



REPUBLIC OF KENYA



**Nyambane v Githinji (Miscellaneous Civil Application E743 of 2024)
[2025] KEHC 2247 (KLR) (Civ) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2247 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E743 OF 2024
LP KASSAN, J
FEBRUARY 27, 2025**

BETWEEN

VICTOR CHWEYA NYAMBANE APPLICANT

AND

MARTIN KIMANI GITHINJI RESPONDENT

RULING

1. Before this court is a Notice of Motion dated 13.08.2024 brought under Order 21 Rule 1B, Order 22 Rule 22, Order 40 Rules 6, and Order 51 Rules 1 of the Civil Procedure Rules, Article 159 (2) (a) and (d) Constitution of Kenya, Sections 1A, 1B, 3A and 95 of the Civil Procedure Act and all enabling provisions of the law wherein the Applicant seeks orders to wit:
 - a. Spent
 - b. Spent
 - c. That this Honourable Court be pleased to grant the Applicant leave to file an appeal out of time;
 - d. That this Honourable Court be pleased to grant interim stay of judgment delivered on 18th August 2023 by Honourable B. M. Cheloti in Milimani CMCC No. E2455 of 2021 pending the hearing and determination of this Application and the appeal herein.
 - e. That the costs of this application abide the outcome of the intended appeal.
2. The said application is premised on the grounds on its face and further supported by the affidavit sworn by the Counsel for the Applicant. The Applicant's case is that judgment was entered against the Applicant on 18.08.2023 for an award general damages of Kshs 200,000/=, special damages Kshs



27,600/=, loss of earning capacity Kshs 108,583.20/=, costs and interest. The Applicant through Counsel followed up on the copy of the judgment until recently when it was availed. After reviewing the same wishes to appeal. The time for file an appeal has since lapsed. That if the application is not granted the Applicant will suffer irreparable loss and damage and if the stay is not granted the intended appeal will be rendered nugatory.

3. The Application is opposed by the Respondent vide a replying affidavit sworn on 23.09.2024 by the Respondent. He deponed that the Application as framed was unmeritorious and did not meet the test for the prayers sought. That judgment was delivered on 18.08.2023 in the presence of the parties. Thereafter the file went missing from the beginning of the year as they tried to apply for the decree and costs only to appear just in time for the Applicant to file the Application for stay and leave to file the appeal out of time. The Applicant through Counsel had severally asked for more time after the stay had lapsed so that they can finalise payment as they were having delays on their end. The memorandum of appeal could have been filed as the Counsel of the Applicant was present when judgment was delivered. The application herein was a ploy to ensure the decretal sum is not paid and as such the Respondent stands to suffer irreparable damage should the Applicant fail to pay which was highly due to the constant threats of closure of Directline Assurance, the Applicant's insurer in the local media which matter was in the public domain. No proper justification was provided by the Applicant to show why the Appeal was not filed almost 12 months after the date of judgment. That the court had discretion to allow the Applicant file the appeal out of time but the Applicant had not demonstrated sufficiently and with good cause the reason for their inordinate delay in filing the draft appeal attached. The Applicant has not demonstrated that they have means and capacity to pay costs awarded to them. The court in exercising its discretionary power direct the full decretal sum of Kshs 432,428/= be deposited in court within 15 days. The Application be dismissed with costs.
4. The application was canvassed by way of written submissions.

Applicant's submissions

5. The Applicant submitted in the case of Edith Gichugu Koine-vs-Stephen Njagi Thoithi eKLR set out the principles to apply for leave to file an appeal out of time as the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted. The Applicant is to establish the basis upon which the court should exercise its discretion in their favour. Other considerations to keep in mind in an application for extension of time include the length of the delay involved and the reasons for the delay, the possible prejudice of the parties, the need to balance the interests of the parties, the need to protect a party's opportunity to fully agitate its dispute against the need to ensure timely resolution, the public interest implications and whether the intended appeal has chances of success or is a mere frivolity. The Applicant submitted that the Application was brought at the earliest opportunity. The Applicant argued that the delay was not so inordinate and was alive to the fact that an extension of time to appeal was not a right of any party but an equitable remedy. The lower court was missing from the beginning of the year when they tried to apply for decree and costs therefore the applicant had sufficient reason for filing the appeal out of time as the applicant could not get a copy of the judgment to prepare and lodge the appeal out of time. That no prejudice will be occasioned upon the Respondent. The appeal has high chances of succeeding.

Respondent's submissions

6. The Respondent submitted that the application was misconceived, vexatious, frivolous and an abuse of the court process. The Applicant had not adequately explained the reasons for the delay in filing the appeal. The applicant has not provided evidence of their diligence in following up on the matter.



that the intended appeal had no chance of success as it did not raise any points of law. The application be dismissed with costs.

