Maina v Macharia (Miscellaneous Civil Application E048 of 2023)
[2025] KEHC 13674 (KLR) (25 September 2025) (Ruling)

Neutral citation: [2025] KEHC 13674 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

MISCELLANEOUS CIVIL APPLICATION E048 OF 2023

CW MEOLI, J

SEPTEMBER 25, 2025

BETWEEN

SIMON WAMBUGU MAINA ..... APPLICANT

AND

HELLEN MUMBI MACHARIA ..... RESPONDENT

RULING

1. The motion dated 14/4/2023 by Simon Wambugu Maina (hereafter the Applicant) seeks three key prayers, namely, leave to appeal out of time against the whole judgement delivered on 17/2/2023 in Ngong CMCC No 111 of 2019 (hereafter the subject suit); that the annexed copy of the memorandum of appeal be deemed as properly filed, upon payment of the requisite court charges and; an order to stay execution of the subject judgment judgement pending the hearing and determination of the intended appeal.

2. The motion is expressed to be brought inter alia under Sections 79G and 95 of the *Civil Procedure Act* (CPA) and order 42 of the Civil Procedure Rules (CPR). The motion is premised on the grounds on its face, as amplified in the affidavit of Benson Nzakyo, the Applicant's advocate. To the effect that that judgement in the subject suit was delivered in favour of Hellen Mumbi Macharia (hereafter the Respondent) on 17/2/2023 and that the Applicant has to date not received a copy of the judgement hence the delay in giving instructions and time to appeal running out. He posits that the appeal has overwhelming chances of success and if execution proceeds and the intended appeal shall be rendered nugatory. He asserted that no prejudice would be suffered by the Respondent.

3. The Respondent opposed the motion via her replying affidavit dated 30/9/2024. Therein contending that the application is incompetent, fatally defective, an abuse of court process and intended to prevent her from enjoying the fruits of her judgement. Pointing out that the Applicant was notified of the judgement vide a letter dated 23/3/2023 but no appeal was filed within the stipulated statutory time. Moreover, in the subsequent declaratory suit, namely, Milimani CMCC E4703 of 2023, the

Applicants entered appearance and are currently defending the matter. In her view, the explanation advanced by the Applicant for failure to file appeal in time is inadequate, while the decretal sum remains unpaid.

4. By a supplementary affidavit sworn by one Beatrice Muriithi described as the legal officer in Applicant's insurer, it was claimed that change of advocates on record caused confusion and that the current advocate on record obtained from the previous advocates particulars relating to HCCA No E048 of 2023 instead of HCC Misc E048 of 2023. Hence the filing of the Notice of change of advocates in the wrong matter caused delay, and the mistake of counsel should not be visited upon the litigant .

5. The parties did not file submissions and wished to rely on their respective affidavits.

Analysis and Determination

6. The court has considered the motion and the rival affidavit material on record. The key prayers in the motion before the court are for leave to appeal out of time and stay of execution pending appeal. Starting with the latter prayer, it refers to an intended appeal, acknowledging that no appeal has been filed, and even if the prayer to deem the annexed memorandum of appeal as duly filed herein were allowed, no appeal can possibly be instituted via a miscellaneous cause.

7. Besides, it is evident on a plain reading of Order 42 Rule 6(1) of the CPR, that an order to stay execution pending hearing and determination of an appeal presupposes the existence of an appeal. The filing of an appeal is a condition precedent to the exercise of this court's appellate jurisdiction under Order 42 Rule 6 (1) of the Civil Procedure Rules. Hence the invocation of the jurisdiction of this Court under Order 42 Rule 6 (1) or 6 (6) of the Civil Procedure Rules must be preceded by the filing of an appeal, or compliance with the procedure for filing an appeal, in this case a memorandum of appeal (See Order 42 Rule 1 of the Civil Procedure Rules).

8. Thus, where a party specifically seeks stay of execution pending hearing and determination of an appeal not yet filed, the Court may be acting in vacuo by considering the Applicant's prayer for stay of execution pending a non-existent appeal. The Court of Appeal in Abubaker Mohamed Al-Amin v Firdaus Siwa Somo [2018] eKLR while citing with approval the decision of the High Court in Rosalindi Wanjiku Macharia vs. James Kiingati Kimani (Suing as the Legal Representative of the Estate of Martin Muiruri (Deceased)) [2017] eKLR approved the reasoning that stay of execution pending appeal must be predicated on an existing appeal.

