



**Oyatsi v Nzoia Sugar Company Limited (Civil Application E032 of 2023) [2023] KESC 103 (KLR) (8 December 2023) (Ruling)**

Neutral citation: [2023] KESC 103 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA  
CIVIL APPLICATION E032 OF 2023  
PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ  
DECEMBER 8, 2023**

**BETWEEN**

**FRANCIS OYATSI ..... APPLICANT**

**AND**

**NZOIA SUGAR COMPANY LIMITED ..... RESPONDENT**

*(Being an application for enlargement of time to file and serve a notice of appeal and/or appeal and stay of execution of the order in Civil Appeal No 47 of 2012 at Nairobi dated 22nd day of April 2023 and an application seeking amendment leave to amend notice of motion))*

**The underlying principles to consider in the extension of time to lodge an appeal**

*The instant applications sought; the enlargement of time to file an appeal and stay of execution of the Court of Appeal judgment; and leave to amend a notice of motion application. The court held that an applicant had to show that the additional, new and fresh evidence could not have been obtained with reasonable diligence for use at the trial, was not within his knowledge, or could not have been produced at the time of the suit or petition due to the circumstances beyond him. The court further highlighted the underlying principles to consider in the extension of time to lodge an appeal.*

Reported by Kakai Toili

**Civil Practice and Procedure** – appeals – timeline for filing appeals - what were the underlying principles to consider in the extension of time to lodge an appeal.

**Evidence Law** – evidence - additional, new and fresh evidence in a suit - what were the factors to consider in an application to allow for additional, new and fresh evidence.

**Jurisdiction** – jurisdiction of the Supreme Court – jurisdiction to allow amendments of applications to determine the real questions in dispute - whether the Supreme Court had the discretion to allow amendments of applications to determine the real questions in dispute - , section 21(2); rule 3(5).

**Jurisdiction** – jurisdiction of the Supreme Court – jurisdiction to interfere with the mandate of superior courts arising from discretionary pronouncements - whether the Supreme Court could interfere with the mandate of superior courts arising from discretionary pronouncements.



## **Brief facts**

The applicant filed two applications; the first one sought enlargement of time to file an appeal and stay of execution of the Court of Appeal judgment dated April 22, 2021 while the second one sought leave of the court to amend the notice of motion dated August 29, 2023. The respondent had appealed against the decision of the trial court at the Court of Appeal which reversed the trial court's judgment *vide* its judgment dated March 8, 2019 (the date and mode of delivery of the Court of Appeal judgment was the main contention in both applications). The respondent thereafter made an application for settling terms of the decree. The same was determined by a one-judge bench of the Court of Appeal on April 22, 2021.

The applicant sought leave to amend the notice of motion on the grounds that the amendment sought to add the final decision of the Court of Appeal dated March 8, 2019 as part of the prayer seeking enlargement of time to file an appeal. Initially, the applicant had sought enlargement of time to appeal against the consequential orders of April 22, 2021 only. The applicant contended that there was discovery of new and important facts disclosed by the respondent's replying affidavit served upon him on September 25, 2023 and that he had realized, for the first time, that the Court of Appeal's judgement was delivered on March 8, 2019, without prior notice to him, reasons which were entirely different from the reasons preferred in his application dated August 29, 2023.

The applicant sought to be granted extension or enlargement of time to file and serve notice of appeal and or appeal against the order of the Court of Appeal dated the April 22, 2021 and that if leave was granted the court grants a stay of execution of the order pending hearing and determination of the intended appeal. The applicant urged that he did not agree with the validity of the judgment and he filed an application seeking orders that the Court of Appeal recalls, cancels the judgment and hear the appeal afresh. The applicant claimed that the Court of Appeal had not given directions as to the hearing of that application and he therefore he filed the instant application.

## **Issues**

- i. What were the underlying principles to consider in the extension of time to lodge an appeal?
- ii. What were the factors to consider in an application to allow for additional, new and fresh evidence?
- iii. Whether the Supreme Court had the discretion to allow amendments of applications to determine the real questions in dispute.
- iv. Whether the Supreme Court could interfere with the mandate of superior courts arising from discretionary pronouncements.

