REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
MISCELLANEOUS CIVIL APPLICATION NO. E302 OF 2024

TODDY CIVIL ENGINEERING CO. LTD……..APPLICANT

VERSUS

NYARU SAWMILL LIMITED……..RESPONDENT

RULING

1. It is not in dispute that on 14/10/2024, the Small Claims Court at Eldoret entered an ***ex parte*** default Judgment in **Eldoret SCCC No. E1649 of 2024** in favour of the Respondent against the Applicant for the sum of Kshs 413,916/-. The default Judgment was entered a consequence of the absence of appearance or filing of a defence by the Applicant, and the Court being satisfied that the Applicant was duly served with Summons.

2. By way of Notice of Motion dated 13/12/2024, the Applicant, through **Messrs Walubengo Waningilo & Co. Advocates**, now seeks orders as follows:

i) […….] spent

ii) That this Honourable Court be pleased to extend the time for filing an Appeal out of time by granting the Applicants 14 days to file an appeal against the Judgment and Decree of the Hon. Otieno, Adjudicator/Magistrate dated the 15th October, 2024 in SCCCOMM/E1649/2024) - Nyaru Sawmill Limited -vs- Toddy Civil Engineering Co. Ltd.

iii) […….] spent

iv) That there be a stay of execution against the Judgment and Decree of the Hon. Otieno, Adjudicator/Magistrate dated the 15th October, 2024 in SCCCOMM/E1649/2024 - Nyaru Sawmill Limited -vs- Toddy Civil Engineering Co. Ltd pending hearing and determination of the intended Appeal.

v) That the Applicant be granted leave to enter appearance and file a Defence in order to clearly affirm to this Honourable Court that it has never engaged in trade/business with the Claimant, much less owe any debts to it, as annexed to the Supporting Affidavit filed herewith.

3. In his Affidavit in support of the Application, one **Anthony Mwaura Nganga**, describing himself as a director of the Applicant, deponed that the Applicant received a Proclamation of attachment of movable property on 06/12/2024, which was illegal and unlawful as the Applicant had no knowledge of the suit and was never served with any proceedings, Summons or Judgement. He deponent that the Appellant is desirous of pursuing an appeal and that the delay was occasioned by the fact that the Applicant was not aware of the Judgement until service of the Proclamation notice. On the prayer for stay of execution pending Appeal, he deponed that unless the same is granted, the Respondent will proceed with execution thereby rendering the intended Appeal nugatory.

4. In response, the Respondent, through **Messrs Limo R.K and Co. Advocates**, filed the Replying Affidavit sworn on 21/01/2025 by one **Stephen Chesire**, who described himself as a director of the Respondent. He deponed that the Application offends the provisions of **Order 34(1)** of the **Civil Procedure Rules**, and also that the Applicant ought to have first invoked the provisions of **Section 34** of the **Civil Procedure Act** before filing an Appeal. He then narrated that the Applicant delivered timber worth Kshs 5,135,916 and was paid Kshs 4,722,000/- leaving a balance of Kshs 413, 916 which remains unpaid to date and which was the subject of the said **Eldoret Small Claims Case No. E1649 of 2024**. He deponed further that the Applicant was served with the Statement of Claim, and also notices for the dates when the matter was scheduled to be in Court but deliberately failed to enter appearance, and that the Judgment is therefore regular and valid, and the draft Memorandum of Appeal also does not raise any triable issue.

5. The Application was then canvassed by way of Written Submissions. The Applicant's Submissions is dated 7/03/2025 while the Respondent's is 8/04/2025.

Applicant's Submissions

6. Counsel for the Applicant basically repeated the matters stated in the Supporting Affidavit and cited the case of **Patel v EA Cargo Handling Services Ltd [1974] EA 75** regarding the Court's powers to set aside ***ex parte*** orders. She submitted that **Article 159(2)(d)** of the **Constitution** enjoins the Court to hear and determine appeals on their merits and to eschew very rigid application of rules and procedure where such application will result in miscarriage or subversion of justice, and that technical lapses will be excused in appropriate circumstances to obviate injustice. She submitted further that immediately upon knowledge of the Judgment/Decree, the Applicant moved swiftly to challenge the same, demonstrating due diligence and promptness. She cited various other cases.

