

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL AND TAX DIVISION
HCCOMM MISC. APP. NO. E128 OF 2025

STEPHEN MUSYOKI MOGAKA T/A

MUSYOKI MOGAKA & CO. ADVOCATES.....APPELLANT/APPLICANT

-VERSUS-

KEPHA MORENO BOSIRE.....RESPONDENT

RULING

1. The appellant/applicant filed a Notice of Motion application dated 4th February 2024 under the provisions of Articles 50 & 159(2)(d) & (e) of the Constitution of Kenya, Sections 3, 3A & 3B of the Appellate Jurisdiction Act, Order 10 Rule 11, Order 22 Rule 22(1), Order 42 & Order 50 Rule 6 of the Civil Procedure Rules, 2010, and all other enabling provisions of the law. The applicant seeks orders for leave to file an appeal out of time against the decision in **Nairobi MCOMMSU NO. E070 of 2024 - Kepha Moreno v Stephen Musyoki**, from the Order dated 14th March 2024 together with the warrant of attachment and sale dated 14th January 2025. The applicant also seeks an order for stay of execution of the decree and Judgment. He also prays for the reviewing, setting aside, or vacating of the interlocutory Judgment and decree of 14th March 2024, with all consequential orders.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Stephen Musyoki Mogaka, the applicant herein. Mr. Mogaka averred that an *ex parte* Judgment and decree were entered against him on 14th March 2024, prompting him to file an application dated 9th May 2024 in the lower Court seeking stay of the

said Judgment and leave to file a defence and counterclaim. He stated that the Hon. Magistrate allowed the application on 21st August 2024, after which he filed his defence and counterclaim on 3rd September 2024. He contended that his counterclaim ought to have been considered as a set-off against the respondent's claim, but on 12th September 2024, the lower Court reinstated the *ex parte* Judgment.

3. Mr. Mogaka deposed that execution has since commenced, including proclamations and warrants dated 15th & 14th January 2025, respectively. He expressed dissatisfaction with the reinstated interlocutory Judgment and asserted that he intended to appeal against it. He explained that the delay in filing the appeal was occasioned by circumstances beyond his control, particularly, his reasonable belief that the Ruling of 21st August 2024 had conclusively resolved the issue. He maintained that he has always been keen to defend the suit, that the intended appeal raises substantial and arguable issues, and that failure to grant leave and stay of the *ex parte* Judgment would render the intended appeal nugatory and cause him irreparable harm.
4. In opposition to the application, the respondent filed a replying affidavit sworn on 19th February 2025 by Mr. Kepha Moreno Bosire, the respondent herein. Mr. Bosire deposed that the Trial Court had granted conditional orders in its Ruling of 21st August 2024, requiring the applicant to file a defence within 14 days and to pay throw-away costs of Kshs.50,000/= within the same period, failing which the Orders would stand vacated. He averred that the applicant failed to comply with the conditional order for payment of costs despite several reminders, and consequently, on 12th September 2024, the Trial Court reinstated the earlier Judgment due to non-compliance. He contended that the applicant has been aware of the reinstated Judgment since

September 2024 but failed to appeal timeously, making the instant application, which was filed five (5) months later, grossly delayed, unjustified, and intended to obstruct execution. He asserted that the applicant has provided no sufficient explanation for the delay, and that he is improperly attempting to set aside the Judgment for a second time without complying with the initial conditional orders.

5. The application herein was canvassed by way of written submissions. The applicant's submissions were filed on 17th March 2025 by the law firm of Omwoyo, Momanyi Gichuki & Company Advocates, while the respondent's submissions were filed by the law firm of Orange & Associates Advocates on 28th March 2025.
6. Mr. Nyaberi, learned Counsel for the applicant relied on the principles set out by the Court in the case of **Joseph Kakomo Mbenga v Maingi Charles & another** [2018] KEHC 5120 (KLR), and submitted that the applicant has satisfied the legal requirements for being granted leave to appeal out of time. He contended that the delay in filing the appeal was occasioned by circumstances beyond the applicant's control, asserting that the applicant reasonably believed that the Ruling delivered on 21st August 2024, which set aside the *ex parte* Judgment and granted leave to defend the suit in the Trial Court, had conclusively resolved the matter. He maintained that the reinstatement of the *ex parte* Judgment on 12th September 2024 took the applicant by surprise, and only came to his attention when execution commenced through proclamations and warrants dated 15th and 14th January 2025, respectively, prompting him to act without delay.
7. Counsel referred to the Court of Appeal case of **Nairobi Women's Hospital v Purity Kemunto** [2018] KECA 117 (KLR), and argued that the intended

appeal raises arguable and *bona fide* issues, including violation of the right to be heard, disregard of the applicant's duly filed defence and counterclaim, improper exercise of discretion, and infringement of constitutional rights to a fair hearing and access to justice. He submitted that these grounds merit full judicial consideration. Mr. Nyaberi asserted that the respondent will not suffer prejudice that cannot be compensated by costs in the event that the instant application is allowed. He maintained that refusal to grant leave and stay of execution will occasion substantial and irreparable prejudice to the applicant.

