



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Mokote v Kabu (Miscellaneous Application E020 of 2023)  
[2024] KEHC 475 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 475 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
MISCELLANEOUS APPLICATION E020 OF 2023  
SN MUTUKU, J  
JANUARY 25, 2024**

**BETWEEN**

**SAIMI OLE MOKOTE ..... APPELLANT**

**AND**

**GERALD NJOROGE KABU ..... RESPONDENT**

**RULING**

1. The Appellant brought this application by way of a Notice of Motion dated 1<sup>st</sup> March, 2023 under Order 51 rule 11 of the Civil procedure rules, sections 3A, 79G and 63(e) of the Civil Procedure Act and all other enabling provisions of the law seeking the following orders:
  - i. Spent.
  - ii. That the intended Appellant be granted leave to file appeal out of time against the whole of the judgement delivered on 8<sup>th</sup> December, 2022 by Hon M L.L Gicheha Chief magistrate at Kajiado Law Court in CMCC No 224 of 2016.
  - iii. That there be a stay of the judgement delivered on 8<sup>th</sup> December 2022 by Hon L.L Gicheha in CMCC NO 224 of 2016 pending the hearing and determination of this application.
  - iv. That the costs of this application be in the intended appeal.
2. The application was supported by the grounds found on the face of it and in the supporting affidavit dated 1<sup>st</sup> March, 2023 sworn by the appellant.
3. The Appellant has averred that judgement was delivered on 8<sup>th</sup> December, 2022 in favour of the Plaintiff. That the case was heard on diverse dates in the year 2019 and 2022. It was fixed for mention on 6<sup>th</sup> October, 2022 to confirm filing of submissions, however the trial court was not sitting on that date. That the date for the delivery of the judgment was not communicated to them and it was only after perusing the court file that he discovered that judgement had been delivered without notice to them.



4. He has stated that the time for filing appeal had lapsed. That he is aggrieved by the judgement and prefers to file an appeal. That the delay in filing the appeal was not occasioned by him. That the appeal raises triable issues and that the Respondent will not suffer any prejudice if the application is allowed. He asked the court to allow the application.
5. The application was opposed through a Replying Affidavit dated 14<sup>th</sup> March, 2023 where it was deposed that the application is misconceived, frivolous, vexatious and meant to delay the Respondent from the fruits of his judgement. That the matter commenced on 1<sup>st</sup> April, 2016 where the Defendant/ Applicant was served but never entered appearance. That interlocutory judgement was entered but was later set aside on 12<sup>th</sup> January, 2019. That the matter was heard interpartes and judgement was entered on 8<sup>th</sup> December, 2022. That it is more than two and a half months since judgement was delivered and that no good reason has been given for the delay in filing the appeal. It is argued that the excuse that the Applicant was not aware of the judgement date is false and made to mislead this court. That he prays that the application be dismissed with costs.

### **Submissions**

6. The Appellant's submissions are not in the court file. On 28<sup>th</sup> November, 2023, this court, in the presence of Mr. Ochako for the Applicant and Mrs. Owino for the Respondent, noted that the Applicant's submissions were not in the court file and directed counsel for the Applicant to ensure that the submissions were placed in the court file. As at the time of writing this judgement, the Applicant's submissions had not been placed in the court file.
7. The Respondent filed their submissions dated 7<sup>th</sup> November, 2023 in which he has argued that this is a simple matter that has taken over 15 years to conclude. That the appeal has no triable issues and is a ploy to delay this matter. Further that the application has not invoked the right provisions of the law to enable this court to grant the orders sought. That the delay in filing the appeal is inordinate and inexcusable. That the appellant has not shown any good faith by pleading to deposit security. They relied on the case of Civil Appeal E002 of 2022 *Nicholas Stephen Okaka and another -vs- Alfred Waga Wesonga* (2022) eKLR.
8. It was their case that should this court be inclined to grant stay of execution pending appeal then the Appellant should be ordered to deposit the entire decretal sum in an interest earning account in the names of both counsel. That it is in the interest of justice that litigation should come to an end. That the application is in bad faith and should be dismissed.

### **Determination**

9. I have considered this application and the grounds in support of the same and in opposition. The Applicant has relied on Section 79G of the *Civil Procedure Act* provides. This section 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.
10. I am alive to the provisions of Section 95 of the *Civil Procedure Act* that provides that: -  
Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.



11. A court exercised its discretion in extending time to any party who comes to it seeking extension of time. The Supreme Court pronounced itself on the applicable principles in granting leave to appeal out of time in *Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others* [2014] eKLR as follows:
- “The underlying principles a court should consider in exercise of such discretion include:
- a. Extension of time is not a right of any 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 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 Respondent if the extension is granted;
  - f. Whether the application has been brought without undue delay.
12. For an applicant seeking extension of time to succeed in his application, he must satisfy the court on the above principles. I have noted that the judgement being challenged in this matter was entered on 8<sup>th</sup> December, 2022. Any appeal challenging that decision ought to have been filed on or before 8<sup>th</sup> January, 2023. This application was brought on 1<sup>st</sup> March, 2023, a delay of about a month and 20 days. The reasons for the delay are explained by the Applicant, who has stated that judgement was delivered without any notification to the parties. I have noted that the record of the court shows that judgment was indeed delivered in the absence of the parties.
13. The explanation offered by the Applicant that he was notified of the date judgment would be delivered and that he knew about the delivery of judgment after perusing the court file is plausible. In these circumstances, the delay in filing the appeal in this matter is not unreasonable.
14. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides:
- 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.
15. I have considered the issue of stay of execution pending the appeal. I note that the Respondent seems amenable to a grant of stay on the condition the Appellant provides security for the due performance of the decree. I will give the Appellant a chance to ventilate the appeal by allowing this application, which I hereby do in terms of prayers 2 and 3 on condition that the Appellant deposits the decretal sum in a joint interest-earning account in both names of both counsel current on record for the parties within 30 days of today’s date failure to which the order for stay shall lapse.
16. Further the Appellant shall file and serve the Record of Appeal within 60 days from today’s date.



17. This matter shall be mentioned on 19<sup>th</sup> June 2024 to confirm compliance and issue further directions.
18. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 23<sup>RD</sup> JANUARY 2024.**

**S, N. MUTUKU**

**JUDGE**

