



**Samuel & another v George Musili Nguli & Syombua Musili(Suing as the Administrators and Legal Representative of the Estate of Lenox Nguli Musili (Deceased) (Civil Appeal E072B of 2021) [2021] KEHC 340 (KLR) (14 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 340 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E072B OF 2021  
MW MUIGAI, J  
DECEMBER 14, 2021**

**BETWEEN**

**MWANGI SAMUEL ..... 1<sup>ST</sup> APPELLANT**

**SARIS HARDWARE LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**GEORGE MUSILI NGULI & SYOMBUA MUSILI(SUING AS THE ADMINISTRATORS AND LEGAL REPRESENTATIVE OF THE ESTATE OF LENOX NGULI MUSILI (DECEASED) ..... RESPONDENT**

**RULING**

1. By a Notice of Motion dated 19<sup>th</sup> May, 2021 filed under Certificate of Urgency, the Appellants seeks the following orders:-
  1. That the application be certified urgent, service thereof be dispensed with and be heard ex parte in the first instance.
  2. That the Court be pleased to enlarge time within which to file the intended appeal and Record of appeal herein and the Appellants be granted leave to file and serve appeal out of time.
  3. That the costs of this application be awarded to the Appellants.
2. The application is based on grounds that the judgment/Decree in Civil Suit No. 223 of 2012 was delivered on 27<sup>th</sup> March 2019. The Appellants stated that they are desirous to appeal against the judgment as per the annexed Draft Memorandum of Appeal. However the Appellants state that the time to file appeal lapsed. The Appellants have asked this court to grant them leave to file their appeal out of time.



3. According to the Appellants, they were issued with a Notice of Entry of Judgment in January, 2020 which prompted them to file an application before the Trial Court seeking orders to set aside the Trial Court judgment but the application was dismissed in March 2021. The Appellants state that it is fair and just to grant the sought orders.
4. The application is supported by the Appellants advocate Kevin Turunga Ithagi replying affidavit sworn on 19<sup>th</sup> May, 2021. He deposed that he had requested to be supplied with copies of the ruling and proceedings for purposes of filing an appeal vide a letter dated 16<sup>th</sup> April, 2021 annexed as ‘LNM-3’. According to the advocate, it is his desire to lodge an appeal against the impugned judgment.

#### Replying Affidavit

5. In opposition to the application, George Musili Nguli swore a replying affidavit on 7<sup>th</sup> July, 2021. He deposed that the Applicant is guilty of inordinate delay since the judgment was delivered on 27<sup>th</sup> March, 2019, a period of 2 years and 3 months. According to the Respondent, the Applicant was represented by an advocate who was duly served with all the court processes and notices whenever any action was taken.
6. He deposed that he has since extracted the decree ‘GMN-1’ and the warrants of attachment are with the auctioneers for Kshs.2,070,944/- which the Applicant should first settle or deposit with the court pending further orders. According to the Respondent he has endured a lot of agony having lost a son over 10 years in the incident yet the Appellants are not willing to meet their obligations under the judgment.
7. According to the Respondent, the Appellants have not demonstrated any good and sufficient cause as envisaged under the law hence the court should not exercise its discretion in favor of the Applicant. He urged the court to dismiss the application with costs.

#### 1<sup>st</sup> Applicant’s Submissions

8. In support of the application, the 1<sup>st</sup> Appellant’s advocate placed reliance on the case of *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others (2014) eKLR* where the principle to be considered by court while deciding whether to extend time to file.
9. It is submitted that the delay was occasioned by good faith. It is submitted that the 1<sup>st</sup> Appellant’s have come to court with clean hands. The intended appeal raises reasonable grounds for determination.
10. According to the 1<sup>st</sup> Appellant’s advocate, the Appellants were not aware of the existence of Machakos CMCC No.223 of 2012 hence the delay to file an appeal. Reliance was placed on the case of *Frigonken Ltd vs. Value Park Food Ltd HCC No.424 OF 2010*. According to 1<sup>st</sup> Appellant’s advocate, the 1<sup>st</sup> Appellant application dated 4<sup>th</sup> March, 2021 seeking to set aside the default judgment delivered by the Trial Court on 27<sup>th</sup> March, 2019 contributed to the delay in filing the appeal on time. It is submitted that the 1<sup>st</sup> Appellant believed that their application had high chances of success.
11. It is submitted that the 1<sup>st</sup> Appellant was condemned unheard as he did not file his statement of defence hence he will be greatly prejudiced if the court doesn’t grant him a chance to appeal.
12. According to the 1<sup>st</sup> Appellant’s advocate, the application seeking to set aside the default judgment and the application before court were filed without undue delay. It is submitted that a delay of 2 years is not inordinate and in any case the law does not set out the maximum period for the delay as illustrated in the case of *Andrew Chemaringo vs. Paul Kipkorir Kibet [2018] eKLR*.



