



Njeru v Mutisya & another (Suing on their Own Behalf and on Behalf of the Estate of the Late Triza Nduku Kithela) (Miscellaneous Civil Application E034 of 2024) [2024] KEHC 2800 (KLR) (19 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2800 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS CIVIL APPLICATION E034 OF 2024**

**FR OLEL, J
MARCH 19, 2024**

BETWEEN

VICTOR MACHARIA NJERU APPELLANT

AND

MATHEW MATHEKA MUTISYA 1ST RESPONDENT

JANE MUKUI KITONYI 2ND RESPONDENT

SUING ON THEIR OWN BEHALF AND ON BEHALF OF THE ESTATE OF THE LATE TRIZA NDUKU KITHELA

(Memorandum of Appeal out of time against the judgement and decree of the Honourable B.A.Luova Adjudicator/Resident Magistrate delivered against the Applicants on 12th October 2023, In Machakos small claims court claim number E583 of 2023.)

RULING

A. Introduction

1. The Application before this court is a notice of motion application filed on 02.02.2023 brought pursuant to the provisions of section 3A 63(e), and 79G of the *Civil Procedure Act*, Order 22 rule 22, Order 42 rule 6, Order 50 rule 6, Order 51 rule 1 of the *Civil Procedure Rules* and Article 159 (2)(d) of the *Constitution* of Kenya and all other enabling provisions of law. The Applicant seeks the following prayers, That;
 - a. Spent
 - b. That this Honourable court be pleased to grant leave to the Applicant to lodge an Appeal and file a memorandum of Appeal out of time against the judgement and decree of the Honourable



B.A.Luova Adjudicator/Resident Magistrate delivered against the Applicants on 12th October 2023, In Machakos small claims court claim number E583 of 2023.

- c. Spent
 - d. That this Honourable court be pleased to grant a stay of execution of the judgement and/or decree issued by Honourable B.A. Luova Adjudicator/Resident Magistrate against the Applicant on 12th October 2023, pending the hearing and determination of the intended Appeal.
 - e. That this Honourable court allows the Applicants security to the court in the form of a Bank guarantee from the family Bank.
 - f. The costs of this Application abide the outcome of the Appeal
2. The Application is supported by the grounds on the face of the said Application and the supporting affidavit of One Victor Macharia Njeru dated 02.02.2024, wherein it was deposed that judgment in the primary suit was delivered in favour of the respondent in the sum of Kshs.30,000/= for pain and suffering, Kshs.100,000/= for loss of expectation of life, Kshs.650,000/= for loss of dependency, Kshs.59,550/= for special Damages, all totaling to Kshs.839,550/= plus costs and interest. Being aggrieved by the said Judgement he had instructed his advocates to file an appeal, but it was necessary to seek extension of time to lodge the said appeal, as time provided for had lapsed.
 3. The delay in filing the appeal had been caused by breakdown in communication between himself and his advocates and thus the delay occasioned was not deliberate and/or unreasonable. Further the appeal as filed had high chances of success as liability was wrongly arrived at and quantum awarded was high. If stay of execution as sought was not granted, the respondent would levy execution and render the Appeal as filed nugatory. The applicant further averred that his insurer, Direct Line Insurance Co Ltd, was willing to provide a bank guarantee as security from Family Bank to court. The application as filed had merit and she prayed that the orders sought be granted.
 4. This application was opposed by the respondents through their replying affidavit sworn by the 2nd respondent Jane Mukui Kitonyi, who deposed that this application was misconceived incompetent and was a gross abuse of the process of the court. The applicant had not met the threshold applied, when considering whether or not extension of time should be granted and the reason advanced for delay in filing the said appeal was not sufficient. The application was therefore filed as an afterthought and meant to solely delay and deny them their right to enjoy the fruits of judgement as a successful litigant. The court was further urged to consider that the appellants counsel had been advised of the said judgment in good time vide letters of 18.10.2023 and also reminded of the same on 11.01.2024 but failed to ensure settlement of the same.
 5. With regard to issue of stay of execution, the respondents averred that the applicant had not shown which substantial loss he would suffer should the decree be paid out and therefore even if the said sum was paid out, the appeal if filed would not be rendered nugatory. The applicant had moved court with unclean hands in equity and the principle of proportionality had dictated that the court should consider and opt for the lower rather than the higher risk of injustice. Given the unexplained delay in filing this application and coupled by the fact that the respondents were aware of the said judgement, it was just to allow the respondents to proceed with enforcing the primary decree. The applicant thus prayed that this application be dismissed with costs.



