



REPUBLIC OF KENYA



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**Mugo v Hornsby & 9 others (Civil Appeal (Application)
E099 of 2022) [2022] KECA 977 (KLR) (27 May 2022) (Ruling)**

Neutral citation: [2022] KECA 977 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E099 OF 2022**

W KARANJA, JA

MAY 27, 2022

BETWEEN

BETH WAMBUI MUGO APPELLANT

AND

CHARLES HORNSBY 1ST RESPONDENT

I.B. TAURIS & CO. LTD 2ND RESPONDENT

BETHWEL KIPLAGAT 3RD RESPONDENT

MARGARET SHAVA 4TH RESPONDENT

TECLA NAMACHANJA 5TH RESPONDENT

AHMED SHEIKH 6TH RESPONDENT

GETRUDE CHAWATAMA 7TH RESPONDENT

RONALD SLYE 8TH RESPONDENT

**TOM OJIENDA (ALL BEING SUED AS FORMER COMMISSIONERS
OF THE TRUTH JUSTICE & RECONCILIATION COMMISSION
(TJRC) 9TH RESPONDENT**

PRESTIGE BOOKSHOP LIMITED 10TH RESPONDENT

*(An application for extension of time to file and serve a Record and Memorandum of Appeal
out of time in an intended Appeal against the Judgment of the High Court at Nairobi
(L. Njuguna, J.) dated and delivered on 31st July, 2017 in Civil Suit No. 234 of 2014)*



RULING

1. Before me is motion on notice dated 5th March, 2022 brought under Article 48 and 159(2)(d) of *the Constitution* of Kenya, Section 3A and 3B of the *Appellate Jurisdiction Act*, Rule 4 and 5(2) of the Court of Appeal Rules seeking orders for an extension of time to file the record and memorandum of Appeal out of time against the entire judgment and decree of the High Court together with Orders of Stay of Execution of the said judgment. It is apposite to state from the onset that as a single Judge I am bereft of jurisdiction to entertain an application for stay of execution under Rule 5(2)b of the Court of Appeal Rules. This ruling is, therefore, only in respect of the application for extension of time under Rule 4 of the Court of Appeal Rules.
2. To place the matter in context; the applicant herein had sued the respondents for defamation. The respondents then filed 4 separate applications which resulted in the impugned ruling. The 3rd respondent had sought to have the suit struck out on grounds that the suit was statute barred; the suit was sub judice and that the respondents were improperly sued as they were acting in good faith. The 1st, 2nd and 4th respondents filed their application seeking to have the appellant's suit struck out with costs for failing to disclose any cause of action against them.
3. The 4th respondent filed another petition seeking to have the suit struck out for being filed out of time or in the alternative it be struck out for disclosing no reasonable cause of action. Lastly, the 2nd respondent filed an application seeking the same orders as the 4th respondent.
4. Having considered the applications, the Court held that the respondents were properly joined as defendants in the suit. The Court also found that it would be premature to strike out the suit as against them at that stage as disclosing no cause of action. However, the Court found that the suit was statute barred and that the matter was not sub judice as that was a defamation suit while the former was a Judicial Review Miscellaneous Application No. 284 of 2013 seeking prerogative rights which were different from the orders sought herein.
5. Aggrieved by the said orders, filed and served a notice of appeal dated 22nd May, 2018 to that effect. The applicant nonetheless failed to file and serve her record of appeal within the statutory stipulated time hence the instant application. The application is premised on grounds that the time to file the record and Memorandum of appeal has run out; that the delay in instituting the appeal is not inordinate; the intended appeal is arguable with good prospects of success; no prejudice shall be occasioned upon the respondent and that it is in the interest of justice for the Court to allow the application.
6. The application is supported by the affidavit of Jennifer Shamalla sworn on even date where it is averred that: the impugned decision was delivered on 31st July, 2017 and they filed a Notice of Appeal on 18th May, 2018; that the reason for the delay was that counsel for the applicant instructed an advocate who was holding brief on behalf of the applicant to file the record and memorandum of appeal, but who failed to do so and misled the deponent; that the applicant all along had every intention to appeal and had already prepared their record and memorandum of Appeal.
7. The applicant further deposes that it was not until 25th January, 2022 when the advocates for the 4th respondent served the applicant with a letter requesting for settlement of their costs that the deponent realised that a record and Memorandum of Appeal had not been filed as instructed; that they have since lodged a complaint with the Law Society of Kenya against the said advocate.