Respondent's Submissions

7. Counsel for the Respondent, too, repeated matters stated in the Replying Affidavit, and submitted that the Applicant, despite being served, failed to participate in the proceedings before the lower Court, and also it did not even try to set aside the Interlocutory Judgment but, instead, resorted to filing the instant Application whose prayers are only available under the provisions of **Order 10 Rule 11** and **Order 12 Rule 7** of the **Civil Procedure Rules**. Counsel also observed that **Section 34 (1)** of the **Civil Procedure Act** stipulates that parties to a suit are to agitate any issues or questions arising from a decree already passed, in the same Court that issued the decree and not by filing a separate suit. He urged that the Applicant, instead of moving the trial Court, jumped gun and filed these separate proceedings. He appreciated the Court's discretion, under **Section 79G** of the **Civil Procedure Act**, to grant leave to file an appeal out of time but averred that the Judgment of the lower Court was delivered on 15/10/2024 and the Applicant filed the instant Application on 13/12/2024, close to 2 months later, and that the Applicant did not even bother to seek leave from the trial Court to file the appeal. He also submitted that it is clear from the wording of **Section 79G (supra)** that before the Court considers extension of time, the Applicant must satisfy it that it has a good cause for failing to file the Appeal within time. He cited the case of **Diplack Kenya Limited v William Muthama Kitonyi [2015] eKLR**, and contended that the Applicant has not given reasonable grounds. According to him, the claim that the Applicant was not aware of the parent suit is not sufficient to attract the discretion of the Court. He cited the Supreme Court case of **Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others [20141 eKLR** and also the case of **Paul Musili Wambua v Attorney General & 2 Others [2015] eKLR**.

8. He reiterated that the claim that the Applicant was not served with pleadings is in contradiction with the documents demonstrating service. He also contended that the draft Memorandum of Appeal does not raise pertinent issues deserving the discretion of the Court as no defence was filed. He also observed that under **Section 38** of the **Small Claims Court Act**, an appeal from that Court to the High Court is only allowed on matters of law and submitted that the Applicant's failure to file a defence at the trial Court defeats logic as to what they are appealing. In his view, the intended Appeal has minimal chances of success, if any. He cited the case of **Mwangangi v Mugi (Civil Appeal 1 of 2023 [2024) 1 KEHC 6321 (KLR) (30 May 2024) (Ruling)**. On stay of execution, he cited **Order 42 Rule 6** of the **Civil Procedure Rules** and submitted that the Applicant has not shown any sufficient cause or substantial loss that may result if the orders are denied, and that the Application was made after a long delay. He cited the case of **Butt Vs Rent Restriction Tribunal (1982)**

KLR 417, and also the case of **James Wangalwa & Another Vs Agnes Naliaka Cheseto (2012) eKLR).**

Determination

9. Before I delve into the merits of the Application, I may recount that **prayer (iv)** of the instant Application is premised as follows:

> ***"That the Applicant be granted leave to enter appearance and file a Defence in order to clearly affirm to this Honourable Court that it has never engaged in trade/business with the Claimant, much less owe any debts to it, as annexed to the Supporting Affidavit filed herewith.***

10. Needless to state, this prayer is clearly misplaced as it does not at all belong to this Court. Matters to do with consequences of a Defendant failing to appear or attend Court, or failing to file a defence, are governed by **Order 10** of the **Civil Procedure Rules**. Those provisions permit the entry of Judgment in default of entry of appearance or filing a defence, and set out guidelines on the process of entry of such judgments. **Order 10 Rule 11** then empowers the Court, in the exercise of its discretion, to set aside or vary its own ***ex parte*** orders or Judgments. The Court with the primary jurisdiction to set aside ***ex parte*** orders is therefore, in the first instance, the same Court that passed it. Only on appeal against grant or refusal to set aside such order should a higher Court be moved. The prayer ought to have therefore been made before the trial Court in the first instance. Entertaining a prayer such as the one above in the High Court is a recipe for opening of floodgates for litigants to bypass the Magistrate's Courts through shortcuts. In the circumstances, I decline to consider the said prayer.

11. In view thereof, the remaining issues for determination can be summarised as follows:

i) **Whether the Appellant should be granted leave to appeal out of time.**

ii) **Whether the orders of stay of execution should issue.**

12. This Court's power to allow or admit a party to file an Appeal before it out of time is derived from Section **79G** of the **Civil Procedure Act** which provides 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 a good and sufficient cause for not filing the appeal in time.” [Emphasis added].”

13. In respect to the length of delay, the Supreme Court, in the case of **Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet [2018] eKLR**, guided as follows:

“**the law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”**

14. In the case of **Edith Gichungu Koine Vs Stephen Njagi Thoithi [2014] eKLR**, the Court of Appeal guided that in an application for extension of time, the Court ought to take into account several factors as observed by **Odek JJA** as follows:

“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.”

15. The **Supreme Court**, while handling an Application for extension of time in **Civil Application No. 3 of 2016 - County Executive of Kisumu –vs- County Government of Kisumu & 7 Others** also advanced similar guidelines.

