



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Aeronautical Society of Kenya & another v Maina (Civil Application
E048 of 2021) [2023] KECA 238 (KLR) (3 March 2023) (Ruling)**

Neutral citation: [2023] KECA 238 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E048 OF 2021
HM OKWENGU, JA
MARCH 3, 2023**

BETWEEN

AERONAUTICAL SOCIETY OF KENYA 1ST APPLICANT

FAUSTIN ONDORE 2ND APPLICANT

AND

EDWARD IKINYA MAINA RESPONDENT

(Application for stay of the judgment and decree and leave to file the notice of appeal against the Judgment of the High Court of Kenya at Nairobi (Lucy Njuguna J.) delivered on 15th October 2020 in Milimani HCCC No. 413 of 2014)

RULING

1. The applicants have filed before this court, a notice of motion dated January 19, 2021 in which they seek two main orders as follows:
 - (i) Leave to file the notice of appeal out of time against the judgment delivered by the High Court (L Njuguna, J) in Milimani HCCC No 413 of 2014 on October 15, 2020.
 - (ii) Temporary stay of execution of judgment delivered by the Hon court in Milimani HCCC No 413 of 2014 on October 15, 2020 and all consequential orders arising therefrom pending the hearing and final determination of the applicants' intended appeal."
2. The application is supported by grounds stated on the motion and an affidavit sworn by the 2nd applicant. In brief, the applicants are aggrieved by the judgment of the High Court in which the court dismissed the applicants' defence in a defamation suit filed against them, and awarded the respondent a sum of Ksh 4,500,000/= together with costs. The 2nd applicant who is the former chairperson of the 1st applicant deposes that at the time of delivery of the judgment, he had travelled to London for personal business and only returned on October 25, 2020. That upon his return, despite having tested negative



for covid-19, he was feeling unwell and was advised to stay in isolation to minimize contacts with other people. He adds that due to the nature of the membership of the 1st applicant, they were not able to hold a substantive meeting within the 14 days period set for filing of an appeal.

3. The applicants maintain that they have an arguable appeal that might be rendered nugatory in the absence of an order for stay of execution. They have attached a draft memorandum of appeal, raising nine grounds. Among other complaints, the applicants contend that; the learned Judge erred in finding that the 1st applicant, being the umbrella body of all aeronautical and aviation practitioners in Kenya, lacked qualified privilege in challenging the respondent's qualifications in applying for the position of airworthiness manager at Kenya Civil Aviation Authority and finding that the applicants were actuated by malice in writing the letter, subject of the defamation case.
4. The applicants have filed written submissions supporting the motion mainly on the issue of grant of stay. They argue that they have met the conditions for grant of orders extending time for filing the notice of appeal.
5. The respondent, Dr Edward Ikinya Maina has opposed the application through written submissions. In regard to the prayer for leave to file the notice of appeal out of time, the respondent rightly points out that the application should be heard by a single judge. Secondly, the respondent states that the reasons advanced for the failure to file the notice of appeal within time are insufficient and unsupported by the course of events. He submits that judgment was delivered in the presence of the applicants' counsel and the chair of the 1st applicant; that the advocate indicated to the court that he had instructions from his client to appeal the whole of the judgment and requested for stay of execution to enable him do so; and on that basis he was granted a stay of execution for 30 days. The respondent maintains that the intended appeal is a nonstarter as it does not disclose any arguable appeal. He urges the court to dismiss the applicants' motion which is a waste of time, and allow him to reap the benefit of his judgment.
6. What is before me is an omnibus application seeking essentially two prayers that I have already set out above. While I do have jurisdiction under rule 4 as read with rule 55(1) of the *Court of Appeal Rules, 2022* (former rule 53 of the Court of Appeal Rules, 2010) to hear the applicants' motion as a single judge in regard to the prayer for extension of time to file a notice of appeal, under rule 55(2) (b), I do not have jurisdiction as a single judge to hear an application for stay of execution. On that basis, I will strike out that prayer and proceed to determine the application for extension of time.
7. In *Nicholas Kiptoo Arap Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, the Supreme Court stated that:

“Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of litigant against a court but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it.”
8. In the same decision, the Supreme Court having reviewed various decisions including this court's decision in *Paul Wanjobi Mathenge vs Duncan Gichane Mathenge* [2013] eKLR, identified the following principles that a court should consider in exercising its discretion to extend time.
 - i 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;
 - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;



- iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - vi. Whether the application has been brought without undue delay; and;
 - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
9. In this case, the judgment was delivered on October 15, 2020, and the applicants moved this court on January 19, 2021 seeking extension of time to file the notice of appeal. As the notice of appeal ought to have been filed within 14 days from the date of the decision, it should have been filed by October 29, 2020. This means that the applicants moved the court about 80 days after the time for filing the notice of appeal had lapsed.
10. The 2nd applicant has explained the delay as arising from his having been out of the country and also having to isolate on coming back. However, the respondent has countered, and this is supported by the record, that the applicants’ advocate was present in the court on the date of delivery of judgment, and did successfully apply for an order of stay of execution pending the filing of an appeal. The applicants cannot now turn round and claim that the advocate had no instructions to file the notice of appeal when he obtained an order of stay of execution pending the filing of an appeal on the same day of the judgment. Moreover, while the 2nd applicant may have been in isolation, he could easily have given instructions to his advocate either through the phone or through email.
11. I am not persuaded that the applicants had a good reason for not filing the notice of appeal within the required 14 days. They have not provided a plausible explanation for the delay, nor have they demonstrated any prejudice that they are likely to suffer. For these reasons, I am not persuaded that this is an appropriate case for me to exercise my discretion in the applicants’ favour. Accordingly, the prayer seeking extension of time to file notice of appeal is dismissed. I award costs of the application to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF MARCH, 2023.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