8. Mr. Orege, learned Counsel for the respondent cited the Court of Appeal case of **Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd** [2017] KECA 98 (KLR), and submitted that the applicant cannot benefit from the discretion to extend time under Order 50 Rule 6 of the Civil Procedure Rules, 2010, since he has failed to demonstrate good cause for the delay. He contended that the applicant deliberately failed to comply with the conditional Orders issued by the Trial Court on 21st August 2024, particularly, the requirement to pay Kshs.50,000/= in throwaway costs within 14 days. He stated that the said non-compliance, despite repeated reminders, resulted in the automatic lapse of the Order setting aside the *ex parte* Judgment, and the reinstatement of the *ex parte* Judgment by operation of the law, consistent with authorities such as **Shah v Mbogo** [1967] EA 116 and **R v. The Minister for Finance ex parte J. R.** [2003] 2 EA 173.
9. Counsel submitted that the applicant cannot rely on claims of surprise, having knowingly and selectively complied with only part of the conditional Order. He asserted that the applicant approached this Court with unclean hands, having concealed material facts and misled the Court regarding his non-compliance. Mr. Orege argued that it is an abuse of the Court process for the

applicant to seek both leave to appeal out of time, and simultaneously, apply for review and setting aside of the same Judgment, reliefs that are mutually exclusive. He stressed on the importance of finality of Court Orders and stated that granting leave to appeal out of time, in the face of deliberate disobedience of the Orders granted by the Trial Court, would undermine the authority of the Court. Counsel submitted that the intended appeal lacks merits and does not meet the threshold for an arguable appeal. Counsel noted that the applicant neither justified the delay nor complied with mandatory conditions, and submitted that he is undeserving of this Court's discretion.

ANALYSIS AND DETERMINATION.

10. Upon consideration of the application herein, the grounds on the face of it and the affidavit filed in support thereof, as well as the replying affidavit by the respondent and the written submissions by Counsel for the parties, the issues that arise for determination are -
 - i) **Whether leave to file an appeal out of time should be granted to the applicant; and**
 - ii) **Whether the impugned *ex parte* Judgment of 14th March 2024 should be reviewed, set aside and/or vacated.**

Whether leave to file an appeal out of time should be granted to the applicant.

11. This Court has the discretion to extend time within which a dissatisfied party can lodge an appeal against the decision of a Subordinate Court pursuant to the provisions of Section 79G of the Civil Procedure Act, which states 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 Supreme Court in the case of **Gitonga & 3 others v Independent Electoral & Boundaries Commission & 17 others** [2018] KESC 39 (KLR), set out the guiding principles when it comes to extension of time, conditions which were also expressed in the case of **Nicholas Kiptoo Arap Salat Korir v The Independent Boundaries Commission & others** - Supreme Court Application No. 16 of 2014, as follows-

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the underlying 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 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) where there is a reasonable cause 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.”***

13. The power of the Court in enlargement of time for the filing of an appeal is discretionary and it is exercised based on established principles, including the length of the delay, the reason for the delay, the arguability of the intended appeal, and the degree of prejudice to be suffered by the respondent if the orders sought are granted.
14. In the instant application, it is not in dispute that the Order reinstating the *ex parte* Judgment was issued on 12th September 2024. The applicant did not however file the instant application until February 2025, approximately five (5) months later. The applicant attributed the delay in filing the application herein to his belief that the Ruling of 21st August 2024, which set aside the *ex parte* Judgment and granted him leave to defend the suit, had resolved the matter conclusively. He further stated that he only became aware of the reinstatement of the *ex parte* Judgment when execution commenced in January 2025.
15. The respondent on the other hand refuted this explanation by submitting that the reinstatement of the *ex parte* Judgment was triggered by the applicant's own non-compliance with the conditional Order setting aside the *ex parte* Judgment and granting him leave to file a defence against the suit in the lower Court. The respondent asserted that the aforesaid Order required the applicant to pay him throwaway costs of Kshs.50,000/= within 14 days, failure to which

the aforesaid Orders would be deemed vacated. According to the respondent, the applicant was duly aware of the automatic consequence of his failure to comply with the Order requiring payment of throwaway costs and cannot claim surprise.

16. Upon perusal of the annexures attached to the applicant's supporting affidavit, it is evident that the Ruling of 21st August 2024 granted the applicant a conditional Order for setting aside the *ex parte* Judgment and for leave to defend the suit in the lower Court. It is not in contest that the applicant in compliance with the Orders issued in the Ruling of 21st August 2024, filed a defence and counterclaim to the respondent's suit in the lower Court within the prescribed timelines, but failed to comply with the Order requiring payment of throwaway costs as directed by the Trial Court. It is therefore manifest that the Order reinstating the *ex parte* Judgment of 12th September 2024 was a direct consequence of non-compliance with a conditional Order that was expressly within the knowledge of the applicant. On perusal of the Court record, there is no credible evidence that the applicant was unaware of the reinstatement of the said Order for nearly five (5) months. I find the applicant's delay in filing the instant application inordinate.
17. Nevertheless, even if this Court was to overlook the delay, an applicant seeking leave to file an appeal out of time must still demonstrate sufficient cause deserving of the Court's discretion. This was the Court of Appeal holding in the case of **Abdul Azizi Ngoma v Mungai Mathayo** [1976] KLR 61 at 62, where the Court stated that –

We would like to state once again that this court's discretion to extend time under rule 4 only comes into existence after 'sufficient reason' for extending time has been established and it is only then that other

considerations such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered. (Emphasis added).

