



**Gicharu v Gachui (Miscellaneous Application E016 of 2022)
[2023] KEELC 258 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 258 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
MISCELLANEOUS APPLICATION E016 OF 2022
LN GACHERU, J
JANUARY 26, 2023**

BETWEEN

NELSON NJOROGE GICHARU APPLICANT

AND

JOHN IRUNGU NDUNGU GACHUI RESPONDENT

RULING

1. By a notice of motion application dated July 18, 2023, the applicant herein Nelson Njoroge Gicharu sought for the following orders;
 1. That this honourable court be pleased to grant the applicant leave to file an appeal out of time.
 2. That this honourable be pleased to order a stay of execution of the Judgement and/or decree issued by the Magistrate’s Court in Kigumo CMCC No 121 of 2021 on September 16, 2021 pending hearing and determination of the intended appeal.
 3. That the costs of this Application abide the outcome of the Appeal.
2. The Application is supported by the following grounds; -
 - a. Kigumo CMCC No 121 of 2021 proceeded for hearing exparte and judgment was entered for the Plaintiff/Respondent against the Defendant/Applicant on the same date.
 - b. The Defendant filed an Application dated September 20, 2021, seeking to set aside the proceedings of September 16, 2021, and the judgment entered.
 - c. Upon hearing of the said application ruling was scheduled for March 17, 2022.
 - d. On March 17, 2022, the Court was not sitting as the duty magistrate was attending to matters at Nkubu Law Courts, parties were instructed to take new dates at the registry.



- e. On March 24, 2022, the ruling was delivered in open court in the absence of both parties and there was no notice that the ruling would be delivered on that date.
 - f. The defendant/applicant only found out that the ruling had been delivered when the plaintiff/respondent served a letter demanding the decretal sum and a decree on the June 10, 2022.
 - g. The applicant being dissatisfied with the said ruling intends to file an appeal to challenge the same.
 - h. That the time within which the Ruling dated March 24, 2022 can be appealed according to the statute has since lapsed.
 - i. That the stay of execution was not granted in this matter and the Applicant is apprehensive that if the Application to Appeal out of time is not allowed the consequent Appeal will be rendered nugatory and the Applicant will suffer irreparable loss and damage.
 - j. That the delay in lodging the appeal and the Application to appeal out to time has been brought without unreasonable delay and the said delay was not intentional on the Applicant's part.
 - k. This Application will not occasion any prejudice to the Respondent.
 - l. This Application has been done without any unreasonable delay.
3. The Application is further supported by the Affidavit of Nelson Njoroge Gicharu, the Applicant herein who reiterated the averments made on the grounds in support of the affidavit. He further averred that he had instructed his Advocate to enter appearance and file an application to set aside a Judgement entered against him in Kigumo CMCC No 121 of 2021. That the said Application was filed and is dated September 20, 2021. Further that the said Application was opposed by the Plaintiff/Respondent and the same was set for Ruling on March 17, 2022.
 4. However, on March 17, 2022, the Court was not sitting and the said Ruling was later delivered on March 24, 2022, in the absence of both parties. That he was later informed by his Advocate that a letter and Decree was received from the Law Firm of Muturi Njoroge Advocates demanding Settlement of the Decretal sum arising from the Judgement in Kigumo CMCC No 121 of 2021, which Judgement was issued exparte.
 5. That he was further informed by his Advocate that upon receipt of the above stated letter, he perused the court file in Kigumo CMCC No 121 of 2021, and that is when he obtained a copy of the ruling that was delivered on March 24, 2022, in the absence of the parties. That the said ruling had dismissed his application that had sought to set aside the judgment.
 6. It was his further averments that he has now instructed his Advocate to file an Appeal against the said Ruling, but he has been informed that the time within which to file an Appeal has lapsed. He contended that he was apprehensive that the plaintiff/respondent may proceed to enforce the Judgement in Kigumo CMCC No 121 of 2021, and attach his property as there is no stay of execution. Further that the Application is brought promptly and without unreasonably delay. That unless the leave to file his Appeal out of time is granted, he stands to suffer irreparable loss and damage. He also contended that it is his believe that his Appeal against the impugned ruling is merited and has overwhelming chances of success. Further, he deponed that Kangethe Enterprises Auctioneers have already proclaimed his property on instructions of the Plaintiff/Respondent herein and unless the Interim Orders for stay of execution are granted immediately, his property shall be attached and



his Appeal shall be rendered nugatory. Further, that he was amenable to furnishing such reasonable security as the Court may direct.