7. I have considered the Application, responses and the submissions filed herein. The main facts relating to the Application herein are not in dispute. These include the existence of the judgment in Nairobi CMCC No. 2455 of 2021 delivered on 18.08.2023 in favour of the Respondent.
8. The issues for determination herein are
 - i. Whether the Applicant herein should be granted leave to appeal out of time against the judgment in Nairobi CMCC No. 2455 of 2021?
 - ii. Whether a stay of execution should be granted against the judgment in Nairobi CMCC No. 2455 of 2021 pending the appeal?
 - iii. Who should bear the costs?
9. Section 79G of the *Civil Procedure Act* provides that the appeals from the subordinate court to the High Court must be filed within a period of 30 days from the date of the decree or order from which the appeal lies. It provides:

“Every appeal from a subordinate court to high court should be filed within a period of thirty days from the date of the decree or order appealed against, From such period any time the lower court may certify as having been requisite of a copy of the or order. Provided that an appeal may be admitted out of time if the appellant satisfied the court that he had good and sufficient cause for the filing of the appeal in time.”
10. It allows for the extension of time within which an appeal ought to be filed is a matter of judicial discretion. An applicant seeking enlargement of time to file an appeal must show that he has a good cause for doing so.
11. The court in exercise of its discretion is supposed to take into account the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted and whether the matter raises issues of public importance. (See Court of Appeal in Edith Gichungu Koine-vs-Stephen Njagi Thoithi (2014) eKLR).
12. In addition, Section 95 of the *Civil Procedure Act* grants to the court the “discretion, from time to time, to enlarge” any time fixed for the doing of any act under the Act. See also, Order 50 Rule 6 of the Civil Procedure Rules. Thus it is incumbent upon the Applicant to satisfy the court that it had good and sufficient cause for not filing the appeal in time, and is deserving of the court’s discretion.
13. The judgment in the primary suit Nairobi CMCC No. 2455 of 2021, was delivered on 18.08.2023. The court file went missing till sometime in August 2024 when the application herein was filed. This is admitted to by the Respondent whose counsel had been trying to extract the decree and costs. Although the application has been brought shy of a year, the explanation is because the court file had been missing. The custody of court files is not with the parties and as such neither party can be blamed for it. In light of this, the delay in bring the application herein although inordinate is with reason.
14. The reason for the delay given by the Applicant was that the court file was missing. In Andrew Kiplagat Chemaringo-vs-Paul Kipkorir Kibet (2018) eKLR, the court held:

“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.”

15. Herein the delay was occasioned by the lower court file gone missing. This can't be attributed in any way to the either party.
16. As to whether the Respondent will suffer any prejudice, this has to be weighed against a party's constitutional right to be heard (See Court of Appeal case *Vishva Stone Suppliers Company Limited-vs-RSR Stone (2006) Limited (2020) eKLR.*). The Applicant deposed that the Respondent will not suffer any prejudice if the orders of leave are granted. The Applicant has expressed his chances of appeal succeeding. The Respondent's deposition as to the prejudice he will suffer cannot dislodge the clear prejudice the Applicant stands to suffer.
17. Where a party is aggrieved and wishes to pursue an appeal it would be fair to exercise discretion in his favour and especially where the delay in filing the appeal is not inordinate and the adverse party will not be prejudiced in any way. The discretion of the court must always be exercised judiciously. The Applicant having expressed his intentions to be heard by this court on appeal, it is my considered view that he ought to be given an opportunity to pursue the appeal.
18. For the above reasons, the Applicant has satisfied the conditions for grant of leave to appeal out of time. The prayer in that respect (prayer (e)) as thus is merited and the same is hereby allowed. The appeal to be filed within 21 days from the date of this ruling.
19. The prayer for leave to file an appeal having been allowed, this court will then proceed to determine the issue as to whether there ought to be stay of execution of the order, judgment of the trial court pending the hearing and determination of the appeal. The principles upon which the above prayer can be allowed are now well settled from the authorities from this court and from the superior courts.
20. Generally, a stay of execution is provided under Order 42 Rule 6 of the Civil Procedure Rules 2010 which provides:

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”
21. For orders of stay of execution to be granted, the Applicant must satisfy the conditions to wit that substantial loss may result to the Applicant unless the order is made; that the application has been made without undue delay; and that 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 See *Amal Hauliers Limited-vs-Abdulnasi Abukar Hassan (2017) eKLR.*
22. The court ought to fairly take into account the interests of the Respondent, who has been deprived of the benefits of his judgment, in addition to the Appellant's right to ventilate their case which the court should not be quick to deny. See *Kenya Shell Ltd. v. Kibiru & others (Supreme); Attorney General v. Halal Meat Produces Limited, Civil Application No. Nairobi 270 of 2008; and Mukuma v. Abuoga (1988) KLR 645.*
23. Where the Applicant is successful, he or she shouldn't be in a position where he or she can't obtain their money back. Additionally, if the Applicant ultimately fails in his intended appeal, the Respondent who has a decision in his favour shouldn't find it difficult or impossible to enforce the decree. This is the



guarantee security of costs gives to parties. See *Nduhiu Gitahi & Ano.-vs-Anna Wambui Warugongo* (1988) 2 KLR 100.

24. Taking all relevant factors into consideration, I do order that;
- a. The Applicant is granted leave to file an appeal out of time and the same must be filed and served within the next 21 days from the date of this ruling.
 - b. The Applicant will deposit the entire decretal sum into an interest earning account in the joint names of the parties' advocates within 30 days from this Ruling date.
 - c. In default of any of these conditions, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.
 - d. The costs of this Application will be in the cause.
25. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF FEBRUARY 2025.

L. KASSAN

JUDGE

In the presence of: -

Mudae for Applicant

No appearance for Respondent

Carol – Court Assistant