16. It is therefore the position that where the delay by a litigant is well explained and the matter sought to be heard out of time raises triable issues or arguable points, the Court will be reluctant to punish such litigant by declining to grant him enlargement of time. On this point, I am guided by the Court of holding in the case of **Kamlesh Mansukhalal Damki Patni Vs Director of Public Prosecution & 3 Others [2015] eKLR**, in which, in declining to strike out a Notice of Appeal filed one day out of time, stated as follows:

“40. It must be realized that courts exist for the purpose of dispensing justice. Judicial officers derive their judicial power from the people, or as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of the Constitution which succinctly states that *“judicial authority is derived from the people and vests*

> ***in, and shall be exercised by the courts and tribunals established by or under this Constitution*.” Judicial officers are also state officers, and consequently, are enjoined by Article 10 of the Constitution to adhere to national values and principles of governance which require them whenever applying or interpreting the Constitution or interpreting the law to ensure, *inter alia*, that the rule of law, human dignity and human rights and equity, are upheld. For these reasons, decisions of the courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve. Such decisions may involve only parties *inter se* (and hence only parties' interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice.”**

17. Similarly, in the case of **Charles Karanja Kiiru – versus- Charles Githinji Muigwa [2017] eKLR**, the Court of Appeal upheld the following statements made by the trial Judge (**P.J. Otieno J**) in the suit which gave rise to the appeal:

> **“It suffices to comment that a court of law should be hesitant at closing the door to the corridors of justice prior to a litigant being heard on his complaint …..”**

18. The question now is whether the delay has been well explained and whether there is an arguable appeal with chances of access.

19. In this case, the Applicant contends that it failed to file the Appeal within time because it was unaware of the existence of the suit. The impugned ***ex parte*** Judgment was delivered on 15/10/2024 and the instant Application was filed on or about 13/12/2024, thus after about 2 months. However, considering that the Appeal window is 30 days, the delay is technically only about 1 month. I do not find this delay to be inordinate but rather, excusable.

20. On whether the Appeal raises triable issues and/or has chances of success, I must state that should this Court allow the Appeal to be filed out of time, what this Court will rely on in determining the Appeal will be entirely the record of the Small Claims Court as is stands currently. No other or further pleading shall be allowed. In this case, the Applicant did not file a defence and neither did it file an Application for setting aside of the default Judgment in which it would have attempted to explain the nature of the defence it intended to present. Had the Applicant done that, perhaps it could have attached a copy of its draft defence. There is therefore currently no defence or draft defence in the Small Claims Court record,

and which is what this Court, sitting as an Appellate forum will rely on entirely. The Applicant will therefore have no way of demonstrating, when arguing the Appeal, the nature of the defence it intended to place before the trial Court for determination. On what basis therefore shall the Applicant be arguing the Appeal?

21. It now becomes quite clear that the Applicant's failure to apply for setting aside of the default Judgment at the trial Court was a massive blunder as the Applicant's Appeal, if any, shall evidently be based on quicksand. As the Applicant will not be permitted to introduce any new pleadings at the Appeal stage, the Appeal is bound to fail and it will thus be a waste of time to grant leave to file it. I honestly am at a loss why the Applicant chose to come to this higher Court for leave to appeal instead of moving the trial Court under the provisions of **Order 10 Rule 11 (supra)** to set side its own ***ex parte*** default Judgment. The Applicant had a much easier avenue before it which, if not successfully invoked, still it would have had the chance to come to this Court for an Appeal against the refusal to set aside. Instead of taking advantage of this simple route readily available to it, the Applicant inexplicably chose a far more difficult, complicated and basically premature journey of seeking leave to appeal against the substance and merits of the Judgment itself when no such substantive Judgment even exists since what was granted was simply a default interlocutory judgment, not a substantive Judgment. Unfortunately, therein lies the Applicant's *waterloo*. It may not be too late however, the Applicant may still consider returning to the trial Court and try the avenue it had inexplicably chosen to bypass.

22. A look at the Application, the draft Memorandum of Appeal, and even the Applicant's Submissions reveals the Applicant's Counsel's erroneous belief that in the intended Appeal, the Appeal Court will be dealing with the issue whether or not the Applicant was served with Summons hence inclusion of prayer 3 aforesaid. Perhaps it is this misconception that informed the Applicant's blunder set out. As aforesaid, the issue of whether service was properly effected is one that ought, in the first instance, to be placed before the same trial Court that entered the ***ex parte*** Judgment, not a higher Court.

23. Even if therefore the Court were sympathetic to the Applicant and wanted to assist the Applicant by exercising its discretion in its favour, the state of this matter, as a consequence of the Applicant's costly blunder as explained above, leaves no room for this Court to come to the Applicant's aid.

24. In the circumstances, the Application for leave to file the Appeal out of time fails. As a natural consequence, the prayer for stay of execution also follows suit as it is now otiose.

Final Orders:

25. In the end, the Notice of Motion dated 13/12/2023 filed by the Applicant fails, and the same is accordingly dismissed. As costs follow the event, the Respondent is also awarded costs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 16TH DAY OF DECEMBER 2025

……..

WANANDA JOHN R. ANURO

JUDGE

Delivered in the presence of:

Ms. Buyengo h/b for Walubengo for the Applicant

N/A for the Respondent

Court Assistant: Brian Kimathi