



**SNN v ANN (Civil Appeal E089 of 2023) [2024] KEHC 341 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 341 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL E089 OF 2023  
FN MUCHEMI, J  
JANUARY 25, 2024**

**BETWEEN**

**SNN ..... APPLICANT**

**AND**

**ANN ..... RESPONDENT**

**RULING**

**Brief Facts**

1. The application dated 26<sup>th</sup> May 2022 is seeking for orders of stay of execution of the ruling in Gatundu SPMC Misc. Civil Application No. E026 of 2021 delivered on 27<sup>th</sup> April 2022 and to leave to file an appeal out of time against the said ruling.
2. The respondent filed a Replying Affidavit dated 19<sup>th</sup> September 2022 in opposition to the application.

**Applicant's Case**

3. The applicant states that the respondent filed an Originating Summons dated 2<sup>nd</sup> September 2021 seeking a restraining order against him preventing him from physically abusing the respondent and her children by stalking them or picketing outside their matrimonial home situated at L.R. No. Ruiru xxx Blockx/xxx or school. In opposition to the application, the applicant filed Grounds of Opposition and Replying Affidavit both dated 13<sup>th</sup> October 2021 whereby he challenged the jurisdiction of the court to handle the matter yet there was a competent court based in Ruiru that could have handled the case. Despite raising the issue of jurisdiction, the applicant contends that the court delivered its judgment on 27<sup>th</sup> April 2022 whose effect will lead to his eviction from his home where he lives with his children including a school going child.
4. Being aggrieved with the decision of the trial court, the applicant sought to appeal the said decision but his attempts to do so were frustrated as he has attempted to obtain a copy of the typed ruling and proceedings but he is yet to receive the same. The applicant thus argues that unless the court intervenes



and grants stay orders against the impugned ruling he and his children stand to suffer irreparable harm and damage as he shall be evicted from his home.

5. The applicant contends that he has an arguable appeal with great chances of success and further that he has made the instant application without undue delay.
6. The applicant further seeks to have the time of filing the appeal enlarged as his advocate handling the matter was bereaved and wrongly assumed that the same was filed and thus the said mistake ought not to be visited to the client.

### **The Respondent's Case**

7. The respondent opposes the application and states that the ruling in Gatundu SPMC Misc. Civil Application No. E026 of 2021 was delivered on 27<sup>th</sup> April 2022 in the presence of advocates of both parties. The respondent further argues that although the applicant's advocates claim that they requested for a copy of the ruling and typed proceedings via letters dated 28<sup>th</sup> April 2022, the said letters do not bear the court stamp or any other form of acknowledgment from the trial court. Furthermore, the respondent argues that since the applicant's advocates requested for a copy of the ruling and proceedings on 28<sup>th</sup> April 2022, they have not taken any substantive action to follow up on the ruling and typed proceedings other than allegedly filing the letter and sitting back and thus the applicant cannot claim that the trial court is frustrating them in obtaining the said ruling and proceedings. Therefore, the applicant is a casualty of his own indolence and ineptitude by willfully electing not to zealously obtain a copy of the impugned ruling which led him to filing the instant application which is misconceived, a none starter and a waste of precious judicial time.
8. The respondent argues that the application does meet the legal threshold for the grant of stay pending appeal nor is the extension of time to appeal warranted. The respondent further argues that the applicant has not demonstrated what substantial loss he stands to suffer and therefore he does not stand to suffer any prejudice if his application is dismissed. Furthermore, the applicant's appeal does not raise any serious issues for consideration by this court as the decision of the trial court was well reasoned. The respondent further argues that the issue of jurisdiction is far fetched and a none issue since the trial court determined that it had jurisdiction over the matter and further that the trial court is within the geographical bearing within the county of residence of the respondent.
9. The respondent states that the trial court issued a restraining order against the applicant and not an eviction order as alleged by the applicant and thus the applicant is misleading the court. Moreover, the applicant and the respondent live in separate households as captured in the pending proceedings of the divorce petition in Ruiru DC E019 of 2021 and therefore there is no danger of the fictitious eviction averred by the applicant.
10. The respondent states that in the event the instant application is allowed, it should be conditional on advance provision of sufficient security for costs.
11. The applicant filed a further affidavit dated 20<sup>th</sup> April 2023 and states that obtaining a copy of the impugned ruling was key to lodging the appeal. The applicant further contends that he has raised substantial issues that need to be determined by the honourable court touching on the jurisdiction of the trial court and the decision of the court on finding that a prima facie case of assault had been demonstrated yet the court acknowledged in its ruling that that was a matter for the criminal court to exclusively determine. The applicant further argues that although the respondent claims that the said ruling was not an eviction order yet it was used to evict him from his home in May 2022.