13. It is submitted that the 1<sup>st</sup> Appellant has an arguable appeal as per the draft Memorandum of appeal marked as LMN2. Reliance is placed on the cases of *Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd & 2 Others Civil Application No. 124 of 2008* and in *Damji Pragji Mandavia vs. Sara Lee Households & Body Care (K) Ltd, Civil Application No. Nai.345 of 2004*.
14. According to the 1<sup>st</sup> Appellant advocate, the 1<sup>st</sup> Appellant has a right to fair hearing guaranteed in the Constitution hence the court should grant the 1<sup>st</sup> Appellant leave to file the appeal out of time.

#### Respondent's Submissions

15. On behalf of the Respondent, it is submitted that the Appellants have not given any sufficient cause as envisaged under Section 79G of the *Civil Procedure Act* as they did not lodge an appeal in time after judgment was delivered on 27<sup>th</sup> March, 2019. It is submitted that the averments in the Respondent's replying affidavit remain uncontroverted through a supplementary affidavit.
16. According to the Respondent's advocate, the Appellants did not file their written submissions within 14 days as directed by court hence the application herein remains unprosecuted.
17. The Respondent urged the court to dismiss the application with costs.

#### Determination

18. I have considered the application, affidavits in support and in opposition to and the written submissions.
19. The Appellants are aggrieved by the judgment and now seek to appeal against the same but the stipulated time to appeal lapsed on 27<sup>th</sup> April, 2019.
20. Section 79G of the *Civil Procedure Act* provides that:

“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.”

21. What is good and sufficient cause? In *Wachira Karani vs. Bildad Wachira [2016] eKLR* Mativo J. held that:

“Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause...” See *Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633* and *Daphne Parry vs. Murray Alexander Carson [1963] EA 546*

22. The principles to be considered in exercising the discretion whether or not to enlarge time are well set out in *First American Bank of Kenya Ltd vs. Gulab P. Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65* where the court stated the principles to be:-

“(i). the explanation if any for the delay;



- (ii). the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;
- (iii). Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.”

23. In the same vein, the Supreme Court of Kenya in the case of County Executive of *Kisumu vs. County Government of Kisumu and 8 Others [2017] eKLR* held:-

“[23] It is trite law that in an application for 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’s 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 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.”

24. According to the Applicant they were not served with the Summons to enter appearance hence they did not file either a Memorandum of appearance or their statement of defence. The Trial Court entered judgment in default of appearance on 27<sup>th</sup> March, 2019. The Appellants assert that they came to know about the existence of the case vide the Notice of Entry of Judgment dated 20<sup>th</sup> January, 2020.

25. The purpose of the Summons to enter appearance is well explained by the Court of Appeal in *Misnak International (UK) Limited vs. 4MB Mining Limited C/O Ministry of Mining, Juba Republic of South Sudan & 3 others [2019] eKLR* where the Honourable Justices held that:-

“27. It is trite that one of the tenets of the rules of natural justice is that a party should not be condemned unheard. In other words, no proceedings should be conducted to the detriment of any person in his absence. It is in line with actualization of this right that the provisions for summons to enter appearance and service thereof come into play. The essence of such summons is to give notice to the party sued of the existence of the suit and invite him/her to enter appearance and defend the suit if she/he so wishes. This requirement has



been reinforced in a number of decisions of this Court namely, *Giro Commercial Bank Ltd vs. Ali Swaleh Mwangula* [2016] eKLR & *Babs Security Services Ltd vs. Mwarua Yawa Nzao & 19 Others* [2019] eKLR.”

26. Indeed, the failure to serve the Defendant with Summons to enter appearance will lead to an irregular judgment.

27. The Court of Appeal in *James Kanyiita Nderitu & another vs. Marios Philotas Ghikas & another* [2016] eKLR stated that:-

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & Another v. Shah (supra)*, *Patel v. E.A. Cargo Handling Services Ltd* (1975) EA 75, *Chemwolo & Another v. Kubende* [1986] KLR 492 and *CMC Holdings v. Nzioki* [2004] 1 KLR 173).”