## **Held**

1. The provisions of section 21(2) of the and rule 3(5) of the granted the court inherent power to make any ancillary or interlocutory orders as could be necessary for the ends of justice. The court therefore had discretion to allow amendments to determine the real questions in dispute and to do substantial justice.
2. An applicant had to show that the additional, new and fresh evidence could not have been obtained with reasonable diligence for use at the trial, was not within his knowledge, or could not have been produced at the time of the suit or petition due to the circumstances beyond him. Based on the evidence presented, it was over four (4) years since the impugned decision was made and on or about October 27, 2019, the applicant was made aware of the delivery of the Court of Appeal judgment by the respondent and the decision was also made available at the Kenya Law Reports virtual portal. In those circumstances, the same did not qualify as a new discovery.
3. There had been proceedings after delivery of the superior court's decision in which the applicant robustly participated. The application was reactionary and filed only upon the issue being raised by the respondent; his averment that he only became aware of the determination of the court of decision on September 25, 2023 was therefore misleading. It could not in any event amount to a new discovery or a call for new/fresh evidence not within the applicant's knowledge. The applicant had, in the



- circumstances, not satisfied the court that he was entitled to the exercise of discretion to warrant the prayers sought in his application dated October 2, 2023.
4. Extension of time was not the right of a party. It was an equitable remedy that was only available at the discretion of the court to a well deserving party. The underlying principles that a court should consider in determining whether to extend time to lodge an appeal included amongst others;
    - a. whether there was a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
    - b. whether there would be any prejudice suffered by the respondents if the extension was granted; and
    - c. whether the application had been brought without undue delay.
  5. The orders that the applicant sought to appeal against were in relation to the one issued on April 22, 2021. That order was in respect to settling terms of the decree and the same was issued by a one-judge bench. The court would not interfere with the mandate of the superior courts especially if the same arose from discretionary pronouncements appurtenant to appellate court's mandate. The applicant did not dispute that he took part in the proceedings leading up to the decision; there had been no formidable explanation why it had taken the applicant that long to seek the prayers sought.
  6. The application had therefore been brought with unreasonable delay. Even if the court were to find that the delay was reasonable the applicant conceded that he had filed an application dated April 21, 2021 seeking the Court of Appeal to recall, cancel the judgement and for the appeal to be heard afresh. Once the applicant took the route of reviewing the Court of Appeal's decision the option to pursue an appeal was no longer available or placed in abeyance to be reverted to at a later stage.
  7. The application for enlargement of time failed on two fronts; the application had been brought inordinately late, and there being a pending application before the Court of Appeal raising the same issues raised therein. Having found as much, and there being no notice of appeal, or substantive appeal before us, the application for stay of execution equally failed.

*Applications dismissed.*

### **Orders**

*Costs awarded to the respondent.*

### **Citations**

#### **Cases**

1. *Asanyo & 3 others v Attorney General* (Petition 21 of 2015; [2018] KESC 10 (KLR)) — Explained
2. *Executive of Kisumu v County Government of Kisumu & 8 others* (Civil Application 3 of 2016; [2017] eKLR) — Explained
3. *Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others* (Civil Application 35 of 2014; [2015] eKLR) — Explained
4. *Githiga, Stephen Maina & 5 others v Kiru Tea Factory Company Ltd* (Sup Ct Application No 12 of 2019 [2019] eKLR) — Explained
5. *Jirongo v Soy Developers Limited & 9 others* (Petition 38 of 2019; [2020] KESC 38 (KLR)) — Explained
6. *Mombasa County Government v Kenya Ferry Services & another* (Application 29 of 2018; [2019] KESC 50 (KLR)) — Explained
7. *Ndutu, Lawrence & 6000 others v Kenya Breweries Limited & another* (Civil Application 291 of 2011; [2012] KECA 8 (KLR)) — Explained
8. *Njihia v Kimani & another* (Civil Application 3 of 2014; [2015] eKLR) — Explained
9. *Njuguna, Mary Wambui v William Ole Nabala & 9 others* (Civil Appeal 100 of 2016; [2018] eKLR) — Explained
10. *Nuri v Kombe & 2 others* (Petition 38 of 2018; [2019] KESC 6 (KLR)) — Explained



