

REPUBLIC OF KENYA

IN THE HICGH COURT OF KENYA AT MURANG'A

MISC. CIVIL APPLICATION NO. 123 OF 2024

JOHN MWANGI IRUNGU.....
APPLICANT

VERSUS

CHRISTOPHER OTIENO1ST
RESPONDENT
KENNEDY MUNENE.....2ND
RESPONDENT

RULING

- 1.** In his Notice of Motion dated 26th August 2024, the applicant, *John Mwangi Irungu* sought several orders some of which are now spent. The substantive prayers pending this court's determination are as follows;
 - (i) That the applicant be granted leave to file and serve an appeal out of time against the judgement delivered on 16th April 2024 in Murang'a Small Claims Court Case No. SCCC/E21 of 2024.

- (ii) That pending the hearing and determination of the intended appeal, there be stay of execution of the costs awarded to the respondent.
- (iii) That costs of the application be costs in the cause.
- 2.** In the grounds premising the motion and in the depositions made in his supporting affidavit, the applicant averred that he was the claimant in SCCC/E21 of 2024 and that his claim against the respondent for damages for material damage to his motor vehicle in the sum of Kshs.221,451 was dismissed with costs by the trial court on 16th April 2024.
- 3.** The applicant averred that he was aggrieved by the trial court's judgement and desires to challenge it on appeal but the time allowed for filing of appeals had expired.
- 4.** Regarding the reasons for his failure to file his intended appeal on time, the applicant claimed that he was not notified about delivery of the judgement and he only came to learn of its existence on 10th June 2024 when he was served with a notice of taxation by the respondent's counsel.
- 5.** The applicant further deposed that his intended appeal has high chances of success given that his claim was dismissed

on grounds that the respondents were not to blame for the accident yet they had been found liable for the same accident in Murang'a Traffic Case No.E096 of 2023; that the respondent's costs were taxed at Kshs.63,000 on 20th August 2024 and if stay was not granted, execution would issue and the intended appeal would be rendered nugatory; that if the leave sought was granted, the respondents will not suffer any prejudice.

- 6.** The application was opposed by the respondents on grounds that the applicant failed to satisfactorily explain the delay of four months between when the judgement sought to be challenged on appeal was delivered and the time the application was filed. The respondents also disputed the applicant's claim that his intended appeal has high chances of success.
- 7.** The application was canvassed by way of written submissions. The applicant who prosecuted his application in person filed his written submissions dated 4th October 2024 while those of the respondents dated 13th May 2025

were filed by their advocates on record, *Ms. F. Kamonya & Company Advocates*.

8. Having considered the application and the parties rival written submissions, I find that the only issue arising for my determination is whether the applicant had demonstrated that he was deserving of the orders sought.
9. The law governing appeals to the High Court against decisions of subordinate courts is set out in *Section 79 G* of the *Civil Procedure Act*. The provision clearly stipulates that the time limited for filing such appeals is 30 days but this time may be extended in the court's discretion if sufficient cause was shown for failure to file the intended appeal on time.
10. There is a long line of authorities which enumerate the factors that courts ought to consider when exercising their discretion in granting or declining to grant extension of time for filing appeals out of time.

In ***Charles Karanja Kiiru V Charles Githinji Muigwa [2017] eKLR***, the Court of Appeal cited with approval *Odek JA's* decision in ***Edith Gichungu Koine V Stephen Njagi***

Thoithi [2014] eKLR and identified those factors as follows;

- (i) The period of the delay
- (ii) The reasons for the delay
- (iii) The degree of prejudice to respondent if the application was granted; and
- (iv) Whether the matter raised issues of public importance, among others;

11. In this case, the judgement sought to be appealed against was delivered on 16th April 2024. The applicant claimed that he was not aware of delivery of the judgement until about two months later on 10th June 2024 when he was served with a notice of taxation of the respondent's costs. He blamed his advocates then on record for failing to notify him about delivery of the judgement.