18. The applicant's explanation is undermined by his admitted partial compliance demonstrated by his filing of a defence and counterclaim, while failing to pay the throwaway costs. The applicant's selective compliance with the Court Orders of 21st August 2024 suggests indolence rather than circumstances beyond his control.
19. As to whether the intended Appeal is arguable, this Court notes that while the applicant alleges violations of constitutional principles and procedural fairness, these concerns cannot overshadow the overriding failure to comply with lawful Court Orders. To this end, I am bound by the Court of Appeal's holding in the case of **Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd** (supra), that a party who approaches the Court without clean hands cannot benefit from discretionary remedies.
20. On the issue of whether the respondent stands to suffer any prejudice that cannot be remedied by an award of costs in the event that the orders being sought herein are granted, this Court notes that the respondent has already obtained Judgment and commenced execution. This Court finds that granting the applicant leave to file an appeal out of time in the absence of a satisfactory explanation for the delay in filing the appeal within the prescribed timelines in the first place, would further delay the conclusion of a matter that the applicant has contributed to, through non-compliance. Further, the applicant has already failed to comply with an Order requiring payment of costs to the respondent and has offered no explanation for the non-compliance. This Court

has no way of ascertaining whether or not the applicant will comply with an Order for payment of costs if issued by this Court.

21. Being bound by the Supreme Court holding in the case of **Gitonga & 3 others v Independent Electoral & Boundaries Commission & 17 others** (supra), where it was held that 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, I am not persuaded that the applicant has demonstrated good and sufficient cause to warrant extension of time. The prayer for leave to file an Appeal out of time therefore fails.

Whether the impugned *ex parte* Judgment of 14th March 2024 should be reviewed, set aside or vacated.

22. The respondent's case is that an order for review, setting aside or vacating of the *ex parte* Judgment cannot be granted since review and appeal are mutually exclusive remedies, thus the applicant's attempt to pursue both simultaneously constitutes an abuse of the Court process.
23. Order 45 of the Civil Procedure Rules, 2010, permits a Court to review its own decision on limited grounds, including discovery of new and important evidence, error apparent on the face of the record, or other sufficient cause. In this case, the applicant does not identify any new evidence or error on the face of the record. Instead, his grievance stems from the Order reinstating the *ex parte* Judgment following his non-compliance with the conditional Order. It is further worthy of note that the Trial Court's reinstatement of the *ex parte* Judgment was automatic, flowing from a self-executing conditional Order that required strict compliance within a defined period. The applicant's failure to pay the throwaway costs as ordered rendered the Court Order of 21st August

2024 inoperative by operation of the law. There is therefore no basis for disturbing a Judgment reinstated under clear and unambiguous conditions.

24. Additionally, this Court agrees with the respondent that the applicant's simultaneous pursuit of both review and appellate reliefs offends established principles of procedure. Order 45 Rule 1(a) of the Civil Procedure Rules, 2010, expressly states that –

Any person considering himself aggrieved -

a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b) by a decree or order from which no appeal is hereby allowed.

25. From the above provisions, the mutual exclusivity of review and appellate reliefs is evident. A party must elect the appropriate remedy he wishes to pursue. He cannot oscillate between them in the hope that if one remedy fails, the other one may succeed. Additionally, it is clear from the provisions of Order 45 Rule 1 of the Civil Procedure Rules, 2010, that an order for review is sought in the Court that issued the order which an applicant wishes to be have reviewed. The High Court cannot review a Subordinate Court's Judgment or Ruling.

26. Accordingly, this Court finds that an order for review, setting aside and/or vacating the impugned *ex parte* Judgment of 14th March 2024 cannot issue.

27. Having considered all the issues arising in the instant application, this Court finds that the applicant has failed to demonstrate sufficient cause to warrant the exercise of this Court's discretion in his favour. Consequently, both the prayers for leave to file an appeal out of time and for review, setting aside or

vacating the *ex parte* Judgment are declined. In light of the foregoing, the prayer for stay of execution of the said Judgment and decree is a non-issue.

28. The upshot is that the instant application is devoid of merits. It is hereby dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 23rd day of January, 2026. Ruling delivered through Microsoft Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Nyariki h/b for Mr. Nyaberi for the applicant

Mr. Maranga h/b for Mr. Orenge for the respondent

Ms B. Wokabi – Court Assistant.