8. It is the applicant's position that another reason for delay is that the applicant was yet to receive a certificate of delay from the court to enable them file the record and memorandum of appeal.
9. She further deposes that on 17th February, 2022 auctioneers served them with a seven (7) day proclamation notice of movable property notice pursuant to warrants of attachment given on the 8th February for the sum of Kshs. 823,930 issued in Civil Suit No. 234 of 2014; that there was an imminent threat by the 4th respondent herein to execute pursuant to the certificate of costs issued by the court; that the default to timeously file the appeal lay with counsel's office which default should not be visited on their innocent client; that no prejudice will be suffered by the respondents if the orders sought are granted.
10. The 4th respondents filed a replying affidavit sworn on 15th March, 2022 by Aldrin Ojiambo. He depones that on 10th August, 2018 the applicant abandoned the appeal and decided to file an application seeking leave to commence fresh proceedings against the respondents out of time; that in the applicant's supporting affidavit sworn on 10th August, 2018 she indicated her firm decision to abandon the appeal and instead bring the application for leave to file the suit out of time; that the decision not to proceed with the appeal was deliberate and reached by the applicant after taking legal advice on the best way to proceed; that the reasons advanced are an afterthought and contradict the affidavits sworn earlier by the applicant.
11. The 4th respondent further deposes that inasmuch as the certified proceedings were available for collection upon payment on 16th May, 2019, the applicant did not file the record of appeal after receiving the proceedings and stated that her advocate instructed one, Brian Wanyonyi to prepare and lodge the appeal but he did not; that the said lawyer was appointed on 1st May, 2020 to 5th December, 2020 and there is no explanation why no action was taken from 16th May, 2019 when the proceedings were collected to 1st May, 2020 when the said lawyer was employed.
12. The applicant filed a supplementary affidavit dated 9th March, 2022 whose contents I have given due consideration.
13. The applicant has also filed submissions reiterating all the averments in the supporting affidavit and submits further, that the appeal is arguable and has chances of success and that no prejudice will be suffered by the respondents if the orders sought are allowed.
14. The 1st and 2nd respondents have filed their submissions and reiterate the contents of their replying affidavit. The 4th respondent has also filed submissions. I have considered the application, the rival affidavits and submissions filed by the parties along with the applicable law.
15. In exercising discretion under Rule 4, some of the considerations the Court has to bear in mind include the length of the delay; the reason for the delay; the degree of prejudice to the respondents if the application is granted, and, possibly, the chances of the success of the intended appeal should the application be granted. See *Fakir Mohammed vs. Joseph Mugambi & 2 Others* [2005] eKLR.
16. These guidelines were amplified by the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others*, [2014] eKLR where the Court stated that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; and that whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and public interest (if any).



17. It is not in dispute that the applicant's suit was struck out on 31st July, 2017 and the applicant obtained enlargement of time within which to file an appeal on 25th May, 2018. Thereafter, there seems to be no effort from the applicant in following up on the appeal. It was submitted that an advocate, Brian Wanyonyi, an employee at the firm of the Applicant's counsel was tasked with filing the appeal. Notably, the applicant's counsel does not give details of when and how they instructions were given.
18. It is also not in dispute that the proceedings were ready for collection on 16th May, 2019 and were collected on the same day. Yet again a reading of the record will reveal that the said advocate was hired on 1st May 2020 to 5th December, 2020 hence the question, what was the applicant and her counsel doing from 16th May, 2019 to 1st May, 2020. There was inaction for almost one year before the alleged instructions were given to Brian Wanyonyi.
19. A cursory reading of the record also shows that on 10th August, 2018 the applicant made a conscious decision to file an application seeking leave to commence fresh proceedings against the respondents out of time. Paragraph 21 states, "...that the best way to approach Court is to seek leave...to institute suit out of time and file a fresh plaint." If this is anything to go by, the applicant seems to have abandoned the intended appeal and this would explain the lack of drive in pursuing this appeal. That application was dismissed on 27th March, 2019. This application was filed almost one year later, evidently prompted by the threat of execution of the decree on costs by the respondents.
20. Regardless of the effort the applicant has made in filing a supplementary affidavit, seemingly in response to the replying affidavits filed by the respondents, she has not put forth a plausible explanation and/or response to the concerns raised in those affidavits. Instead, the applicant goes on and on about the difficulty they had in accessing the case details from their portal and only found out that the case was linked to the advocate, Brian Wanyonyi.
21. It is also noteworthy, that the judgment herein was delivered almost 4 years ago and the respondents have moved on, and reviving this old matter on some implausible grounds will be prejudicial to them. I also note that although the typed proceedings were collected from the court, no plausible explanation has been proffered as to why the proceedings were not accompanied by the certificate of delay, as is usually the case.
22. Inasmuch as the decision whether or not to grant leave to appeal is discretionary, and that discretion is unfettered, such discretion must be exercised judicially and not whimsically, and within the defined parameters set out earlier. The applicant has dismally failed to give a satisfactory explanation for the inordinate delay. I am not persuaded that this application meets the threshold required for the Court to extend time. Accordingly, this application is hereby dismissed with costs to the respondents.

DELIVERED AND DATED AT NAIROBI THIS 27TH DAY OF MAY, 2022.

W. KARANJA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

