



Mwangangi v Mugi (Civil Appeal 1 of 2023) [2024] KEHC 6321 (KLR) (30 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6321 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 1 OF 2023
FN MUCHEMI, J
MAY 30, 2024**

BETWEEN

PATRICK MUTUA MWANGANGI APPLICANT

AND

BENSON MAINA GATHITHI MUGI RESPONDENT

RULING

Brief Facts

1. The application dated 5th September 2023 seeks for orders of leave to file an appeal out of time against the judgment in Thika Small Claims Court Civil Case No. 540 of 2022 delivered on 13th July 2023. The applicant also seeks for orders for stay of execution in respect of the said judgment delivered on 13th July 2023 pending the hearing and determination of the appeal.
2. In opposition to the application, the respondent filed a Replying Affidavit sworn on 14th October 2023.
3. On 7/09/2023, the court granted interim stay of execution on condition that the applicant deposit Kshs. 40,000/- in court within 7 days. On 7/11/2023, Counsel for the respondent informed the court that the decretal amount was Kshs. 900,000/- and thus Kshs. 40,000/- as security was quite low. The court therefore enhanced the amount of security to be deposited to Kshs. 160,000/- making the total sum Kshs. 200,000/-. The applicant failed to deposit the additional security amount which led to the court vacating the orders of stay granted earlier. The orders of stay stand vacated and this court shall only address the prayer for extension of time to appeal.

Applicant's Case

4. The applicant states that judgment in Thika Small Claims Court Civil Case No. 540 of 2022 was delivered on 13th July 2023 whereby he was condemned to pay Kshs. 161,630/-. Being dissatisfied with the judgment, the applicant states that he is desirous of challenging the decision of the trial court however the time within which to file an appeal has lapsed.



5. The applicant contends that he was not aware that judgment was delivered on 13th July 2023 as he was represented by his advocate who never informed him of the delivery of the said judgment. It was not until the applicant was served with the warrant of attachment and proclamation notice that he became aware of the judgment.
6. He contends that the judgment entered was for Kshs. 161,630/- while the warrant of attachment shows that the decretal amount is Kshs. 964,996/-.
7. The applicant contends that the delay in filing the appeal is due to failure of his advocate to inform him of the said judgment.

The Respondent's Case

8. The respondent opposes the application on the premise that it is misconceived, vexatious, frivolous and an abuse of the court process. The respondent deposes that the applicant does not deserve the court's exercise of judicial discretion in his favour for he has not explained the reasons of the delay in filing the appeal satisfactorily. Whereas the applicant has faulted his advocates for not notifying him of the judgment, he has not tendered any evidence to demonstrate that he was diligent in following up on the judgment since he was aware of the matter. In the absence of an affidavit from the said advocate, the respondent argues that the assertions remain mere unproven non-persuasive excuses to which the court cannot exercise its discretion in favour of.
9. The respondent states that the applicant has demonstrated a history of indolence and inertia as during the trial. The trial court had to wake him up from his slumber after interlocutory judgment had been entered and execution commenced. The trial magistrate in setting aside the *ex parte* judgment observed that the judgment was regular because the applicant was duly served but declined to file a response.
10. The respondent thus argues that the application and the intended appeal have been brought as an afterthought and delay tactic to frustrate his effort to execute and enjoy the fruits of his judgment.
11. The respondent argues that the intended appeal has no chances of success as the appeal does not raise any points of law in line with section 38 of the *Small Claims Court Act*. As such, the respondent states that the applicant is not deserving of the orders he seeks in this application.
12. Directions were issued that the application be canvassed by way of the written submissions. However, none of the parties filed submissions within the time given by the court.
13. The main issue for determination is whether the court should exercise its discretion to grant 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;

14. 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.

15. 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 v 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.
16. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat v 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.

17. Similarly in the case of *Paul Musili Wambua v 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.”

18. The applicant has faulted his advocates on record for not informing him about the delivery of the judgment of the trial court, for the delay caused in filing his appeal. I have perused the court record and noted that judgment was delivered on 13th July 2023.
19. Whereas it is true that mistakes of an advocate should not be visited on a litigant, it is also true that suits belong to the parties not their advocates. Thus where a litigant has instructed an advocate in a matter, he or she has an obligation to follow up on instructions given to ensure that they were executed



and executed in good time. This principle was enunciated in the Court of Appeal in *Habo Agencies Limited v Wilfred Odhiambo Musingo* (2015) eKLR where the court stated:-

It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.

20. Similarly in *Bi-Mach Engineers Limited v James Kaboro Mwangi* (2011) eKLR, the court reiterated the duty of an applicant to follow up on instructions given to an advocate and expressed itself as follows:-

The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up on the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy.

21. The applicant has not shown any attempts he made to find out from his advocates the position of the matter or follow up on the judgment. The applicant only faults his advocates for not telling him about the judgment. From the foregoing, it is my considered view that the applicant has not satisfactorily explained the delay in filing the intended appeal.
22. I have perused the intended Memorandum of Appeal and the judgment of the trial court and noted that the appeal does not raise pertinent issues of law. 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 intended appeal succeeding in the event this application is granted, are quite limited. In the circumstances, I reach a conclusion that the applicant has not established to the satisfaction of the court the reasons for enlargement of time.
23. Accordingly, it is my considered view that this application dated 5th September 2023 lacks merit and is hereby dismissed with costs.
24. It is hereby so ordered.

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

F. MUCHEMI

JUDGE

