



**Ogutu & another v Andale & Asieko (Suing as the Legal Administrator of the Estate of the Late Raphael Ondeko Andale-DCD) (Miscellaneous Civil Application E021 of 2024) [2024] KEHC 3974 (KLR) (24 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3974 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
MISCELLANEOUS CIVIL APPLICATION E021 OF 2024  
RE ABURILI, J  
APRIL 24, 2024**

**BETWEEN**

**JOHN CALVINS OWINO OGUTU ALIAS KELVIN OWINO  
OGUTU ..... 1<sup>ST</sup> APPLICANT  
JOHN ODERA OCHIENG ..... 2<sup>ND</sup> APPLICANT**

**AND**

**ISACK ESILABA ANDALE & ELIJAH JAMES ASIEKO (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF THE LATE RAPHAEL ONDEKO ANDALE-DCD) ..... RESPONDENT**

**RULING**

1. The Applicants herein by their application dated 20<sup>th</sup> February 2024 seek leave of this court to appeal out of time and for an order staying execution of decree in Maseno SPMCC No. E120 of 2019 pending the hearing and determination of the interned appeal,
2. Despite the court imploring the parties counsel to endeavour to agree to resolve the application amicably, the parties were unable to agree hence this Ruling.
3. The Respondent who is the decree holder in the lower court opposes both limbs of the application dated 20<sup>th</sup> February 2024 contending that the Applicant does not deserve the orders sought as the delay is inordinate (112 days) which delay is not explained. That as extension of time is discretionary, in the absence of a credible reason for the inordinate delay, as there is no evidence of sickness of the Applicant's instructing client, this court should not accept the unsupported averments in the Applicant's affidavit.
4. He relied on the case of *Njang Ngigi v Nyogi James & Another* [2016] eKLR arguing that even 2 days' delay that is unexplained is unreasonable.



5. On the prayer for stay of execution of decree, it was contended in submissions that in the event that the court grants leave to file an appeal out of time then ½ of the decretal sum should be paid to the Respondents and the balance be deposited in a joint interest earning account since the only issue is on quantum of damages.
6. The Applicants deposed and submitted that the reasons for the delay were that despite judgment being rendered on 7<sup>th</sup> November 2023, the instructing client was unwell and admitted in hospital, that the appeal raises arguable issues and that substantial loss will result to the Applicant if stay is declined.
7. The Applicants' counsel submitted that their clients are prepared to pay part of the damages being loss of expectation of life and pain and suffering and have the contested award on loss of dependency deposited into a joint interest earning account since they are only challenging the award on loss of dependency which they aver is on the high side.
8. The above is a summary of what each of the parties have placed before this court seeking for a determination.
9. The issues for determination emerge from each of the respective prayers namely:
  1. Whether this court should enlarge time for filing the appeal as intended and if so;
  2. Whether the condition for stay of execution of decree pending appeal have been met by the Applicant.
10. Section 79G of the *Civil Procedure Act* provides the timelines within an appeal from decree or order of the lower court may be made to the High Court, which is 30 days from the date of decree or order.
11. The proviso thereof does provide for the discretion of the court in enlarging time for filing of the appeal out of time.
12. Nonetheless, the extension of time is not an automatic right. There are conditions a party must meet.
13. Order 50 Rule 6 of the *Civil Procedure Rules* also provides and gives this court the power to enlarge time where a limited time has been fixed for doing any act or taking proceedings under the Civil Procedure Rules or by summary Notice or by order of the court.
14. Courts have over time held that where there is delay, the period of that delay, and the reasons for the delay must be explained to the satisfaction of the court. This is because Article 159 of *the Constitution* abhors delayed justice.
15. Furthermore, the right of appeal of a party who has taken their sweet time to challenge a judgment or decree must be weighed against an equally weight right of the decree holder to enjoy the fruits of their judgment and therefore there must be a just cause for depriving a plaintiff decree holder, of that right.
16. On delay, the Judgment and decree sought to be impugned were rendered on 7<sup>th</sup> November 2023. The appeal ought to have been filed on or before 7<sup>th</sup> December 2023.
17. It was not until 21<sup>st</sup> February 2024 that the Applicant filed the application herein seeking for enlargement of time to file an appeal out of time. The day was for 112 days.
18. On the reasons for the delay it is noted from annexure CM-1(b) that instructions to appeal were given by the Insurance company on 16<sup>th</sup> February 2024, a few days to the lodgement of this application. The author of that letter of instructions acknowledges the advocate letter of 10<sup>th</sup> November 2023 notifying the insurance of the outcome of the suit against their insured.