11. Omega Enterprises (K) Ltd v Kenya Tourist Development Corporation & 2 others (Civil Appeal 59 of 1993; [1998] eKLR) — Explained
12. Rai & 3 others v Rai & 4 others (Petition 4 of 2012; [2013] eKLR'; [2014] 2 KLR) — Explained
13. Salat v Independent Electoral and Boundaries Commission & 7 others (Application 16 of 2014; [2014] KESC 12 (KLR)) — Explained
14. Sheikh t/a Hasa Hauliers v Highway Carriers Ltd (Civil Appeal 46 of 1986; [1988] eKLR [1988] KLR 306) — Explained
15. Teachers Service Commission v Kenya National Union of Teachers (KNUT) & 3 others (Petition 3 of 2015; [2015] KEELRC 863 (KLR)) — Explained
16. University of Eldoret & another v Hosea Sitienei & 3 others (Application 8 of 2020; [2020] eKLR) — Explained

#### **Statutes**

1. Constitution of Kenya, 2010 — article 3, 35 — Interpreted
2. Court of Appeal Rules, 2010 (cap 9 sub leg) — rule 32, 34 — Interpreted
3. Supreme Court Act, 2011 (Act No 7 of 2011) — section 21(2) — Interpreted
4. Supreme Court Rules, 2020 (Act No 7 of 2011 sub leg) — rule 3(5) — Interpreted

#### **Advocates**

*Mr. Oyatsi*

*Mr. Edmond Wekesa*

## **RULING**

#### Representation

Mr Oyatsi for the applicant

(Shapley Barret & Company Advocates)

Mr Edmond Wekesa for the respondent.

(Wekesa & Simiyu Advocates)

1. This ruling will dispose of two applications that are before the court. Both applications have been filed by the applicant. The first is dated August 29, 2023 seeking enlargement of time to file an appeal and stay of execution of the Court of Appeal judgment dated April 22, 2021. The second, dated October 2, 2023, seeks leave of the court to amend the notice of motion dated August 29, 2023.
2. The litigation background between the applicant and the respondent commenced at the Employment and Labour Relations Court (ELRC) wherein the applicant had made a claim for wrongful dismissal. The ELRC found in his favour and awarded him a sum of Kshs 13, 464,217.00. The respondent appealed against that decision and the Court of appeal reversed the ELRC judgement and *vide* its judgment dated March 8, 2019 reduced the award to Kshs 2,285,189.00. (the date and mode of delivery of the Court of Appeal judgment is the main contention in both applications). The respondent thereafter made an application for settling terms of the decree. The same was determined by a one-judge bench of the Court of Appeal (Asike Makhandia JA) on April 22, 2021.
3. Given the nature of the orders sought in the application dated October 2, 2023 we find it is apt to begin with the same. In the application, the applicant prays for this court to grant him the following orders:
  1. That the applicant be granted leave to amend its notice of motion dated August 29, 2023 as per the attached draft amended notice of motion.



