



**Mary Help of the Sick Mission Hospital v Kamau; Karanja & another (Interested Parties)  
(Civil Application E260 of 2023) [2023] KECA 1291 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1291 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E260 OF 2023  
PM GACHOKA, JA  
OCTOBER 27, 2023**

**BETWEEN**

**MARY HELP OF THE SICK MISSION HOSPITAL ..... APPLICANT**

**AND**

**PETER THUKU KAMAU ..... RESPONDENT**

**AND**

**GEORGE K KARANJA ..... INTERESTED PARTY**

**KENYA MEDICAL PRACTITIONERS AND DENTISTS**

**COUNCIL ..... INTERESTED PARTY**

*(An application for leave to file and serve the Notice of Appeal and Record of Appeal out of time from the Ruling of the High Court of Kenya at Nairobi (Mulwa D.J.) delivered on 3rd May 2023 in PLC Case No. 29 of 2019)*

**RULING**

1. Before me is a Notice of Motion dated 12<sup>th</sup> June, 2023 seeking leave to file and serve the notice of appeal and the record of Appeal out of time against a portion of the ruling of the High Court of Kenya Civil Division, Nairobi Misc. Civil Application E403 OF 2022 (Honourable Lady Justice Mulwa J.) delivered on 3<sup>rd</sup> May 2023.
2. The application also seeks an order for stay of execution which should heard before a 3 Judge bench and therefore I will only deal with the prayer for extension of time. In any event, how can one apply for stay of execution and at the same time seek for extension of time? It is trite law that stay of execution can only be granted if there is a proper appeal before the Court.
3. To put the application in context, I shall summarize the grounds in support of the application. The applicant states: that the ruling was delivered online on 3<sup>rd</sup> May, 2023 but they had a problem with



internet connectivity at the time; that they requested for a copy of the ruling from the deputy registrar which they received on 18<sup>th</sup> May, 2023 via email; that their application had only been allowed partially, such that it only granted them leave to appeal against the ruling of the 2<sup>nd</sup> interested party, the Medical Practitioners and Dentists Council, delivered on 25<sup>th</sup> February, 2022 in PIC Case No.29 of 2019; that however, stay against the ruling was not granted; and that by the time the ruling was availed to them, the period for filing the notice of appeal, had already lapsed. For clarity, the ruling stated as follows:

- a. The applicant is granted leave to appeal out of time against the ruling of the KPMD Council dated 25<sup>th</sup> February 2022 in PIC Case No.29 of 2019;
- b. The 2<sup>nd</sup> interested party shall supply the Applicant with a certified copy of the proceedings and any recordings that led to the delivery of the ruling dated 25<sup>th</sup> February 2022 in PIC Case No. 29 of 2019 within 14 days from the date of that Ruling;
- c. The Applicant is directed to file the Memorandum of Appeal and serve within seven days of this ruling, upon order (b) above being complied with and the record of appeal within 45 days thereafter;
- d. There shall be no stay of execution of the Ruling dated 25<sup>th</sup> February 2022 in PIC Case No. 29 of 2019.”