19. A Mr. Kelvin Ngure then explains that he had been on sick leave for a very long time but was now well and that the advocate's letter was misfiled by the secretary who had just found it and placed it before the concerned officer.
20. He indeed apologized for the delay in furnishing instructions and goes ahead to instruct that extension of time be sought to challenge quantum of damages awarded, while further instructing their advocates to implore the Plaintiff's counsel to allow for negotiations geared towards reduction of quantum of damages so that the insurance can settle.
21. The Respondent's counsel contends that no hospital treatment notes were availed to prove sickness. Whereas hospital treatment notes would prove sickness, and that is the whole truth, where the sickness is not that involving an accident, filing in court treatment notes for a person would violate their right to privacy which is guaranteed by the Constitution.
22. This is however, not to say that a letter from the doctor could not be filed to prove illness.
23. Nonetheless, this court would indeed wonder why a person working in such an establishment would, in a letter instructing advocates say that he was very ill and on sick leave, when they were not, just to benefit the insurance company from delayed settlement of a decree. That could be possible but morally wrong as one would in my view, be inviting illness on themselves.
24. That said, there is an explanation for the delay of 3<sup>1</sup>/<sub>2</sub> months to file an appeal, by the Applicants' insurers who are liable to settle the claims on decree holders.
25. In addition, the right of appeal enables a party to ventilate their grievances fully and in this case, challenging quantum of damages on loss of dependency.
26. It follows that justice can still be done to a party who has delayed approaching the court but gives a plausible explanation.
27. Accordingly, I find that this is a good case where this court can exercise discretion and enlarge time to file an appeal, which in my view, is not frivolous.
28. I grant leave to the Applicants to file an appeal from Maseno SPMCC No. 120 of 2019 out of time. The intended appeal shall be filed and served within 10 days of today.
29. On the second limb of the application, the Applicants pray that there be a stay of execution of decree in Maseno SPMCC No. 120 of 2019 pending the filing, hearing and determination of the intended appeal.
30. On this limb, even without delving into the conditions that must be met under Order 42 Rule 6 (2) of the Civil Procedure Rules for an order of stay to issue, the Applicant has offered Bank Guarantee but during the oral hearing, upon the Respondent asking for payment of ½ of the decretal sum and the balance to be deposited in an interest earning account, the Applicants' counsel submitted that the Applicants' insurers were willing to settle the claims for pain and suffering and loss of expectation of life and deposit the bulk which is for loss of dependency in an interest earning account. The respondents' counsel urged that the court orders for payment of half of the decretal sum to them and the rest be invested as proposed by the applicants' counsel.
31. That being the case, I need not venture into the other conditions that must be met for stay orders to issue.
32. From the application and draft memorandum of appeal, the Applicants challenge the award under loss of dependency in the sum of Kshs.600,000 claiming that the respondents were not qualified



dependants under Section 4 of the Fatal Accidents Act. Although no decree is annexed, from the letter of 20<sup>th</sup> November 2023 advising their clients of the judgment rendered on 7<sup>th</sup> November 2023;

1. Liability was entered at 100% against the defendants,
  2. Pain and suffering, Kshs.150,000.
  3. Loss of expectation of life Kshs.100,000
  4. Loss of dependency Kshs.600,000
  5. Special damages Kshs.15,000  
Total Kshs.865,550 plus costs and interest.
33. The Applicants have already offered security for the due performance of decree albeit they have not demonstrated any substantial loss that they are likely to suffer if stay is not granted.
34. However, in view of the serious attack on the loss of dependency award and in the absence of evidence of means on the part of the Respondents, to refund the decretal sum should the appeal be successful, then indeed, the appeal shall be rendered nugatory.
35. For the above reasons, I exercise discretion and balance the interests of each party to this appeal and order as follows:
1. There shall be stay of execution of decree in Maseno SPMCC No. 120 of 2019 pending the filing, hearing and determination of the intended appeal herein conditional upon the Applicants paying to the Respondents through the Respondents' counsel Ms. S. N. Ngare & Company Advocates the sum of Kshs.265,000 together with costs of the suit based on Kshs.265,000 as the principal sum, for disbursement to the Respondents herein.
  2. The balance of Kshs.600,000 which is the award for loss of dependency shall be deposited in a joint interest earning account to be held by both parties' counsel Kimondo Gachoka & Company Advocates and Ms. Ngare & Company Advocates in a reputable commercial Bank until further orders of this court, upon determination of the intended appeal.
  3. The above orders shall be complied within 30 days of today.
  4. The Respondents shall have costs of this application assessed at Kshs.15,000 which shall be added to the Kshs.265,000 and costs of the suit in the case below based on the Kshs 265,000 as the Principal sum.
36. This file is closed.
37. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 24<sup>TH</sup> DAY OF APRIL, 2024**

**R. E. ABURILI**

**JUDGE**