7. The Application is opposed via the Replying Affidavit sworn by John Irungu Ndungu Gachui, the Respondent herein who averred that the suit subject of this Application being Kigumo CMCC No 121 of 2021, was concluded and a Judgement was rendered on September 16, 2021.
8. That the Applicant thereafter filed an Application for stay of the Judgement and Ruling was set for March 17, 2022, but was delivered on March 24, 2022. It was his contention that the application for stay of execution was dismissed with costs and the Applicant herein did not take any action to stay and/or set aside the orders of the said Court. Consequently, a Decree was issued on June 6, 2022, and the same was captured in the Ruling of the Court dated March 24, 2022. He contended that litigation must come to an end as was noted by the trial Court in its ruling. The Respondent admitted that the Ruling was initially to be delivered on March 17, 2022, but was deferred to March 24, 2022, which was a week after and it was not sufficient for the Applicant to aver that he was not aware of the said Ruling.
9. He also contended that the Applicant was very indolent for his failure to follow up with the Court Registry over the outcome of his Application for stay. Further that since the Applicant has been indolent, he should not waste the Court's valuable time and resources as the matter was determined in 2021. It was his further contention that the Applicant has not met the four tests for a successful grant of an Application for orders of stay of the decree that was issued by the trial Court.
10. That through this Application, the Applicant is trying to evade justice and he thus opposed the Applicant's instant application dated July 18, 2022. He urged the Court to dismiss the said Application.
11. The Application was canvassed by way of written submissions. The Applicant filed his written submissions on October 28, 2022, through the Law Firm of Githinji Mwangi & Associates Advocates. The Respondent on his part filed his written submissions on October 31, 2022, through Muturi Njoroge & Co Advocates.
12. The Applicant submitted that he was aggrieved by the Ruling of the Court which was delivered on March 24, 2022, in his absence and he intends to appeal against the said Ruling. However, the requisite period for lodging the appeal has lapsed. He submitted that he has an arguable appeal as he was denied the right to be heard. He relied on the cases of *Kenya Power & Lighting Co Ltd v Rose Anyango & Anr* [2020] eKLR, where the Applicants were granted leave to file Appeal out of time and were also granted stay of execution pending Appeal. That the delay in filing the appeal has been explained.
13. On his part, the Respondent submitted that extension of time to file appeal out of time is an equitable remedy reserved for a deserving Applicant, but the Applicant herein failed to demonstrate a good and sufficient cause for not filing the Appeal in time and should not be granted the said equitable remedy. The Respondent relied on the case of *Mombasa County Government v Kenya Ferry Services & another* (2019) eKLR, where the Supreme Court held as follows;

Concerning extension of time, this court has already set the guiding principles in the *Nick Salat* case as follows:

... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for



extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising 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 same should be expressed] to the satisfaction of the Court;
5. whether there will be any prejudice suffered by the respondents, if 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”

14. He also relied on the case of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR, where the Court of Appeal set out the factors to aid the Courts exercising the discretion whether to extend time to file an Appeal out of time. These factors are;

- i. The period of delay;
- ii. The reason for the delay;
- iii. The arguability of the appeal;
- iv. The degree of prejudice which could be suffered by the Respondent the if the extension is granted;
- v. The importance of compliance with time limits to the particular litigation or issue; and
- vi. The effect if any on the administration of justice or public interest if any is involved.

15. The respondent also submitted that the applicant has not met the conditions for grant of stay of execution as provided by order 42 rule 6(2) of the *Civil Procedure Rules*; These conditions are;

- (2) No order for stay of execution shall be made under subrule (1) unless—
 - (a) the Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.