2. That the costs of the application be provided for.
4. The application is supported by an affidavit sworn by the applicant and written submissions both dated October 2<sup>nd</sup>. The amendment ostensibly seeks to add the final decision of the Court of Appeal dated March 8, 2019 as part of the prayer seeking enlargement of time to file an appeal-initially the applicant had sought enlargement of time to appeal against the consequential orders of April 22, 2021 only.
5. The applicant, in making his application, contends that there is discovery of new and important facts disclosed by the respondent's replying affidavit served upon him on September 25, 2023. And that he has realized, for the first time, that the Court of Appeal's judgement was delivered on March 8, 2019, without prior notice to him, reasons which are entirely different from the reasons preferred in his application dated August 29, 2023. He further contends that, he has all along doubted the genuineness of the Court of Appeal judgment since it was not lawful for the superior court to issue a notice of delivery of judgment on March 4, 2019, giving notice to the parties that judgment was to be delivered on June 7, 2019 and contrary to the said notice, deliver that judgment four (4) days later-on March 8, 2019-without giving notice to the parties; and that therefore, without prior notice to the parties and specifically to him, the decision of the Court of Appeal was invalid, null and void. In this regard the applicant referred to this court's decision in *Geoffrey M Asanyo & 3 others v Attorney General* SC Petition No 21 of 2015.
6. The application has been opposed by the respondent's wide grounds of opposition and a replying affidavit sworn by the respondent's company secretary, Rita Mukhongo-both dated October 13, 2023- and the respondent's written submissions dated October 17, 2023 wherein the respondent submits that it informed the applicant the circumstance under which it became aware of the judgment *vide* a letter dated October 29, 2019; and that, it was incumbent upon the applicant to make enquiries with the Court of Appeal registry as to the circumstances under which the judgment was delivered on March 8, 2019; no such enquiries have been set out by the applicant. That, additional proceedings between the parties herein have also taken place subsequent to the delivery of the judgment of the Court of Appeal - without the applicant raising these new issues- including an application for settling terms of the decree, proceedings at the Employment and Labour Relations Court seeking refund of Kshs 8,061,000.00 and thereafter, a ruling was delivered on February 25, 2022 and lastly, an application was filed and still pending determination at the Court of Appeal, dated April 21, 2021, wherein the applicant seeks orders to set aside and/or review the Court of Appeal's judgement dated March 8, 2019.
7. The respondent further submitted that the application is fatal for being predicated on the wrong statutory provisions; the applicant has not shown that he could not have obtained the alleged new information with reasonable due diligence for use at the time of filing the application dated August 29, 2023; previous conduct of the applicant disentitles him of the exercise of this court's discretion and lastly, the applicant cannot maintain an appeal before this court and a review of the same judgment in the Court of Appeal. The respondent cited the following authorities in support of its submissions: *Daniel Kimani Njibia v Francis Mwangi Kimani & another* [2015] eKLR, *Hamdia Yaro Shek Nuri v Faith Tumaini Kombe & 2 others* [2019] eKLR, *Cyrus Shakhhalaga Khwa Jirongo v Soy Developers Limited & 9 others* [2020] eKLR, *Sheikh t/a Hasa Hauliers v Highway Carriers Ltd* [1988] eKLR *Mary Wambui Njuguna v William Ole Nabala & 9 others* [2018] eKLR.
8. Having considered the application dated October 2, 2023, response and the submissions filed by both the applicant and by the respondent, we find that the provisions of section 21(2) of the *Supreme Court Act, 2011* and rule 3(5) of the *Supreme Court Rules, 2020* grant this court inherent power to make any ancillary or interlocutory orders as may be necessary for the ends of justice. This court therefore has discretion to allow amendments to determine the real questions in dispute and to do substantial



justice. We have determined as much in *Stephen Maina Githiga & 5 others v Kiru Tea Factory Company Ltd* Sup Ct Application No 12 of 2019 [2019] eKLR, and in *Kampala International University versus Housing Finance Company Limited* Sup Ct Application No 34 (E035) of 2021.