B. Analysis & Determination

6. I have carefully considered the Application, corresponding affidavits thereto on record. The two issues which arise for determination is; Whether this court should grant the Applicant leave to file his appeal out of time and secondly also grant him an order of stay of execution pending determination of the Appeal (if leave is granted).

i. Whether an order allowing the Applicants to file their Appeal out of time should be Allowed.

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.”

7. Order 50 Rule 6 of the *Civil Procedure Rules* does also provides that;

“where a limited time has been fixed for doing any act or taking any proceedings under these rules or by summary notice or by order of the court, the court shall have powers to enlarge time upon such terms(if any) as the justice of the case may require, and such enlargement maybe ordered although the application for the same is not made until after the expiration of the time appointed or allowed.”

8. The principles of granting leave to file an appeal out of time were discussed by the Court of Appeal in the case of *Omar Shurie v Marian Rashe Yafar* (Civil Application No. 107 of 2020) UR where it was held:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”

9. Similarly, The Court of Appeal in the case of *Tbuita Mwangi v Kenya Airways Ltd* [2003] eKLR discussed some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time, They include the following:

- i) The period of delay;
- ii) The reason for the delay;
- iii) The arguability of the appeal;
- iv) The degree of prejudice which could be suffered by the if Respondent the extension is granted;
- v) The importance of compliance with time limits to the particular litigation or issue; and
- vi) The effect if any on the administration of justice or public interest if any is involved.



10. Further the importance of giving a sufficient reason for the extension of time to appeal was discussed in the Court of Appeal case of *Susan Ogutu Oloo & 2 Others v Doris Odindo Omolo* (2019) eKLR where it was held:-

“In an application for extension of time, the single Judge has discretion. I am aware that the discretion I have is to be exercised judiciously and not whimsically or capriciously. The guiding principles on the issue of extension of time was laid out by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v IEBC* (2014) eKLR Sup Ct Application No 16 of 2014.

The Supreme Court aptly stated extension of time is not a right of a party; a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court. Of paramount importance, the reason for delay must be explained to the satisfaction of the Court. Further, the application for extension must be brought without undue delay and it must be demonstrated if the respondent will not suffer prejudice if extension is granted”.

11. The applicant counsel was duly informed of the said judgement by the respondents advocate vide their letter of 18.10.2023 and again reminded of the same on 11.01.2024, but took no proactive action in filing this appeal. From the pleadings filed, it is obvious that the reason put forth explaining the delay are weak and unsatisfactory. Bottomline, no plausible explanation has been proffered as to why, the applicant and his advocate were unable to communication between 12th October 2024 and 5th February 2024 when this application was filed almost four months later. In the era of modern communication, it cannot take over three months to communicate and make a decision as to whether to file an appeal or not.
12. Court’s discretion can only be exercised based proper reasons advanced, the court will consider all facts and circumstances of the case, both prior and subsequent and the respective merit of the application under consideration. Courts also exist for purposes of dispensing justice and its decisions must be reflective of fairness and made in the best interest of the people whom the law is intended to serve. The oxygen principles further emphasis that the court’s overriding objective is to make just determination and dispose of court business in an expeditious manner. Therefore, to allow this application would be an affront to these rules, and would not promote the dispensation of justice and/or enhancing public confidence in the process of court

Disposition

13. Taking all relevant factors into consideration;
- a. The application dated 2nd February 2024 is unmerited and the same is therefore dismissed with costs
 - b. The costs of this application is assessed at kshs.25,000/= all inclusive.
 - c. The applicant is granted 14 days from the date hereof to settle the decree issued in Machakos Small claims court Number E583 of 2023, plus costs and interest, failure of which execution to issue.
14. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 19TH DAY OF MARCH, 2024

FRANCIS RAYOLA OLEL



JUDGE

Delivered on the virtual platform, Team this 19th day of March, 2024

In the presence of: -

Mr. Ouko for Appellant/Applicant

Mr. Gichimo for Respondent

Sam Court Assistant