9. Earlier, the Court of Appeal in the case of Equity Bank -Vs- Westlink MBO Limited [2013] eKLR while commenting on Rule 5 (2) (b) of the Court of Appeal Rules, whose wording is substantially similar to Order 42 Rule 6 (1) of the Civil Procedure Rules, and on Order 42 Rule 6 (6) of Civil Procedure Rules, left no room for doubt that an application for stay of execution pending appeal could only be entertained before it after the filing of an appeal or a Notice of Intended Appeal. (See also Balozi Housing Co-operative Society Limited -Vs- Captain Francis E. K. Hinga [2012] eKLR). Order 42 Rule 1 of the CPR provides that an appeal to the High Court shall be in the form of a memorandum of appeal. In this case, an appeal is yet to be filed and therefore, there is no basis upon which this court could exercise its appellate jurisdiction under the said provision in a miscellaneous matter.

10. If the Applicant desired to seek an order to stay execution alongside the prayer for the late admission of their appeal, they ought to have first filed the memorandum of appeal in a proper appeal and the relevant application. In my considered view, the words that "an appeal may be admitted out of time" in Section 79G, appears to admit both retrospective and prospective applications. So that leave under the Section may be sought before or after a memorandum of appeal is filed. However, it may be more prudent for a party who also seeks stay of execution in the same motion for leave to appeal out of time to

have filed the memorandum of appeal in advance. In the circumstances, the prayer seeking temporary stay of execution of the ruling delivered in the lower Court suit pending hearing and determination of the substantive appeal has no legal anchor and cannot be entertained.

11. Turning now to the prayer seeking leave to appeal out of time, the power of the Court to enlarge time for filing an appeal out of time is expressly donated by Section 79G, as well as generally, by Section 95 of the *Civil Procedure Act*. 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."

12. The principles governing leave to appeal out of time are settled. The successful applicant must demonstrate "good and sufficient cause" for not filing the appeal in time. In Thuita Mwangi v Kenya Airways [2003] e KLR, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in pari materia with Section 79G of the *Civil Procedure Act*, reiterated its decision in Mutiso v Mwangi [1997] KLR 630 as follows:

> " It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted."

13. While the discretion of the Court is unfettered, a successful applicant is obligated to adduce material upon which the Court should exercise its discretion, or in other words, the factual basis for the exercise of the Court's discretion in his favor. The Supreme Court in the case of Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The Court stated inter alia that:-

> " (The underlying principles a court should consider in exercise of such discretion include;
>
> 1. Extension of time is not a right of any 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 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 Respondent if the extension is granted;
> 6. Whether the application has been brought without undue delay.

7. ....."

See also County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] eKLR.

14. At the outset it is pertinent to note that the Applicant himself has inexplicably not sworn an affidavit in support of the motion, leaving it to his advocate and a stranger to swear affidavits in support of the motion. I advisedly refer to the deponent of the supplementary affidavit as a stranger because Jubilee Allianz General Insurers which she purports to be the insurer of the Applicant is not a party to this matter. All that the deponent states in her affidavit is that she has been authorized by the insurer of the Applicant to swear the supplementary affidavit.

15. As the insurer is not a party to this case, the next question arising from these facts is whether the insurer's rights under the doctrine of subrogation have crystalized in this instance. The answer is in the negative, as undeniably, the insurance company has not settled the Respondent's claim against its insured, the Applicant herein, and in whose behalf the insurance company purports to approach the Court.

16. In that regard, the Court of Appeal in Africa Merchant Assurance Company v Kenya Power & Lighting Company Limited (2018) eKLR had this to say: -

> " 26. The essence of the doctrine of subrogation is not in contention. It allows an insurer after compensating an insured for any loss under the insurance contract to step into the shoes of the insured. In that, the insurer is entitled to all the rights and remedies the insured might have against a third party in respect of the loss compensated....
>
> 28. As it stands, the law in that respect is settled, that is, that an insurer cannot under the doctrine of subrogation institute a suit in its own name against a third party. See this Court's decisions in Octagon Private investigation Security Services vs. Lion of Kenya Insurance Co. [1994] eKLR and Michael Hubert Kloss & another vs. David Seroney & 5 others [2009] eKLR."

17. In the case of Egypt Air Corporation vs. Suffish International Food Processors (U) Ltd and Another [1999] 1 EA 69 the Court defined the basis of the doctrine of subrogation as follows:-

> " The whole basis of subrogation doctrine is founded on a binding and operative contract of indemnity, and it derives its life from the original contract of indemnity and gains its operative force from payment under that contract; the essence of the matter is that subrogation springs not from payment only but from actual payment conjointly with the fact that it is made pursuant to the basic and original contract of indemnity. If there is no contract of indemnity, then there is no juristic scope for the operation of the principle of subrogation." (Emphasis added)

18. The Court stated in Opiss vs. Lion of Kenya Insurance Company Civil Appeal No. 185 of 1991:

> " The right to subrogation does not create a privity of contract between the insurance company and the third party; it only gives the insurance company the right to take over the rights and privileges of the insured and therefore must be brought in the name of the insured."

