



REPUBLIC OF KENYA



Kamau v Kamau (Civil Appeal E006 of 2023) [2024] KEHC 6323 (KLR) (30 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6323 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA**

CIVIL APPEAL E006 OF 2023

FN MUCHEMI, J

MAY 30, 2024

BETWEEN

PAUL KIMANI KAMAU APPLICANT

AND

GEORGE KIMANI KAMAU RESPONDENT

RULING

1. The application dated October 4, 2023 seeks for orders to admit the appeal out of time against the judgment in Thika Small Claims Court Civil Claim No. E665 of 2022 delivered on August 18, 2023.
2. The respondent opposed the application and filed a Replying Affidavit dated February 29, 2024.

Applicant's Case

3. The applicant states that judgment in Thika SCCCC No. E665 of 2022 was delivered on August 18, 2023 whereby the court found in favour of the respondent against the applicant. The trial court found the applicant 100% liable and awarded the respondent damages in the sum of Kshs. 181,390/- being special damages with costs and interests.
4. Being aggrieved with the said judgment, the applicant states that he applied for a copy of it through his advocates on August 30, 2023 but was supplied with the judgment on September 29, 2023.
5. The applicant further states that the court registry staff said they could not trace the file until September 29, 2023 when his request was honoured. As such, the applicant argues that he was not in a position to prepare the memorandum of appeal without the full judgment of the trial court thus the delay in lodging the appeal.
6. The applicant avers that the time prescribed by statute to lodge an appeal lapsed before he could obtain a copy of the judgment. He deposes that even after that, he was not aware that the court could extend time for filing the appeal. Accordingly, the applicant states that the failure to lodge the appeal was beyond his control and it is only fair and just that the leave to file out of time be granted.



The Respondent's Case

7. The respondent opposes the application on the premise that it is frivolous, vexatious and an abuse of the court process. The respondent contends that he was the registered and insured owner of motor vehicle registration number KCB xxxx.
8. On December 27, 2019, the respondent states that he reported to his insurer's offices, Old Mutual General Insurance Kenya Limited formerly known as UAP Insurance Company Ltd that his motor vehicle had been involved in an accident and had been damaged. The respondent states that he filled out the relevant claim documents after which his insurance company settled his full claim. Thereafter, the respondent states that his insurer instructed their advocates to file a recovery suit under the doctrine of subrogation against the applicant, who at the time of the accident was the registered owner of motor vehicle registration number KBJ xxxx, which had been blamed for causing the accident. The suit filed was Thika SCCC No. E665 of 2022 seeking damages of the sum of Kshs. 181,890/- plus costs and interests against the applicant
9. The respondent states that the matter proceeded for hearing and judgment was entered in his favour. As such, he states that the instant application and impugned appeal are only meant to frustrate him in getting the fruits of his judgment. Furthermore, the respondent contends that execution is a lawful process which cannot render an appeal nugatory.
10. The respondent argues that the intended appeal is an afterthought. Moreover, the applicant has not given sufficient reasons to warrant the court to exercise its discretion in his favour. In any event, the respondent argues that the filing of a memorandum of appeal within time did not require a certified copy of the judgment and proceedings.
11. The respondent states that the intended appeal does not have high chances of success as the issues raised in the memorandum of appeal were extensively addressed in the judgment by the trial court.
12. The respondent states that he stands to suffer prejudice should the application be allowed including any additional costs for defending the appeal.

The Applicant's Submissions

13. The applicant reiterates what he deposed in his affidavit and submits that the mistakes of the court registry staff should not be visited upon him because he gave instructions to his advocate in good time and made all the necessary steps to ensure the same was done in a timely manner. To support his contentions, the applicant relies on the cases of *Belinda Muras & 6 Others vs Amos Wainaina* [1978] and *Philip Chemwolo & Another vs Augustine Kubede* [1982-88].
14. The applicant submits that from the CTS status as of September 5, 2023 when he applied for the typed proceedings, the status remained "submitted waiting processing." As such, the applicant submits that he has been vigilant and desirous of instituting the appeal and further that he is willing to prosecute the appeal and has undertaken steps to compile the records of the appeal.
15. The applicant argues that amongst his grounds of appeal, is the fact that his motor vehicle did not hit the respondent's motor vehicle since there was a lorry involved. The applicant contends that he is appealing on the issue of liability which is a *bona fide* issue for determination by the current court. To support his contentions, the applicant relies on the case of *Martha Wangari Karua vs IEBC Nyeri* Civil Appeal No. 1 of 2017 and submits that the rules of natural justice require a court to hear a party however weak his case may be.



16. The applicant contends that no prejudice will be occasioned to the respondent by admitting the appeal out of time as he shall have a chance to respond to the appeal on merit.

The Respondent's Submissions

17. The respondent submits that the instant application is a gross abuse of the court process whose sole aim is to delay and prevent him from enjoying the fruits of a lawful judgment. The respondent argues that execution is a legal/lawful process which cannot render an appeal nugatory.
18. The respondent contends that the filing of a memorandum of appeal did not require a certified copy of judgment and proceedings. The respondent submits that the grounds of the intended appeal do not demonstrate an appeal with high chances of success as all the issues therein were addressed extensively in the lower court judgment. Moreover, the respondent states that the applicant has not informed the court whether he intends to rely on new evidence to dispute liability and ownership on matters of facts and law. Additionally, the applicant has not filed or served his record of appeal.
19. The respondent relies on the case of *Serephen Nyasani Menge vs Rispah Onsase* [2018] eKLR and submits that the applicant has not shown that he shall suffer substantial loss if the application is not allowed.

The Law

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

20. 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.

21. 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 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.
22. 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.
23. 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.”

24. 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 judgment. The issue of delay of typed proceedings and judgment is a well-known issue in our legal system and courts have extended time and held that such delay is not on the part of the party but the court and this issue consist of facts beyond a party’s reach. This was stipulated by the Supreme Court in the case of *Hassan Nyanje Charo vs Khatib Mwasbetani & 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.

25. 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.

26. In this matter, the trial court delivered its ruling on August 18, 2023. The applicant requested for a copy of the judgment vide a letter dated August 20, 2023 and sent on August 30, 2023. From the copy of the print out of the CTS the applicant’s advocates applied for the copy of judgment and proceedings on 30th August and 5th September respectively. However, the requisite court fees to enable the court registry process their application was not paid. Thus it is evident that the delay was occasioned by the applicant himself and not the court registry as he claims.



27. The applicant filed the instant application on October 5, 2023 which is approximately 17 days after the requisite period within which an appeal ought to be filed. The delay of 17 days in my view is not inordinate and inexcusable although the reasons given by the applicant for the delay are not plausible.
28. I have further perused the grounds of appeal as set out in the Memorandum of Appeal and without delving into the merits of the appeal noted that the appeal does not raise any arguable grounds of appeal. Furthermore, an appeal from the Small Claims Court to the High Court is only allowed on matters of law pursuant to Section 38 of the *Small Claims Court Act*. The grounds of appeal as set out in the memorandum of appeal pertain to points of fact. Thus, it is evident that the chances of the appeal succeeding in the event that the orders are granted are limited.
29. Consequently, it is my considered view that the applicant has not established to the satisfaction of the court that this court should exercise its discretion to enlarge time.
30. Accordingly, the application dated October 4, 2023 lacks merit and is hereby dismissed with costs.
31. It is hereby so ordered.

RULING DELIVERED, DATED AND SIGNED AT THIKA THIS 30TH DAY OF MAY 2024.

F. MUCHEMI

JUDGE

