



Principal and Chairman Board of Management Jilore Secondary School & another v Akinyi (Miscellaneous Civil Application E072 of 2024) [2024] KEHC 16250 (KLR) (17 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16250 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS CIVIL APPLICATION E072 OF 2024
SM GITHINJI, J
DECEMBER 17, 2024**

BETWEEN

THE PRINCIPAL AND CHAIRMAN BOARD OF MANAGEMENT JILORE SECONDARY SCHOOL 1ST APPLICANT

EMMANUEL KAI MUNGA 2ND APPLICANT

AND

EVERLYNE AKINYI RESPONDENT

RULING

Representation:

Mr Ndambuki Advocates for the Applicant

Mr Nyambuto Advocate for the Respondent

1. By a Notice of Motion application dated 11/7/2024 brought under section 1A, 1B, 3A and 79G of the [Civil Procedure Act](#), Order 22 Rule 22, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, the Applicants seek: -
 1. Spent.
 2. Spent.
 3. That the Applicants be granted leave to appeal out of time from the judgment and decree delivered on 28/5/2024 in Malindi CMCC No. E274 of 2023 Everlyne Akinyi versus The Principal and Chairman Board of Management Jilore Secondary School and Emmanuel Kai Munga.



4. That this honourable court be pleased to issue an order of stay of execution of the judgment delivered on 28/5/2024 in Malindi CMCC No. E274 of 2023 Everlyne Akinyi versus The Principal and Chairman Board of Management Jilore Secondary School and Emmanuel Kai Munga and all the consequential orders arising therefrom pending the hearing and determination of the Applicants' intended appeal to the High Court.
 5. That this Honourable Court be pleased to grant any further relief and/or order it may deem fit and just to grant in the circumstances.
 6. That the costs of this application be provided for.
2. The application is supported by 13 grounds on the face thereof among them, materially, that the appeal has good chances of success; that the delay in filing the intended appeal was occasioned by the absence of the Applicants' insurer's legal officer from office and the Applicants' inadvertent failure to give instructions to appeal in good time; that the Applicants are apprehensive that the Respondent shall commence execution thus rendering the intended appeal nugatory; that should execution proceed, the Appellants stand to suffer irreparable loss as the Respondent has no known capability to refund the decretal sum; that no prejudice shall be suffered by either party should the orders sought be granted; and that the Applicants are willing to abide with any such security as the Court shall impose in allowing the application.
 3. The supporting affidavit is sworn by Emmanuel Kai Munga, the 1st Applicant's driver, wherein he reiterates the grounds in support emphasizing that the intended appeal raises crucial arguable grounds of appeal with high chances of success.
 4. Opposing the application, the Respondent through her advocate Mr. Geoffrey Kilonzo filed a Replying Affidavit sworn by the said advocate on 15/8/2024 contending that the application is an abuse of the court process, lacks merit and was filed inordinately late in bad faith to cover the indolence of the Applicants. According to Mr. Kilonzo, the Applicants have never been keen to pursue the intended appeal despite being granted 45 days stay of execution. Counsel deposed that should the orders sought be granted; the Applicants be ordered to deposit the entire decretal sum in a joint interest earning account as security.
 5. The application was canvassed by way of written submissions which I have perused and understood.

Determination

6. I have considered the application by the Applicants, the grounds, supporting affidavit, replying affidavit and written submissions for and against the application as supported by cited authorities. In my view, the main issues for determination are: -
 - i. Whether leave to file appeal out of time should be granted.
 - ii. Whether an order for stay of execution pending determination of the intended appeal should issue.
7. Under Section 79G of the *Civil Procedure Act*, time for filing an appeal from judgment of the subordinate court to the High court is 30 days. In this case, the judgment sought to be challenged was rendered on 28/5/2024. It follows that any appeal challenging that decision ought to have been filed on or before 27/6/2024. Instead, no appeal was filed within that period and the Applicants have now come before this court seeking to have the time enlarged. The application was filed on 11/7/2024, approximately 14 days after the lapse of the statutory period.



8. The Court of Appeal in *Charles Karanja Kiiru v Charles Githinji Muigwa* [2017] eKLR indicated that whenever an application for extension of time is before a court, the court ought to consider several factors as observed by Odek JJA in *Edith Gichungu Koine v Stephen Njagi Thoithi* [2014] eKLR thus:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

9. This aligns with the provision of section 79G of the *Civil Procedure Act*, which provides that Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.

10. The Court of Appeal further held that there is a duty imposed on courts to ensure that the factors considered are consonant with the overriding objective of civil proceedings litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court.

11. It is obvious that the intended appeal falls out the stipulated time within which to file an appeal under section 79G of the *Civil Procedure Act*. The reason given for the delay is that the Applicants inadvertently failed to give their advocates on record instructions to appeal in good time and that was occasioned by the absence of the Insurer’s legal officer in the office. While the Court’s discretion to extend time is unfettered, the same must be exercised judiciously and not capriciously. Having that in mind, I am not convinced that the delay has been satisfactorily explained to warrant this Court to exercise that discretion in favour of the Applicants.

12. The absence of a legal officer from the office, does not mean that the office work and related matters thereto should come to a standstill. To me this sounds like a mere excuse for the Applicants’ own indolence in pursuing their right. No justification has thus been tendered to deny the Respondent from enjoying the fruits of the judgment. In the foregoing, I decline to enlarge time to appeal out of time.

13. Having arrived at that conclusion, there is no basis for the Court to determine whether or not an order for stay of execution is merited.

14. The outcome is that the application dated 11/7/2024 is hereby dismissed with costs.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 17TH DAY OF DECEMBER, 2024.

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S.M. GITHINJI

JUDGE

In the absence of; -

Mr. Ndambuki for the Applicant

Mr. Nyambuto for the Respondent

