



Ibrahim v Muthami & another (Suing as administrators of the Estate of Joshua Musee Munyoki - Deceased) (Miscellaneous Application 35 of 2024) [2024] KEHC 3195 (KLR) (19 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3195 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS APPLICATION 35 OF 2024
FR OLEL, J
MARCH 19, 2024**

BETWEEN

MARY MWIKALI IBRAHIM APPELLANT

AND

**KALUNDA J MUNYWOKI MUTHAMI & JULIUS MUNYWOKI MUTHAMI
(SUING AS ADMINISTRATORS OF THE ESTATE OF JOSHUA MUSEE
MUNYOKI - DECEASED) RESPONDENT**

RULING

1. The application before this court for determination is the Notice of Motion application dated 6th February 2024 brought pursuant to provisions of Section 1, 1A, 3A, 63(e), 65(1)B, and 67 of the [Civil Procedure Act](#), Order 22, rule 22, Order 42 Rule 6 and Order 51 rules 1 and 3 of the [Civil Procedure Rules](#) and all other enabling provision of law. Prayers (1) and (2) of the said application are basically spent and the main prayer sought is prayer (3), (4) & (5) that;
 - a. That this Honourable court be pleased to grant leave to the applicant (proposed appellant) to appeal out of time against the judgement delivered by the Honourable P Wechuli(PM) on 21st September 2023 in Kithimani CMCC No 121 of 2021
 - b. That time for lodging an appeal against the judgement delivered by Honourable P. Wechuli (PM) on 21st September 2021 in Kithimani CMCC No 121 of 2021 be extended/enlarged.
 - c. That the said leave do operate as a stay of all proceedings and/or execution of any ruling, judgement, decree, order and all consequential orders in Kithimani CMCC No 121 of 2021 pending the hearing and determination of the intended Appeal.
 - d. That the draft annexed Memorandum of Appeal be deemed as filed upon leave being granted as per prayer 5 above and upon payment of the requisite fees thereto.



- e. That costs of this Application and other costs incurred herein consequential to follow the events.
2. The application is supported by the grounds on the face of the said application and the supporting affidavit of the Appellant/Applicant; Mary Mwikali Ibrahim dated 6th February 2024 2023. The applicant aver that the primary suit was heard on merit and judgement entered in favour of the respondent in the sum of Kshs.944,614/= plus costs and interest on 21.09. 2023. Being aggrieved by the said Judgement, on advice from her insurer, she had opted to file an appeal against part and/or all of the said Judgement hence necessitating the Application herein. Upon Judgement being delivered, the advocate on record had informed the instructing insurance company of the outcome and sought to obtain a copy of the said ruling. This process took long and unfortunately time to Appeal lapsed before instructions to Appeal was given.
 3. That further delay was occasioned by a change of the insurer legal officer's dealing with this file. The legal officer assigned the file was transferred and there was a delay in having the file reassigned to a different legal officer to review the advocate's opinion on the judgement and issuance of appropriate instructions to the said firm to proceed with filing of the said Appeal. The instructions to appeal were issued on 23.01.2024 and acknowledged 31.01.2024. The applicants advocate thereafter did proceed to file this application as instructed.
 4. The applicant further stated that respondents counsel had extracted the decree and if stay of execution was not granted, there was real likelihood that execution would issue and that would render the appeal filed to be nugatory. She was willing to offer security for due performance of the decree herein as shall be directed by this Honourable court. The court could properly invoke its power as provided for under section 3A of the *civil procedure Act*, to allow this application *ex debito Justitiae*, as it was merited.
 5. This application is opposed by the Respondents, through the replying Affidavit of the 1st Respondent Kalunda J Munywoki Muthami, dated 11th February 2024. He maintained that the said application was misconceived as the applicant was all along aware of the lower court decree and had not given a good reason as to why extension of time should be granted. The application had been filed as an afterthought to buy time and avoid settling the decree issued by the trial court. Secondly the applicant had not met the conditions for granting stay under Order 42 Rule 6(2)(b) of the *Civil Procedure Rules*, 2010. In particular, the applicant had not illustrated the substantial loss she would suffer should stay of execution, not be granted. The proposed appeal had little chance of success and granting the same would greatly prejudice the respondents.
 6. The respondents therefore urged this court to find that this Application constituted an abuse of the process of the court, and was only filed to waste the courts precious time and delay Justice. The court was thus urged to dismiss the same, with the alternative prayer that if this application was found to have merit, then the Applicant was to be directed to pay the respondents half the decretal sum and deposit the other half in a joint interest earning account held in the name of both Advocates.