28. The Learned Justices further stated that:

“In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment”

29. However, the court notes that in the Trial Court Judgment, the Trial Magistrate indicated that the Appellants entered appearance dated 17<sup>th</sup> April, 2012 but did not file their defence. Based on the handwritten court proceedings attached to the application herein, on 7<sup>th</sup> November, 2018 Nyaata for the Plaintiff, the Respondent herein informed court that the Appellants had not filed their defence hence judgment should be entered against them but the Trial Magistrate directed that a request for judgment be filed. The request is dated 8<sup>th</sup> November, 2018. On 9<sup>th</sup> August, 2018 an advocate known as Gichuru on behalf of the Appellants indicate that he had file a Memorandum of Appearance. On 27<sup>th</sup> September, 2018, an advocate known as Thiongo holding brief for Gichuru informed court that the Appellants insurer, Blue Shield had been declared bankrupt hence Thiongo did not have instruction.

30. On 13<sup>th</sup> December, 2018, the case proceeded for formal proof in the absence of the Appellants or their advocate and on 27<sup>th</sup> March, 2019 the Trial Court delivered a Judgment in favour of the Plaintiff with a stay of the judgment for 30 days.



31. The court notes that the Notice of Entry of Judgment is dated 20<sup>th</sup> January, 2020. According to the 1st Appellant’s advocate the application dated 26<sup>th</sup> February, 2020 seeking to set aside the default judgment delivered by the Trial Court on 27<sup>th</sup> March, 2019 also contributed to the delay in filing the appeal on time since the application was dismissed in March 2021.
32. Indeed, the Court of Appeal in *Kenya Ports Authority vs. Silas Obengele Civil Application No. Nai. 297 of 2004 [2006] 2 KLR 112* stated that:
- “Whereas it is now settled that whenever there is a delay, even for one day, there must be some explanation for it otherwise an extension may not be granted where there was material before the single judge from which he could and did conclude that the delay or the periods of delay...the full bench will not interfere” See *County Executive of Kisumu vs. County Government of Kisumu and 8 Others [2017] eKLR*”.
33. The record establish that the Appellants entered appearance despite them stating that they did not do so. The explanation by the Appellants that they were unaware of the Trial Court proceedings is unsubstantiated. A memorandum of appearance was simply filed and the Appellants went into slumber until a Notice of Entry of Judgment dated 20<sup>th</sup> January, 2020 was brought to their attention. The application seeking to set aside the judgment was filed after 1 months on 28<sup>th</sup> February, 2020.
34. According to the Appellants they come to court with clean hands. To the Appellants, the delay was occasioned by good faith. The court finds this assertion in the negative.
35. The default judgment was delivered on 27<sup>th</sup> March, 2019 hence the 30 days stipulated under Section 79G of the *Civil Procedure Act* lapsed on 27<sup>th</sup> April, 2019. The court finds that there is sufficient evidence that the Appellants and/or their advocate were aware of the existence of Machakos CMCC No.223 of 2012 where the judgment appealed against emanates.
36. The court will associate itself with the case of *Mbukoni Services Limited & another vs. Mutinda Reuben Nzili & 2 others [2021] eKLR*, where Odunga J. stated that:-
- “27. The broad approach under the current constitutional dispensation is that unless there is fraud or intention to overreach, an error or default that can be put right by payment of costs ought not to be a ground for nullifying legal proceedings unless the conduct of the party in default can be said to be high handed, oppressive, insulting or contumelious. The court, as is often said, exists for the purpose of deciding the rights of the parties and not imposing discipline.”
37. In the same vein the *East African Court of Appeal in Shah vs. Mbogo & Another (1967) EA 116* as follows:
- “..... the court’s discretion to set aside an exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the course of justice.”
38. The court finds no good and sufficient cause has been shown by the Appellants to warrant extension of time to file the intended appeal.



Disposition

- a. The Notice of Motion dated 19<sup>th</sup> May, 2021 lacks merit and is hereby dismissed.
- b. Costs of the application shall be borne by the Appellants.

It so ordered.

**RULING DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 14<sup>TH</sup> DAY OF DECEMBER 2021.**

**M.W MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**Mr. Mukula holding brief for Mwalimu for Respondent**

**Geoffrey - Court Assistant**