16. It was his submissions that the applicant rushed the court when he was served with a notice of judgement on June 8, 2022, and that was three months after Judgement had been entered and that was an Inordinate delay. Further, that the applicant failed to demonstrate good and sufficient cause for not filing the Appeal on time and thus this application should be dismissed as litigation must come to an end.
17. The court has carefully read and considered the instant application, the grounds for and against the same, the rival written submissions and the relevant provisions of law and renders itself as follows; -
18. There is no doubts that the Respondent herein John Irungu Gachui, had filed a matter at Kigumo Principal Magistrate's Court being MECL No 121 of 2021. The Plaintiff was not attached to the proceedings herein. From the Ruling delivered by the Court on March 24, 2022, it is evident that the said matter proceeded exparte. As alluded on Page 3 of the said Ruling that the Defendant therein who is the Applicant in this matter was duly served with the summons to enter appearance on May 19, 2021, but failed to enter appearance within the stipulated time, despite receiving summons. It is also evident that the said matter proceeded for hearing exparte before the Magistrates Court on September 16, 2021, in the absence of the Defendant (Applicant herein). Thereafter an exparte Judgement was entered against the said Defendant(Applicant) herein on September 16, 2021.
19. It is also not in doubt that on September 20, 2021, the Applicant herein who was the Defendant at Kigumo PMELC No 121 of 2021, filed an Application before the said Court seeking for review, setting aside and/or varying of the proceedings of September 16, 2021, and the Judgement thereof and that the matter be re-opened for interparties hearing. He also sought for leave to defend the said suit by being allowed to file a Defence.
20. It was his allegations that he had never been served with summons to enter appearance and that he was not aware of the said hearing date. He also averred that he had a meritorious defence against the Plaintiff's claim and he urged the trial Court to allow him file his Defence as annexed to his Replying Affidavit.
21. The said Application was opposed by the Plaintiff thereon who is the Respondent herein vide his Replying Affidavit dated October 6, 2021. He had averred that the Defendant had been duly served, but ignored and/or failed to file his Defence. He also denied that the Defendant's said Defence was meritorious and that it did not raise any triable issues.
22. After interparties hearing of the Notice of Motion Application dated September 20, 2021, the trial Court set the Ruling date of March 17, 2022. However, as per the Notice issued by Kigumo Principal Magistrate's Court on March 8, 2022, the trial Magistrate Hon J Irura (PM) was not sitting from March 14, 2022, to March 18, 2022, as she was away at Nkubu Law Court, her previous Court Station to finalize the matters that she had extensively handled before her transfer to Kigumo Law Courts. It was further stated in the said Notice that parties in Civil Matters coming up on the stated dates were requested to take fresh dates in the Registry.
23. Indeed, the cause list of March 17, 2022, for Hon J Irura (PM) showed the Ruling in MCCC/21/2021;- John Irungu Ndungu Gachiu v Nelson Njoroge Gicharu was supposed to be delivered then. However, there was a note "Court Not Sitting: To Take Fresh Dates At The Registry".
24. There is no doubt that though the said Ruling was not delivered on March 17, 2022, it was later delivered on 2March 4, 2022, in the absence of the parties. It was not clear whether the date of March 24, 2022, was taken by the parties or whether the parties were notified of the new date for Ruling. However, it is evident that vide this Ruling of March 24, 2022, the Defendant (Applicant's herein)



Application of September 20, 2021, was dismissed for lack of merit. That meant that he could not file his Defence and the ex parte Judgement of September 16, 2021 remained in force.

25. It is also evident that a Decree emanating from the Judgement of September 16, 2021, was issued on June 6, 2022, which is marked as JG 2.
26. This Decree was forwarded to Nelson Njoroge Gicharu, vide a letter dated June 8, 2022, drawn by Muturi Njoroge Advocate. Nelson Njoroge Gicharu is the Applicant herein. The said letter requested the recipient, Nelson Njoroge Gicharu to pay the Decretal Sum as per the attached Decree emanating from the Judgement of September 16, 2021, within 7 days from the date hereof and failure to do so, execution was to issue.
27. The applicant thereafter filed this Misc Application dated July 18, 2022, and sought for stay of execution and leave to file an appeal out of time.
28. The Applicant averred that he was not aware of the delivery of the said Ruling until when he was served with the letter of June 8, 2022. That upon perusal of the Court file, he noted that his application of September 20, 2021, had been dismissed. Though aggrieved by the said ruling, the stipulated time to lodge an appeal had lapsed and thus this application.
29. The issue now for determination is whether the Applicant is deserving of the orders sought.
30. It is evident that the Ruling sought to be appealed against was delivered on March 24, 2022. Section 79G of the *Civil Procedure Act* is very clear on the time within which an Appeal from the Subordinate Court should be filed. It states as follows;

