Mbevi & another v Kenga (Sued as Guardian Ad Litem of David Maitha Kazungu) & another (Miscellaneous Application E035 of 2024) [2024] KEELC 13721 (KLR) (10 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13721 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

MISCELLANEOUS APPLICATION E035 OF 2024

EK MAKORI, J

DECEMBER 10, 2024

BETWEEN

MICAH VINCENT MBEVI ..... 1ST APPLICANT

EDWARD SIMBA THOYA ..... 2ND APPLICANT

AND

FRANCIS THOYA KENGA (SUED AS GUARDIAN AD LITEM OF DAVID MAITHA KAZUNGU) ..... 1ST RESPONDENT

CHRISTINE DAMA MAITHA ..... 2ND RESPONDENT

RULING

1. Notice of Motion Application dated 29th August 2024 seeks

   a. Spent.

   b. That the Honourable Court be pleased to order a stay of court proceedings resulting from the ruling and order made on 19th December 2023 in Malindi MCELC No. E031 of 2020 and all other consequential and subsequent orders, pending the hearing and determination of this Application and the intended Appeal.

   c. That the court be pleased to grant leave to the Appellant/Applicants to appeal out of time against the whole ruling made by Hon. James N. Mwaniki (CM) in Malindi MCELC No. E031 of 2020 on 19th December 2023.

   d. The Memorandum of Appeal attached herein shall be deemed duly filed upon payment of requisite fees.

   e. The costs of this application will be provided.

2. The application was canvassed by way of written submissions.

3. The issues that I frame for the decision of this Court are whether the Court should enlarge the time within which to appeal – out of time, whether to deem the filed Memorandum of Appeal as duly and properly filed, whether to stay proceedings in MCELC No. E031 of 2020 and who should bear the costs of this motion.

4. The reasons for the delay in filing the appeal have been stated that any delays whatsoever were occasioned by the time taken to get a certified copy of the ruling delivered on 19th December 2023.

5. According to the Applicant, the intended appeal is meritorious because the 1st Defendant filed a Notice of Motion Application dated 28th August 2023 under Order 32 Rule 3(1), (2), (3), and Rule 15 of the Civil Procedure Rules 2010. Through the Application, the Applicant sought to be appointed guardian ad litem for the 1st Defendant, whom he alleged to be of unsound mind.

6. The court allowed the said application and, through its ruling delivered on 19th December 2023, appointed the Applicant therein as a guardian ad litem for the 1st Defendant, ordered the suit to start de novo, and further granted the said appointed guardian ad litem leave to file a statement of defense for the 1st Defendant.

7. According to the Appellant Order 32 Rule 15 of the Civil Procedure Rules, 2010 provides that:

> " 15. Application of rules to persons of unsound mind
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> The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind, and to persons who though not so adjudged are found by the court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued."

8. According to the Appellant, Order 32 Rule 15 provides that for persons who have not been previously adjudged to be of unsound mind, the court, on application, has to conduct an inquiry to satisfy itself as to the unsoundness of mind or mental infirmity before appointing a guardian ad litem.

9. In the case of Balakrishnan v Balachandran (1956)1 mad lj 459, as was quoted by the court in MMK v AMK, Miscellaneous Civil Application No. 51 of 2015 [2016] KLR, the Indian court in interpreting a similar provision under the Indian Civil Procedure Rules, Order XXXII Rule 15 of the Indian Civil Procedure Code, held that;

> " ... the said rule is intended to ensure that no man is adjudged a lunatic without proper enquiry, and that the court should hold a judicial inquiry and may seek the assistance of medical experts."

10. The Indian court went further to state:

> " That the procedure involves a judicial inquiry which consists normally of two parts:
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> (1) Questioning the lunatic (or person in question) by the judge himself in open court, or in chambers, in order to see whether he is really a lunatic and of unsound mind (or unfit to protect his interests), and
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> (2) as the court is generally presided over only by a layman, to send the alleged lunatic to a doctor for report about his mental condition after keeping him

> under observation for some days.... When this elementary precaution of judicial inquiry prescribed by law is not observed, I am afraid that the laws of this country will not allow a man to be declared a lunatic and a guardian appointed for him, on such basis."