9. The applicant states that he learnt of the Court of Appeal's determination on September 25, 2023 making the same a fresh and important discovery. In *Cyrus Shakhhalaga Khwa Jirongo v Soy Developers Limited & 9 others* Sup Ct Appl No 38 of 2019 [2020] eKLR this court held that an applicant has to show that the additional, new and fresh evidence could not have been obtained with reasonable diligence for use at the trial, was not within his knowledge, or could not have been produced at the time of the suit or petition due to the circumstances beyond him.
10. Based on the evidence presented, it is now over four (4) years since the impugned decision was made and it is clear to us that, on or about October 27, 2019, the applicant was made aware of the delivery of the Court of Appeal judgment by the respondent and the decision was also made available at the Kenya Law Reports virtual portal. In those circumstances, the same does not qualify as a new discovery. Further to that fact, there have been proceedings-set out above- after delivery of the superior court's decision in which the applicant robustly participated. The application is reactionary and filed only upon the issue being raised by the respondent; his averment that he only became aware of the determination of the court of decision on September 25, 2023 is therefore misleading. It cannot in any event amount to a new discovery or a call for new/fresh evidence not within the applicant's knowledge. The applicant has, in the circumstances, not satisfied this court that he is entitled to the exercise of discretion to warrant the prayers sought in his application dated October 2, 2023.
11. We now turn to the application dated August 29, 2023 wherein the applicant seeks the following orders;
  1. That the applicant be granted extension or enlargement of time to file and serve notice of appeal and or appeal against the order of the court of appeal dated the April 22, 2021 in Nairobi Civil Appeal No 47 of 2012.
  2. That if leave is granted in (2) above this honourable court in exercise of its inherent power do further grant a stay of execution of the Court of Appeal order dated April 22, 2021 in Nairobi Civil Appeal No 47 of 2012 pending hearing and determination of the intended appeal.
12. The application, is supported by the sworn affidavit of the applicant and written submissions both dated August 29, 2019 wherein he contends that the delivery of the Court of Appeal decision dated March 8, 2019 was not in accordance with article 3 as read with article 35 of the *Constitution* as well as rule 32 of the *Court of Appeal Rules*. The applicant also highlights the sequence of events as follows; the Court of Appeal issued a notice on March 4, 2019 for delivery of its decision on June 7, 2019, but the decision was instead delivered earlier-on March 8, 2019. On October 18, 2019, the applicant's advocates then received a letter from the respondent's advocates seeking approval of a draft order extracted from the judgment. The applicant's advocates rejected the request to accept the validity of the judgement and approval of the draft order. The respondent *vide* a letter dated October 29, 2019 advised the applicant that it had found the judgment at the Kenya law portal but had thereafter written to the court to be issued with a certified copy of the judgment.
13. The applicant urges in the above context that he took the following steps at the Court of Appeal to show that he does not agree with the validity of the judgment; first, he filed submissions in the settling of terms application where he disputed its validity. Secondly, he filed an application dated April 21, 2021 seeking orders that the Court of Appeal does recall, cancel the judgment and hear the appeal afresh.



That the Court of Appeal has not given any directions as to the hearing of the said application and he therefore relies on this court to issue him a remedy by enlarging the time to file his intended appeal and issuing stay orders against the impugned decision. He cites the following authorities in support of his submissions: *Geofrey M Osanyo & 3 others versus Attorney General* (*supra*), *Omega Enterprises (K) Ltd vs Kenya Tourist Development Corporation & 2 others* Civ Appeal No 59 of 1993 and in making the point that a decision not delivered in accordance with the law and in particular a judgment that is neither dated nor delivered in open court is a nullity.

14. In response to the application the respondent filed notice of preliminary objection, grounds of opposition, replying affidavit sworn by Rita Mukhongo, all dated September 25, 2023 and submissions in support of the preliminary objection dated 26<sup>th</sup> September wherein it contends that, from the provisions of article 163 of the *Constitution* and rule 34 of the *Court of Appeal Rules*, this court lacks jurisdiction to hear appeals from the decision of a single judge of the Court of Appeal on the settlement of terms of an order and equally lacks jurisdiction to stay execution of the order of the single judge; the inordinate delay of over two  
(2) years' in bringing the application has not been explained hence the applicant has not met the conditions set out in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR.
15. On the prayer for stay orders, the respondent submits that the jurisdictional entry point for an application for stay is the presence of a proper notice of appeal absent of which the court lacks jurisdiction to grant the order for stay of execution; it is untenable to appeal against the order for settling of terms whilst the judgement giving rise to the order is intact. In support of its preliminary objection the respondent cited the case this court's decisions in *Daniel Kimani Njibia versus Francis Mwangi Kimani & another* [2015] eKLR, *Teachers Service Commission versus Kenya National Union of Teachers & 3 others* [2015] eKLR, *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another* [2012] eKLR, *Mombasa County Government v Kenya Ferry Services & another others* [2019] eKLR, *Executive of Kisumu v County Government of Kisumu & 8 others oth* [2017] eKLR.
16. The applicant filed a rejoinder to the respondent's replying affidavit dated October 2, 2023 wherein he reiterated that he only became aware of the Court of Appeal judgment on September 25, 2023 and therefore his plea before us is warranted.
17. On our part we must reiterate our prior holding in many a case that, extension of time is not the right of a party. It is an equitable remedy that is only available to at the discretion of the court to a well deserving party. The under-lying principles that a court should consider in determining whether to extend time to lodge an appeal were aptly set out in the *Nicholas Salat* case (*supra*) to include amongst others; a. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court; b. Whether there will be any prejudice suffered by the respondents if the extension is granted and c. Whether the application has been brought without undue delay.
18. We have already held that the applicant was, from October 29, 2019, well aware of the final decision of the Court of Appeal and its delivery on March 8, 2019. The orders the applicant now seeks to appeal against is in relation to the one issued on April 22, 2021. This order is in respect to settling terms of the decree and the same was issued by a one- judge bench (Asike Makhandia JA). First, In *David Kimani Njibia v Francis Kimani & another* SC Civ Appl No 3 of 2014 [2015] eKLR we held that this court will not interfere with the mandate of the superior courts especially if the same arises from discretionary pronouncements appurtenant to appellate court's mandate. Secondly, the applicant does not dispute that he took part in the proceedings leading up to the decision; there has been no formidable explanation why it has taken the applicant this long to seek the prayers sought. The