Analysis & Determination

7. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and discern that the only issues which arise for determination is whether time should be extended to allow the Appellant file her Appeal out of time and subsequently, if allowed, should this court grant stay of execution of the Judgment/Decree dated 21st September 2023 issued in Kithimani CMCC No 121 of 2021.



8. Under Section 79G of the *civil procedure Act* a party is allowed to appeal against a decree/ruling within 30 days. But where there was a delay, the court could admit/allow the appeal to be filed out of time if the applicant satisfies the court that he/she had a good and sufficient cause for not filing the appeal in time. In the Supreme court citation of *Nicholas Kiptoo arap Korir Salat vs IEBC & 7 Others* (2014) eKLR the following principles of extension of time was laid down;
 - a. Extension of time is not a right of a 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 case by case basis;
 - d. Whether there is a reasonable explanation for the delay. The delay should be explained to the satisfaction of the court.
 - e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - f. Whether the application has been brought without undue delay; and
 - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
9. The court too could fall back on provisions of Section 1A, 1B & 3A which granted the court inherent powers to grant such orders as it may deem necessary and further enjoined court to determine disputes in a just manner while considering the lower rather than higher risk of injustice. In the citation of *Shabbir Ali Jusab vs Anaar Osman Gamrai & another* (2013) eKLR it was held that; the court should focus on substantive justice and disregard procedural technicalities.
10. The Appellant aver that the delay in issuance of instructions to Appeal was based on delayed/late instructions from the Applicants insurance company, who had internal changes within its legal setup as the legal officer, handing the matter was changed and further due to a delay in getting the typed ruling from court. It should be noted that Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court. An applicant must give court a reasonable explanation for the delay to the satisfaction of the court before the court can issue discretionary orders to his/her favour.
11. Unfortunately for, the Appellants, her explanation for the delay, is not plausible and does not hold. The typed Judgement was delivered and signed on the said 21.09.2023 in the presence of both counsels. The Applicants counsel asked for 30 days stay of execution and the same was granted. The issue of still seeking for typed judgement therefore does not arise as photocopying the already typed judgement could not have taken take time.
12. Further the applicant has not provided any proof of change of legal officers at the insurers office's to indeed prove that this internal change affected response time to the counsel's letter advising them over this judgement and the appeal timelines. The delay in filing this Appeal took over four months which again under the circumstance's constitutes an inordinate delay, when considering that the contents of the judgment was within their knowledge as at September 2023.
13. Finally, the court notes from the email filed dated 23rd January 2024, where the legal officer advices the Applicants counsel to; "Kindly do file a holding appeal and an application for stay of execution."



This simply implies that this appeal is to being filed as an afterthought to hold approaching execution heat. This shows and I indeed do find and hold, that this application is filed with ulterior motive, it is made in bad faith and with unclean hands in equity. The reasons thus advanced for the delay are hereby rejected.

14. There being no Appeal filed, the provisions of Order 42 Rule 6(2)(b) of the *Civil Procedure Rules*, 2010 cannot come into play and becomes unnecessary to consider the aspect of stay of the decree dated 21st September 2023, issued in Kithimani CMCC No 121 of 2021.

Disposition

15. Taking all relevant factors into consideration I do find that the application dated 6th February 2024 is unmerited and proceed to dismiss the same with costs to the Respondent.
16. The costs of this Application is assessed at Kshs .25,000/= all inclusive.
17. There shall be a stay of execution of 14 days from the date hereof to enable the Applicant organize to settle the decree issued and attendant costs and interest. In default execution to issue
18. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 19TH DAY OF MARCH, 2024 DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 19TH DAY OF MARCH, 2024

FRANCIS RAYOLA OLEL

JUDGE

In the presence of:-

Ms Kahiti for Appellant/Applicant

Mr Munyua Respondent

Sam Court Assistant