## The Applicant's Submissions

12. The applicant submits that on May 30, 2022, he obtained an order from this court for status quo to be maintained but the respondent had already enforced the ruling of the trial court before he served her with this honourable court's orders. As such, the applicant argues that the only issue left for determination is on enlargement of time within which to file the appeal.
13. The applicant submits that the application was filed timeously as it was filed on May 26, 2022 and the trial court delivered its ruling on April 27, 2022. The applicant further argues that the delay in filing the appeal was caused by the registry. The applicant states that obtaining a copy of the ruling was key to informing him as to what the content of the ruling and thereafter, his advocates was to advise him on the merit or demerits of tendering an appeal.
14. The applicant relies on the case of *Winfred Nkuene Kirimi vs Jecinta Gakii* [2020] eKLR and submits that he has an arguable appeal as he has challenged the jurisdiction of the trial court and the decision by the court in finding that the respondent had established a prima facie case of assault yet the criminal court in Ruiru being Ruiru Criminal Case No. 132 of 2020 dismissed a similar case on assault for want of prosecution.
15. The applicant submits that no prejudice will be occasioned on the respondent as she is in possession of the suit property and he has been forced to move out. The applicant relies on the case of *Stecol Corporation Limited vs Susan Awuor Mudemb* [2021] eKLR and submits that the balance of convenience and justice is in his favour as he stands to lose his right of appeal and lose the chance of challenging an injustice that he feels has been proffered against him.
16. Upon perused the court record and noted that the applicant filed the instant application on 27<sup>th</sup> May 2022 in Kiambu High Court Civil Appeal No. E109 of 2022 and the court issued interim orders on May 30, 2022. The court directed that status quo to be maintained and that the application be served upon the respondent. The applicant has averred in his submission that at the time of serving the application and the orders thereof, the respondent had already enforced the ruling of the trial court. Thus the orders for stay for execution against the ruling have been overtaken by events. Consequently, the main issue for determination is whether the court ought to exercise its discretion in granting the applicant leave to file his appeal out of time.

## The Law

### Whether the court should exercise its discretion to grant the applicant leave to file his appeal out of time;

17. Section 79G of the *Civil Procedure Act* states:-

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 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.

18. It is clear from the wording of section 79G of the *Civil Procedure Act*, that before the court considers extension of time, the applicants must satisfy the court that that they have good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of *Diplack Kenya Limited*



vs William Muthama Kitonyi [2018]eKLR an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.

19. The Supreme Court in the case of Nicholas Kiptoo Korir arap Salat vs IEBC and 7 others [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that:-

“The underlying principles a court should consider in exercise of such discretion should 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 on a case by 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.

20. Similarly in the case of Paul Musili Wambua vs Attorney General & 2 others [2015]eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-

“.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of 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.”

21. The applicant has faulted the trial court for the delay in filing his appeal as the registry took a long time in availing to the applicant a copy of the typed proceedings. The Supreme Court in the case of Hassan Nyanje Charo vs Khatib Mwashetani & 3 others [2014] eKLR where the court stated:-

Counsel for the applicant has stated that he has exercised all due diligence to get the proceedings from the Court of Appeal, but to no avail.....

Would it be in the interests of justice then to turn away an applicant who has prima facie, exercised all due diligence in pursuit of his cause, but is impeded by the slow turning wheels of the court’s administrative machinery? We think not.



22. The Supreme Court further expounded in the case of *County Executive of Kisumu vs County Government of Kisumu & 8 Others* [2017] eKLR and held:-

However, we hasten to add that a ground of delay of getting typed proceedings is not a prima facie panacea for a case of delay whenever it is pleaded. Each case has to be determined on its own merit and all relevant circumstances considered. It is worth reiterating that in considering whether or not to extend time, the whole period of delay should be stated and explained to the satisfaction of the court.

23. In the present case, the trial court delivered its ruling on April 27, 2022 and the applicant filed the instant application on May 27, 2022, which was on the 30<sup>th</sup> day following delivery of the ruling. The applicant was within the statutory timelines within which he could file the appeal. It is therefore my considered view that there was delay in filing the instant application and that the applicant was within the statutory period to lodge his appeal. During the pendency of this application, the time of filing this appeal has since elapsed.
24. Consequently, this court hereby allows this application by granting the applicant fourteen (14) days to file his appeal.
25. Each party to meet their own costs of this application.
26. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 25<sup>TH</sup> DAY OF JANUARY 2024.**

**F. MUCHEMI**

**JUDGE**