12. The applicant asserted that once he got to learn about existence of the judgement, he filed an application for leave to file an appeal out of time vide Misc. Civil Application No.E103 of 2024 but he was forced to withdraw it on 23rd

August 2024 as it had legal defects; that he subsequently filed the instant application seeking similar orders.

- 13.** I have considered the reasons advanced by the applicant to explain the delay of about four months between date judgement was delivered and filing of the instant application. Although it is not disputed that the judgement was delivered in the presence of the applicant's advocates on record, the applicant has maintained that his advocates failed to notify him of delivery of the judgement and he only got to learn of its existence about two months later. It is not disputed that the applicant had filed a similar application being Misc. Application No.E103 of 2024 which had legal defects which he withdrew on 23rd August 2024 and two days later, he filed the current application.
- 14.** In my considered view, the delay of about four months in the circumstances described by the applicant was not prolonged or inordinate and, in any event, it was sufficiently explained.
- 15.** I have considered the respondent's submissions that the existence of the instant application was causing them prejudice as they have been unable to enjoy the fruits of

their judgement for over one year since the judgement was delivered. But in applications such as the one before me, the court is called upon to undertake a delicate balancing act between the competing rights and interest of both parties.

- 16.** Whereas it is true that the respondents were entitled to enjoy the fruits of their judgement, the applicant had an equally important right of exercising his statutory and constitutional right of appeal to a superior court to have his grievances with the trial court's decision ventilated and resolved.
- 17.** In weighing the degree of prejudice the parties were likely to suffer depending on the outcome of the application, i have considered the fact that if the application was dismissed, the door of justice may be closed on the applicant's face which may result to a violation of his constitutional right of access to justice guaranteed under *Article 48* of the Constitution and the right to a fair trial enshrined under *Article 50 (1)* of the Constitution.
- 18.** On the other hand, if the prayer for grant of leave was allowed, the respondents are not likely to suffer much

prejudice. I say so because the only prejudice they are likely to suffer was a little more delay before accessing the fruits of their judgement which can be ameliorated by an award of costs.

- 19.** Moreover, I have perused the applicant's draft Memorandum of Appeal and contrary to the respondent's submissions, I am of the view that the grounds therein cannot be said to be idle or frivolous. And although I cannot say at this stage that the appeal has high chances of success as submitted by the applicant, I can safely say that the appeal is arguable.
- 20.** For all the above reasons, I find merit in the applicant's prayer for leave to file his intended appeal out of time. The applicant's prayer is consequently allowed on terms that he shall file and serve his intended appeal within 14 days of today's date.
- 21.** Regarding the applicant's prayer for stay of execution of the costs awarded to the respondents pending hearing and determination of his intended appeal, it is my view that this prayer is not merited since *Order 42 Rule 6 (2)* of the *Civil Procedure Rules* which governs grant of orders of stay of

execution pending appeals only applies to existing appeals as opposed to intended appeals.

- 22.** That said, it is important to point out that the court under its inherent and residual power can grant stay of execution with respect to intended appeals if doing so will be in the interests of justice.

Given the facts which give rise to the applicants intended appeal, I find that it will be in the interest of justice to grant stay of execution of the costs awarded to the respondents pending filing of the applicant's intended appeal. If and when the applicant files his intended appeal, he can move the court for orders of stay pending the appeal.

- 23.** Flowing from the foregoing, I hereby issue orders of stay of execution of the costs awarded to the respondent which shall remain in force for the period of leave granted to the applicant. For clarity, the orders of stay of execution shall remain in force for the next 14 days.

- 24.** Costs follow the event and are at the discretion of the court. To compensate the respondents for the inconvenience the instant application may have caused them and considering

the amount of costs involved in this matter, I award the respondents throw away costs in the sum of Kshs.15,000.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **MURANGA** this 17th day of December 2025.

HON. C. W. GITHUA

JUDGE

In the presence of;

The applicant

No appearance by the respondents

Ms. Susan Waiganjo, Court Assistant