favour of the respondents.
 - vii. Pain and suffering; Ksh.30,000/-



- viii. Loss of Expectation of life; kshs.100,000/-
 - ix. Loss of dependency; kshs.1,600,000/-
 - x. Special damages; Kshs.140,000/-
 - xi. Total; Ksh.1,870,000/- less 50% = Kshs.935,000/-
 - xii. Costs and interests.
- b. Through their advocates on record, the respondent has instructed M/s Blegif Consult Auctioneers, who have proceeded and carted away motor vehicles Reg. Nos. KCH 600N, KBV 436W/ZD 2435, KBM 769B, KCC 336J and two shipping containers and other movable assets which do not belong to the applicant and intended appellant in execution of the judgment in Homabay CMCC No. 040 of 2020 being John Ogola Owade (suing as the legal representative of the estate of Rogers Otieno Owade(deceased) vs Fayud Yusuf Mohammed and Anor.
 - c. The respondents' 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. That it is the applicant/intended appellant's contention that the execution process is unlawful and improper as the applicant/intended appellant has never been served with the warrant of execution and proclamation notice as required under the law.
 - e. That the 1st respondent/applicant's auctioneers, M/s Blegif Consult auctioneers, proceeded on the night of 2nd May 2024 together with hired goons and carted away motor vehicles registration Nos. KCH 600N, KBV 436W/ZD 2435, KBM 769B, KCC 336J and two shipping containers the applicant/intended appellant denies ownership of.
 - f. The applicant/intended appellant was unaware that this matter had proceeded and that the judgment had been delivered, as the applicant denies having moved in the proceedings.
 - g. 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.
 - h. That the applicant/intended appellant further contends ownership of motor vehicle registration number KCH 600N as indicated in the copy of records indicated in the 1st respondent's list of documents dated 28th June 2020 as document Number 8.
 - i. That further, the applicant/intended appellant holds the position that during the hearing of this matter, the respondent did not prove negligence against the applicant/intended appellant as the police abstract did not blame the applicant/intended appellant.
 - j. Unfortunately, the period to file an appeal has already lapsed. Therefore, the intended appellant/applicant's advocates have come to his honourable court seeking leave to appeal out of time.
 - k. That the applicant/intended appellant is apprehensive that should execution proceed, he stands 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.
 - l. Therefore, unless this application is certified urgent and heard immediately and the orders sought herein granted, the 1st respondent, its employees, servants and/or agents have already



attached and carted away motor vehicles registration numbers KCH 600N, KBV 436W/ZD 2435, KBM 769B, KCC 336J and two shipping containers and this application will be rendered nugatory thereby exposing the intended appellant to substantial loss and damage.

- m. That this application has been made without unreasonable or undue delay.
 - n. The application herein also seeks a stay of execution against the honourable trial court's judgment of 12th May 2022, pending the hearing and determination of the application and the intended appeal.
 - o. That the intended appellants/applicants have an arguable appeal with high chances of success.
 - p. 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-partes.
 - q. That the intended appellant/applicant is apprehensive that the respondents may proceed and sell the unlawfully and illegally carted away motor vehicles registration numbers KCH 600N, KBV 436W/ZD 2435, KBM 769B, KCC 336J and two shipping containers as the applicant/intended appellant denies ever having been served with the warrants of execution and or proclamation notices as required under the law.
 - r. That the judgment/decree entered is of a substantial sum of money, and the applicant/intended appellant is apprehensive that if the 1st 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 1st respondent.
 - s. That the respondent has not disclosed nor furnished the court with any documentary evidence to prove her financial standing.
 - t. 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.
 - u. 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.
 - v. That this application is made in good faith and will not occasion any prejudice to the respondent.
 - w. It is in the interest of justice that the application be granted.
 - x. Unless this matter is heard as a matter of urgency and prayers sought, the intended appellants/applicants herein shall suffer irreparable harm and thereby defeat the purpose of this suit and render the same nugatory.
 - y. The object of the said application may well be rendered nugatory if this court does not hear the matter urgently and grant the orders sought therein. The applicant will thus suffer substantial loss and irreparable harm once the respondent proceeds with execution and the applicants are successful on appeal.
 - z. This application has been done without any unreasonable delay.
3. The 1st respondent opposed the application based on the following reasons:



- 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. 040 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 vs 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 assertion that he was unaware of the proceedings and that the judgment had been issued, the records do not support this claim. His application includes his statement of defence from the trial court. Without the trial court proceedings, I would have expected an affidavit from his previous legal representatives to demonstrate that the matter progressed without their knowledge. However, this was not provided. Therefore, I cannot conclude that he was unaware of the proceedings.
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