4. Further grounds are that the 2<sup>nd</sup> interested party, the Medical Practitioners and Dentists Council in its’ ruling delivered on 25<sup>th</sup> February, 2022 in PIC Case No.29 of 2019 had accused the applicant/intended appellants of negligence and proceeded to issue amongst other orders: that a fine of Kshs.350,000/= be paid by the applicant and further orders that the applicant was to initiate mediation with the respondent with a view of compensating him and in the event of non-compliance with the said orders, the 2<sup>nd</sup> interested party would be at liberty to suspend, withdraw or cancel the operating license of the by the 2<sup>nd</sup> interested party would applicant; that the applicant having been granted leave to appeal against the ruling delivered on 25<sup>th</sup> February, 2022 in PIC Case No.29 of 2019 on condition that it was supplied with a certified copy of the proceedings that led to the delivery of the said ruling, meant that the substratum forming the basis of the orders issued be the subject matter on appeal; and that they have written two letters to the 2<sup>nd</sup> interested party, one on 22<sup>nd</sup> May, 2023 and a reminder on 30<sup>th</sup> May, 2023 requiring them to supply certified copy of the proceedings that led to the delivery of the ruling to enable them file the appeal, but they had not received a response.
5. The application is supported by the affidavit of Winnie Aguti, counsel for the applicant in which she reiterates the grounds on the face of the application.
6. The respondent has filed a replying affidavit and deposes that the applicant has not exhibited a notice of appeal even in draft form that can warrant an invitation to this Court to exercise its’ jurisdiction under rule 4 of the Court of Appeal Rules hence the application is fatally defective and ought to be dismissed; that despite the ruling being delivered on 3<sup>rd</sup> May, 2023 the applicant filed the instant application on 12<sup>th</sup> June, 2023, 39 days later and that, that inordinate delay has not been plausibly explained; that in the ruling of 3<sup>rd</sup> May, 2023 the applicant was directed to file a memorandum of appeal within 7 days of the ruling yet no plausible explanation has been given for the failure to do so. According to the respondent, the applicant cannot claim that the follow up of certified proceedings has fettered its’ ability to file a memorandum of appeal considering that the applicant has had custody of the ruling dated 25<sup>th</sup> February, 2022 prior to the



7. The applicant has filed submissions dated 27<sup>th</sup> June, 2023. It reiterates the contents of the grounds of the application and adds that the period taken by the applicant’s advocate to file the instant application cannot be one that would be referred to as “unduly” late and that their intended appeal has merit.
8. The respondent has filed submissions dated 22<sup>nd</sup> June, 2023. He submits that the application is unmerited; that the applicant’s counsel who was present in Court on 3<sup>rd</sup> May, 2023 inordinately filed the application 39 days late and the reason for the delay has not been explained; that the respondent is gravely prejudiced as since the delivery of the ruling on 25<sup>th</sup> February, 2023 the hospital is yet to initiate any attempt of compensation to the family since the 29<sup>th</sup> day of December, 2018 when the respondent’s wife passed on.
9. I have considered the application, the rival affidavits, and the written submissions. The question to be determined is whether the applicant has given reasons that deserve the exercise of discretion in its’ favor. It must always be remembered that the exercise of discretion is not an act of mercy as the sword of justice cuts both ways. A party who wins deserves the fruits of the judgment and equally a party who loses has a right of appeal. It is therefore incumbent upon a party who has lost and delayed in filing a notice of appeal or record of appeal to give a satisfactory explanation for the delay.
10. The discretion that I am called to exercise in the determination of this application is provided for under Rule 4 of the Court of Appeal Rules as follows:

“The court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

11. In *Leo Sila Mutiso vs. Hellen Wangari Mwangi* [1999] 2 EA 231 this Court set out the principles that guide this Court in such an application 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 in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”

12. In *Fakir Mohammed vs. Joseph Mugambi & 2 others* (2005)eKLR, this Court found that the factors that the Court can take into consideration are discretionary and non-exhaustive;

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possible) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors.”



13. I note that the applicant has given the following reasons: that the ruling was delivered online on 3<sup>rd</sup> May, 2023; that they had internet connectivity challenges and thus did not fully appreciate the ruling when it was delivered; that they wrote to the deputy registrar on 8<sup>th</sup> May, 2023 requesting for a copy of the ruling and only received it on 18<sup>th</sup> May, 2023; and that at that point, the period for filing the notice of appeal had lapsed.
14. I have considered the reasons given and I am satisfied that the applicant has given good reasons for the delay. It is not denied that the ruling was delivered online and failure of technology is expected at times. The applicant states that they were unable to log in and only got the ruling upon application to the Court. It is also not disputed that the applicant has requested proceedings to enable them to lodge an appeal. The respondent does not deny that the proceedings have not been supplied.
15. In view of the foregoing, I am satisfied that the delay of 39 days is not unreasonable in the circumstances. Accordingly, I allow the application, and the applicant is directed to file the notice of appeal within 7 days and to file the record of appeal 30 days after the filing of the notice of appeal. The application is dismissed with costs. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF OCTOBER, 2023.**

**M. GACHOKA CIArb, FCIArb**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*signed*

**DEPUTY REGISTRAR**