See also;-Kenya Power & Lighting Company Limited v Julius Wambale & Another (2019) eKLR

19. As earlier noted, in this case the insurance company is yet to make good the Respondent's claim but has seemingly assumed to step into the shoes of their insured by deposing the supplementary affidavit in support of the motion. The insurance company lacks the locus standi to authorize or swear affidavits in this matter and the supplementary affidavit being incompetent must be struck out. It is so ordered.

20. This leaves the supporting affidavit, which was sworn by counsel rather than the Applicant. This conduct is to be frowned upon as counsel ought not to be drawn into the dispute between parties. No doubt counsel on record for the Applicant is privy to certain pertinent facts and would be able to depose to non-contentious issues. Rule 8 of the Advocate (Practice) Rules states: -

> " No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear: Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears."

21. As a matter of good practice, advocates ought to refrain from giving evidence in contentious matters, but this does not bar them from deposing affidavits regarding non-contentious matters about which they are well versed. The rationale behind the rule is to bar and shield the advocate from entering the fray or arena between his client and adverse parties. See Nyamogo & Nyamogo Advocates v Kogo (2001) EA 174 and Simon Isaac Ngugi v Overseas Courier Services (K) Ltd (1998) eKLR

22. Further every such affidavit sworn must comply with the prescription in Order 19 Rule 3(1) of the Civil Procedure Rules requiring that:

> " (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove."

23. The Court of Appeal in Hakika Transporters Services Ltd v Albert Chulah Wamimitaire [2016] eKLR citing its decision in Salama Beach Ltd v Mario Rossi, CA. No. 10 of 2015, expressed the principle as follows:

> " As regards the appellant's objection regarding the affidavit supporting the application, it is clear that Mr. Munyithya has deponed only to matters within his personal knowledge as counsel acting in this matter both in the High Court and in this Court. Ordinarily counsel is obliged to refrain from swearing affidavits on contentious issues, particularly where he may have to be subjected to cross examination (See Pattni v. Ali & 2 Others, CA. No. 354 of 2004 (UR 183/04). Rule 9 of the Advocates (Practice) Rules however permits an advocate to swear an affidavit on formal or non-contentious matters." (Emphasis added).

24. Similarly in this case, counsel is not a stranger to the proceedings and the affidavit material appears to relate to issues within his personal knowledge, and which strictly speaking, may not qualify as contentious. The affidavit merely states that instructions to file appeal were delayed because a typed copy of the judgment had not been received. In the court's view, although it is eminently desirable that affidavits be sworn by parties themselves, the supporting affidavit herein appears compliant with Rule 8 of the Advocate (Practice) Rules. The court however found it puzzling that of the two affidavits sworn in support of the motion, none is by the Applicant, and no explanation was proffered.

25. That said, no evidence of any request for a copy of the judgment is exhibited. Neither is evidence of follow up with the lower court since 2023 when judgment was delivered. And while the motion may have been timeously filed, the court notes from the record the extended delay in its prosecution. On 2.05.2023 the duty court fixed the motion brought under certificate of urgency for hearing on 5.07.2023, but on the said date, there was no attendance, and the matter was set for mention on 10.07.2023. Thereafter, the motion remained dormant until 29.02.2024 when the court itself set down the matter for directions on 19.09. 2024 and issued notices. On that date, the current counsel attended and was directed to serve the motion for hearing on 30.10.2024. It appears that the court did not sit on that date, and once more the matter lay dormant until the court on its own motion once more set down the hearing for 29.05.2025 when the motion was eventually heard.

26. The delay of two years in prosecuting a motion of this nature is inordinate and unexplained, and the Respondent's complaints on this score are justified. This delay coupled with the Applicant's apparent disinterest in the matter militates against granting any further indulgence. The Respondent ought not to pay the price for the tardy conduct of an apparently reluctant Applicant and his advocates, by being subjected to even more delay.

27. The Court of Appeal in Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 Others [2019] eKLR addressed itself on the question of delay as follows; -

> " The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained, hence a plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There have to be valid and clear reasons, upon which discretion can be favourably exercisable....."

28. Clearly, in the circumstances of this case, granting the prayer for leave to appeal out of time might only work prejudice through delay against the Respondent, and appear to condone the lackadaisical conduct of the Applicant in this matter. While the Court is alive to the emphasis in Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited [2020] eKLR concerning the importance of the right of appeal, the right is not absolute and must be balanced against the Respondent's corresponding right to have the dispute determined expeditiously. The prayer for leave to appeal out of time has not been justified. In the circumstances, the Court finds no merit whatsoever in the motion dated 14.04.2023. The motion is hereby dismissed with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 25TH DAY OF SEPTEMBER 2025.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Mr. Ombati

For the Respondent: Mr. Machoka

C/A: Lepatei