



**Ochanda v Onyango (Civil Miscellaneous Application E068 of 2024)
[2025] KEHC 3915 (KLR) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3915 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL MISCELLANEOUS APPLICATION E068 OF 2024**

**JK SERGON, J
MARCH 27, 2025**

BETWEEN

DANIEL OCHANDA APPLICANT

AND

ERICK ONALA ONYANGO RESPONDENT

JUDGMENT

1. The application coming up for determination is a notice of motion dated 28th November, 2024 seeking the following orders;
 - (i) Spent.
 - (ii) That this Honorable Court be pleased to lift the warrant of arrest and set aside all execution/ or order to commit the Applicant herein to civil jail.
 - (iii) Spent.
 - (iv) That, leave be granted to the applicant to file appeal against Ruling of Honorable Clare Odunga Delivered On 21st May 2024 In Kericho small claims court No. E030 of2024 out of time.
 - (v) That costs of this Application be provided for.
2. The application is supported by the grounds on the face of it and the supporting affidavit of Daniel Ochanda the Defendant/Applicant in the instant Application.
3. He avers that he had instructed the firm of Oyoo Z. Antone And Co. Advocatesto defend him in this suit herein on or about February 2024 and that his former advocates up to date have never updated informed about the status of the suit despite the fact that he has on several occasions visited the said advocate's office and was informed that the matter was still pending in court.



4. He avers that he has never been called by his former advocate either to appear in court to give his evidence concerning the subject of the suit herein.
5. He avers that on 27th November 2024, he was served by the Respondent with notice to show cause and that he appeared to court on 28th November 2024 and warrants of arrest were issued against him.
6. He avers that he was utterly shocked by the above chronology of events, which unbeknownst to him have led to a warrant of arrest issued against him and that the judgment was issued against him without being heard which is in violation of his right to be heard.
7. He avers that he is apprehensive that unless the Respondent is stopped by the orders of this Honorable court, the Respondent will continue with the execution of her decree and he will suffer reparable loss noting that he is terminally ill and may not survive imprisonment. He avers that the present application has been made timorously and in good faith and that he is ready and willing to comply with any conditions which the honorable Court may deem fit and just to impose in granting the Orders sought.
8. The matter came up for inter partes hearing, the advocate for the applicant stated that he served the instant application and filed an affidavit of service and therefore the application should be treated as unopposed. There was no response to the application and/or representation on the part of the respondent.
9. I have considered the application and response by parties and I find that the issue (s) for determination are whether to lift the warrant of arrest and set aside all execution/or order to commit the Applicant herein to civil jail and whether to grant leave to the applicant to file an appeal against ruling of Honorable Clare Odunga delivered on 21st May, 2024 in Kericho Small Claims Court No. E030 Of2024 out of time.
10. On the issue as to whether to lift the warrant of arrest and set aside all execution/or order to commit the Applicant herein to civil jail. This court finds that the applicant has not contested the mode or manner in which the said orders were obtained, he conceded to having been served with a notice to show cause. Committal to civil jail is a lawful process by virtue of section 38 of the *Civil Procedure Act* which provides: ‘Subject to such condition and limitations as may be prescribed, the Court may, on application of decree holder, order execution of the decree (d) by arrest and detention in prison of any person.’ In the case of *Innocent G. Ondiek v Julius Nakaya Kabole* [2019] eKLR it was held that: “As stated above, the only viable ground of setting aside an order for committal to civil jail, is when the respondent challenges the mode or manner in which the said orders were obtained. The respondent herein states that he was not aware of the notice to show cause proceedings against him as he was not served with the notice... It is clear that the service herein has not been successfully challenged. The Deputy Registrar considered the affidavit of service, and found and held that the service was proper. It is my holding, therefore, that the service of the notice to show cause was proper and that the respondent has not offered any sufficient reason to warrant the setting aside of the orders made on the 3rd April 2019.”
11. On the issue as to whether to grant leave to the applicant to file an appeal against the ruling of Honorable Clare Odunga delivered on 21st May, 2024 in Kericho Small Claims Court No. E030 OF 2024 out of time, the operative section of the law is section 79G of the *Civil Procedure Act* provides that: “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.” Regarding the length of delay, it is evident from the pleadings on record herein that the judgement that the applicant is seeking to appeal against was delivered on 21st May, 2024. The instant application was filed on the 28th November, 2024, causing a delay slightly over 5 months. The applicant submitted that the delay in lodging the appeal was occasioned by the fact he had instructed the firm of Oyoo Z. Antone And Co. Advocates to defend him in this suit herein on or about February 2024 and that his former advocates up to date have never updated informed about the status of the suit. The applicant contended that he had visited the said advocate's office severally and was informed that the matter was still pending in court. In the circumstances, I am inclined to allow the applicant leave to lodge an appeal against the judgment/ decree of Honorable Clare Odunga delivered on 21st May, 2024 in Kericho Small Claims Court No. E030 OF 2024 out of time

12. Consequently, the notice of motion dated 28th October, 2024 is partially allowed with the following order:-
- (i) Leave is hereby granted to file an appeal against the judgement and/or decree of Honorable Clare Odunga delivered on 21st May, 2024 in Kericho Small Claims Court No. E030 OF 2024 and the applicant to file a memorandum of appeal within twenty (21) days of this ruling.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 27TH DAY OF MARCH, 2025

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J.K. SERGON

JUDGE

In the Presence of

C/Assistant – Rutoh

No Appearance for the Parties