11. According to the Appellant, in its ruling delivered on 19th December 2023, the court did not indicate any recorded questions by the court and answers by the alleged lunatic in compliance with the legal requirement under Order 32 rule 15 of the Civil Procedure Rules, 2010. As noted in the ruling, the court only considered the statement of defense by the 1st defendant dated 22nd June 2020 and the medical documents annexed to support the application dated 28th August 2023 to conclude that the 1st Defendant is of unsound mind.

12. The Appellant avers that, as evident, the court did not comply with the proper procedure for declaring a person unfit to protect his interest under Order 32, rule 15 of the Civil Procedure Rules, 2010, in the appointment of Francis Thoya Kenga as the guardian ad litem for the 1st Defendant.

13. The Appellant submits that the court should find that in the absence of a previous court judgment declaring the 1st Defendant to be of unsound mind, a record of the inquiry conducted by the court to establish itself as to the unsoundness of mind of the 1st Defendant and an order directing the 1st Defendant to an independent medical expert for examination and medical opinion and report, the court did not in appointing Francis Thoya Kenga as a guardian ad litem, adhere to the statutory procedure under Order 32 Rule 1 of the Civil Procedure Rules and therefore the said appointment is null and void.

14. The Respondents submit that the applicants have not met the conditions for a grant of stay of proceedings pending an appeal or a leave grant to file an appeal out of come for the following reasons.

15. Regarding the prayer for a stay of proceedings pending an appeal, the Respondents submit that the applicants have not demonstrated that they have complied with the procedure for instituting an appeal from the trial Court to this Court within a reasonable time. At the moment, no appeal is pending before this Court. The Memorandum of Appeal was not filed. As such, as the matter stands, there is no appeal pending in any Court. The intended appeal is from a ruling delivered pursuant to an application made under Order 32 Rule 15 of the Civil Procedure Rules. That being the case, the Appellant does not have an automatic right of appeal against the said ruling given the fact that the order made by the trial Court is not amongst the Orders that are appealable as of right as prescribed in Order 43 Rule 1(1) of the Civil Procedure Rules.

16. Section 75(1) of the *Civil Procedure Act* provides for the orders against which an appeal would lie as of right or with the Court's leave.

17. Order 43 Rule 1 of the Civil Procedure Rules sets out the orders and Rules for which appeals would lie as of right. Order 43(2) of the Civil Procedure Rules provides that an appeal shall lie with leave of the Court from any other order made under the Rules. This means that unless the order sought to be appealed against falls under the orders appealable as of right, leave must first be obtained before such an appeal can be lodged. The leave to appeal should first have been sought from the trial Court as provided in Order 43 Rule 1(3) of the Civil Procedure Rules. Order 43 Rule 1(3) of the Civil Procedure Rules provides as follows:

> " An application for leave to appeal under Section 75 of the Act shall in the first instance be made to the Court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order."

18. I agree with the Respondent that no leave to appeal against the ruling was sought from the trial Court at the time of delivery of the ruling or within 14 days of the date of delivery of the ruling. No explanation has been given as to why the leave was not sought from the trial Court, and no reasons have been given for the delay in seeking the said leave. In the absence of an explanation, the applicants do not deserve the discretion of the Court.

19. Further to the foregoing, I agree with the Respondents that the application for a stay of proceedings has not been made within a reasonable time. The ruling was delivered on 19th December 2023. The present application was filed in this Court on 29th August 2024, after a period of 9 months. The applicants had participated at length in the application that gave rise to the said ruling. As shown in the applicant's replying affidavit to the said application, attached to the Respondent's replying affidavit, the applicants were always represented by an Advocate who had instructions to do so. They were not denied an opportunity to be heard in the application. When the ruling was delivered, the applicants did not indicate to the trial court that the ruling had aggrieved them and that they intended to appeal to this court. Instead, the applicants participated in further proceedings in the suit before the trial Court. They filed a reply to the respondent's statement of defense and defense to counterclaim dated 21st May 2024, as well as a new list of documents and witness statements in readiness for the hearing of the suit de novo. A copy of the applicant's reply to the defense and the defense to counterclaim, as well as the new list of documents and witness statements, are attached to the Respondents' replying affidavit. The primary suit has already been set down for hearing on 26th November 2024.

20. No explanation has been given for the nine-month delay. The Respondents submit that for a party intending to appeal and seeking orders for a stay of proceedings pending an appeal, a delay of nine months is inordinate.

21. Apart from the foregoing, there is no evidence that the applicants ever applied for certified copies of the proceedings and ruling to prepare a record of appeal. The letter requesting the copies of proceedings and ruling has not been attached to the supporting affidavit. It is not known whether they applied for copies of proceedings and ruling and when the application was made, if at all.

