



REPUBLIC OF KENYA



KENYA LAW
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**Kamau v Kavuli (Miscellaneous Civil Application E022 of 2023)
[2024] KEHC 601 (KLR) (30 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 601 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
MISCELLANEOUS CIVIL APPLICATION E022 OF 2023
CW GITHUA, J
JANUARY 30, 2024**

BETWEEN

KELVIN MAINA KAMAU APPLICANT

AND

**JOSEPHINE KAVULI MUNG'UTI ALIAS JOSEPHINE KAVULI MUNG'UTHI
ALIAS JOSEPHINE KAVOLI MUNG'OTI RESPONDENT**

RULING

1. The applicant, Kelvin Maina Kamau approached this court through the Notice of Motion dated 24th April, 2023 principally seeking two substantive orders. He sought this court's leave to file his intended appeal against the Judgment delivered on 1st March, 2023 in Kandara P.M C.C. No. E131 of 2022 and that if leave was granted, stay of execution of the impugned Judgment be granted pending hearing and determination of the appeal.
2. In the grounds premising the motion and in depositions made in the Supporting affidavit, the applicant contended that failure to file his intended appeal within the time prescribed by the law was not deliberate but was caused by delay in obtaining a copy of the Judgment from the trial courts registry; that he still wished to appeal against the trial court's decision but cannot do so now without leave of the court since time to appeal has expired.
3. In addition, the applicant averred that the respondent had commenced execution of the decree by having his attachable assets proclaimed and unless stay was granted, those assets were at risk of being sold in realization of the decree which will render both the application and the intended appeal nugatory and that in any event, the respondent was not likely to suffer any prejudice if the application was allowed.
4. The application is opposed through a replying affidavit sworn by the respondent on 2nd May 2023. The respondent asserted that the application lacked merit and ought to be dismissed since the applicant had



failed to give satisfactory reasons for failure to file his intended appeal within time; that the application was filed in bad faith as it was essentially aimed at delaying or denying her realization of fruits of her successful litigation; that if the application was allowed and stay pending appeal was granted, she will suffer great prejudice as she was intending to use the decretal amount to finance her further medical expenses. That in any case, the applicant has not met the threshold for grant of stay of execution pending appeal.

5. When the application came up for directions on 4th May 2023, the court, pursuant to a proposal made by the parties, directed that the application be prosecuted by way of written submissions which both parties subsequently filed through their respective advocates on record. In their submissions, both learned counsel expounded on the positions taken by their clients in support and in opposition to the motion.
6. Having carefully considered the application, the parties rival written submissions and all the authorities cited, I find that the first issue which falls for my determination is whether the applicant's prayer for leave to file his intended appeal out of time was merited since my decision on this prayer will determine the fate of the second prayer for stay of execution pending conclusion of the intended appeal.
7. The starting point is the law governing the filing of appeals to the High court and enlargement of the prescribed time for filing of appeals to this court if an appeal was not filed within the time stipulated under Section 79 G of the Civil Procedure Act (CPA) which 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.”

8. From the above provisions, it is clear that this court has extremely wide and unfettered discretion to admit an appeal filed out of time or to enlarge time for filing of an appeal out of time provided that the applicant convinced the court that good and sufficient cause existed for failure to file the appeal on time.
9. The court of appeal in Thuita Mwangi v Kenya Airways Ltd [2003] eKLR gave guidelines on factors which a court should consider when exercising its discretion in applications of this nature.

Such factors include the following; -

- i. The length of delay.
 - ii. The reason for the delay.
 - iii. The chances of the appeal succeeding if the application was allowed.
 - iv. The degree of prejudice to the respondent if the application was allowed.
10. I am also guided by the decision of the Supreme Court in Nicholas Kiptoo Arap Salat & 7 others [2015] eKLR in which the court held *inter alia* that extension of time was not an automatic right of a party and that to be deserving of that relief, a party must demonstrate good cause for not filing the intended appeal within the prescribed time. The applicant must also prove that the application was brought without undue delay. Further, the court should consider whether any prejudice will be suffered by the respondent if the extension was granted.



11. In this case, it is not disputed that the judgment intended to be appealed against was delivered on 1st March, 2023. Given the method for computation of time set out in Section 57 of the [interpretation and General Provisions Act](#) and order 50 Rule 3 of the [Civil Procedure Rules](#) (CPR), the statutory prescribed time for filing of the intended appeal expired on or about 4th April,2023. The application was filed on 24th April,2023, about 20 days later.
12. Although the reason given for the delay is not at all satisfactory given that the applicant did not avail any evidence to show what effort if any was made to obtain a copy of the trial courts judgment in good time, I am persuaded to find that a delay of about 20 days cannot be said to be prolonged or inordinate. I find that the same is excusable.
13. Further, I have perused the grounds advanced in the draft memorandum of appeal and looked at as a whole, I am satisfied that the same are not idle or frivolous.
14. Whereas I agree with the respondents that she has a right to enjoy fruits of her Judgement within the shortest time possible, my take is that this right should be weighed against the equally weighty right of the applicant of accessing the appellate court to ventilate his grievances and exhaust the due process made available to him by both [the Constitution](#) and the law.
15. Having weighed the competing interests of both parties, I find that the scales of justice tilts more towards granting the applicants prayer for enlargement of time because if the same was not granted, he will suffer grave prejudice since the doors of justice will be firmly slammed on his face before his appeal is heard on merit. This may in turn violate his constitutional right of access to justice and fair hearing guaranteed under Article 48 and Article 50(1) of [the Constitution](#) respectively.

On the other hand, if the prayer was denied, the respondent is not likely to suffer any prejudice which cannot be ameliorated by an award of costs.
16. Given the foregoing, I find merit in prayer 3 of the motion and it is hereby allowed on terms that the applicant shall file and serve his intended appeal within the next 14 days.
17. Regarding the prayer for stay of execution pending determination of the intended appeal, I have considered the parties extensive submissions on this issue together with the authorities cited by both parties. In my view, Order 42 Rule 6(1) and (2) of the [CPR](#) is only applicable where there was an existing appeal pending determination and although this is not the case in this matter, in order to preserve the substratum of the intended appeal noting that the execution process has already commenced, I am persuaded to exercise my discretion under the inherent powers of this court which I hereby do and grant the applicant stay of execution of the trial courts Judgment and decree for the duration of the leave granted to file the intended appeal. For the avoidance of doubt, stay is granted for 14 days of todays date so that if no appeal is filed within next 14 days, stay shall automatically lapse and the respondents will be at liberty to proceed with execution.
18. Regarding the prayer for costs, cost follow the event and are at the courts discretion. In this case, the order that best commends itself to me on costs is that the respondent be and is hereby awarded costs of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 30TH DAY OF JANUARY, 2024.

C.W GITHUA

JUDGE



In the presence of :

Mr. Mutua holding brief for Mr. Ndungu for the respondent

Ms. Jeptoo holding brief for Ms. Bitok for the applicant

Ms. Susan Waiganjo Court Assistant