application has therefore been brought with unreasonable delay. Third, even if this court were to find that the delay was reasonable the applicant concedes that he has filed an application dated April 21, 2021 seeking the Court of Appeal to recall, cancel the judgement and for the appeal to be heard afresh. Once the applicant took the root of reviewing the Court of Appeal’s decision the option to pursue an appeal is no longer available or placed in abeyance to be reverted to at a later stage. We have found as much in *Fabim Yasin Twaha v Timamy Issa Abdalla & 2 others* [2015] eKLR and in *University of Eldoret & anothers v Hosea Sitienei & 3 others* SC Application No 8 of 2020; [2020] eKLR where we held as follows:

“[34] We therefore note that when the applicants preferred to pursue review of the decision, as they were entitled to, that was the best option in their assessment even if it turned out to be unsuccessful. Allowing them to take the second option at this stage, as if they never exercised the first option in the first place, would not only contribute to protracting litigation but also defeat the whole essence of finality of the litigation process. This would mean that precious judicial time and resources would have been unnecessarily expended in not settling the dispute but rather satisfying the litigants’ options to cherry pick and engage in trial and error at the altar of judicial process without the attendant consequences.”

19. We therefore find that the application for enlargement of time fails on two fronts; the application has been brought inordinately late, and there being a pending application before the Court of Appeal raising the same issues raised herein. Having found as much, and there being no notice of appeal, or substantive appeal before us, the application for stay of execution equally fails.
20. On costs, we are guided by the decision in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* SC Petition No 4 of 2012 [2014] eKLR which held that an order on cost is a judiciously-exercised discretion of the court, accommodating the special circumstances of the case, while being guided by ends of justice considering the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation. Taking due regard of the merits of the case and the industry undertaken by the respondent we find that the respondent is entitled to costs of both applications.
21. Consequently, we make the following orders:
  - a. The notice of motion dated August 29, 2023 and filed on September 1, 2023 is hereby dismissed.
  - b. The notice of motion dated October 2, 2023 and filed on October 5, 2023 is hereby dismissed.
  - c. Costs of the both applications are awarded to the respondent.

Orders accordingly.

**DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF DECEMBER, 2023.**

.....  
**P.M. MWILU**

**DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT**

.....  
**M.K. IBRAHIM**

**JUSTICE OF THE SUPREME COURT**  
.....



**S. C. WANJALA**

**JUSTICE OF THE SUPREME COURT**

.....

**NJOKI NDUNGU**

**JUSTICE OF THE SUPREME COURT**

.....

**I. LENAOLA**

**JUSTICE OF THE SUPREME COURT**

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

**REGISTRAR,**

**SUPREME COURT OF KENYA**