22. It is trite that a decision on whether or not to grant a stay of proceedings pending appeal is discretionary. The applicant must show that he is deserving of the Court's discretion.

23. I further agree with the Respondent that as enunciated in the decision in Re Global Tours & Travel Ltd, High Court Winding up Cause No.43 of 2000, Ringera J. enumerated the factors to be considered whether to grant a stay of proceedings or not follows:

> " As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice...the sole question is whether it is in the interest of justice to order for stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And, in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously."

24. Further, In the case of Kenya Wildlife Services v James Mutembei [2019] eKLR, the Court held that:

> " Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation.it impinges on right of access to justice, right to be heard without delay and overall right to fair trial. Therefore the test for stay of proceedings is high and stringent."

25. Similarly, in Halsbury's Law of England 4th edition Volume 37, pages 330 to 332, it is states as follows:

> " The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the courts general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue."

26. It has been emphasized that this power ought to be exercised sparingly and only in exceptional cases. It will be exercised where the proceedings are shown to be frivolous, vexatious, harassing, manifestly groundless, or there is no cause of action in law or equity. The applicant for a stay on this ground must show not merely that the Plaintiff might not or probably would not succeed but that he could not possibly succeed based on the pleadings and the facts of the case.

27. A reading of the impugned ruling shows that it was not final on the issue of the mental state of the subject. The penultimate paragraph on the last page of the ruling states as follows:

> " Whereas these are issues that may not be determined at an interlocutory application and require canvasing on merits and during trial, the same cannot be wished away."

28. The issue of the subject's mental state was, therefore, not determined with finality. This gives the applicants the opportunity to challenge this issue at the hearing of the main suit and determine the matter with finality on merits. The suit should, therefore, be allowed to continue without interruption until the dispute is determined on merits.

29. Proceeding with the suit will allow the parties to ventilate all issues involved in the dispute without undue regard to technicalities of procedure and undue delay. This will facilitate the timely disposal of the dispute. If allowed, this instant application will delay the dispute's conclusion before the trial Court.

30. Concerning the prayer for leave to appeal out of time, the respondents submit that Section 79G of the *Civil Procedure Act* provides that every appeal from a subordinate Court to this Court shall be filed within 30 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 necessary for preparation and delivery to the appellant of a copy of the decree or order.

31. It is trite law that for an appeal to be admitted out of time, the appellant must satisfy the Court that he had good and sufficient cause for not filing the appeal in time. Given that the 30-day period lapsed long ago, the burden is upon the applicants to show sufficient cause for not filing the intended appeal in time. The applicants are required by the proviso to Section 79G to demonstrate sufficient cause for which they are not to blame to account for the delay.

32. Given the foregoing, the extension of time sought in the application is not an automatic right of the applicants. It is an equitable remedy subject to the discretion of the Court.

33. In the case of Omar Shurie v Marian Rashe Yafar [2020] eKLR, the Makhandia JA set out the factors for consideration in such an application as follows:

> " The case of Leo Sila Mutiso v Hellen Wangari Mwangi [1999] 2 EA 231 is the locus classicus which laid down the parameters as follows:
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> > " 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."
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> Be that as it may, the issues to consider as a single Judge are both discretionary and non-exhaustive as was explained in the case of Fakir Mohammed v Joseph Mugambi & 2 Others [2005] eKLR where it was held that:
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> > " The exercise of this Court's discretion under Rule 4 has followed a well-beaten path..... 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 factor."
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> This was reiterated further in the case of *Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees, Civil Application No. 190 of 2019* in which it was stated that:
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> > " Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity."
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> There is no maximum or minimum period of delay set out under the law. However, a prolonged and inordinate delay is more likely than not to disentitle the applicant leave. Likewise, the reason or reasons for the delay must be plausible. In Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR this Court stated:
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> > " The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary

favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable."

34. In the present application, the Applicants have not explained the 9-month delay, and no attempt has been made in the supporting affidavit to explain the delay. The delay is inordinate, has not been explained, and is not excusable, and the prayer for leave to appeal out of time should not be granted.

35. For the reasons aforesaid, the current application lacks merit and is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 10TH DAY OF DECEMBER 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Kinaro, for the Applicant

Mr. Shujaa, for the Respondent

Court Assistant: Abdirashid