“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.”
31. However, the proviso to that Section provides that time can be extended, so long as the Appellant is in a position to give good and sufficient cause or reasons for the delay.
32. The impugned Ruling having been delivered on March 24, 2022, the time within which the Appeal was to be filed lapsed on April 24, 2022.
33. The Applicant has averred that he was not aware that the Ruling was delivered on March 24, 2022, until when he received a letter and a Decree on June 8, 2022, and that is when it came to his realization that his Application had been dismissed. This Application was filed about 3 ½ Months after the delivery of the Ruling.
34. The proviso to Section 79G of the *Civil Procedure Act*, is clear that time to file Appeal may be extended when good and sufficient cause has been shown. The Applicant needed to satisfy this Court that he had a good and sufficient cause for not filing the Appeal on time.
35. The Supreme Court of Kenya stated the factors to be considered in an Application for extension of time in the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others* Application No 16 of 2021 [2014] eKLR, as follows; -
 - a. 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;



- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 - e. Whether there will be any prejudice suffered by the Respondents if the extension is granted;
 - f. Whether the application has been brought without undue delay; and
 - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
36. As the court had earlier given chronology of events, it is clear that the impugned ruling was supposed to be delivered on March 17, 2022, but was later delivered on March 24, 2022, in the absence of the parties. There is no evidence that the applicant was notified of the new date or was notified that the Ruling had been delivered in his absence.
37. Though there was a delay of 3½ months, the court finds that the Applicant has explained to the satisfaction of this court why he did not file the Appeal on time. The explanation as given is satisfactory and this court has no reasons to doubt it.
38. The court has also seen the draft memo of appeal and the court finds it arguable.
39. On the issue of stay of execution, the same is governed by order 42 rule 6 (2) of the [Civil Procedure Rules](#) which provides;
- (2) No order for stay of execution shall be made under subrule (1) unless—
 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
40. The Court of Appeal in the case of [Butt v Rent Restriction Tribunal](#) [1982] KLR 417, gave guidance on the factors that should guide the court in exercising its discretion on an application for stay of execution. These factors are;
- 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 - 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
 - 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 - 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.



5. The court in exercising its powers under Order XLI rule 4(2)(b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
41. The decree that was issued herein is a monetary decree. Vide a letter dated June 8, 2022, the Plaintiff’s Advocates had threatened to execute against the defendant or applicant herein for failure to settle the said decree. There is therefore the danger of execution and the Applicant who alleges that he was not served with the summons to enter appearance may suffer substantial loss.
42. Further the Court finds that the Applicant allegedly got to learn about the Decree on June 8, 2022, and filed the instant Application on July 18, 2022. He explained that he had first to instruct his Advocate, who then perused the court file and learnt that the earlier application for review and setting aside had been dismissed. Therefore, this court finds that there was no unreasonable delay in filing this application. This court will also be persuaded by the findings in the case of *JMM v PM* [2018] eKLR, where the court held;
- As I said, I accept the proposition that if it is shown that execution of enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is equally important proposition that a litigant if successful, should not be deprived of the fruits of a Judgement in his favour without just cause”
43. Taking into account all considerations, the court finds the applicant’s notice of motion application dated July 18, 2022, is merited and it exercises its discretion and grants stay of execution and leave to file appeal out of time. Consequently, the Notice of motion application dated July 18, 2022, is allowed in terms of prayers No 2 & 5, with costs to the applicant herein.
44. The applicant to file the intended appeal within 14 days from the date hereof. failure to comply, the orders issued will lapse automatically.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG’A THIS 26TH DAY OF JANUARY, 2023.

L GACHERU

JUDGE

Delivered virtually in the presence of;

Mr Githinji for the applicant.

Mr Gitari for the respondent.

Court Assistant – Joel Njonjo.

L GACHERU

JUDGE

26/01/2023

