



**Galgalo v Tadi (Miscellaneous Civil Application E010 of 2023)  
[2024] KEHC 6005 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6005 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MARSABIT  
MISCELLANEOUS CIVIL APPLICATION E010 OF 2023**

**JN NJAGI, J**

**MAY 24, 2024**

**BETWEEN**

**ABDULLAHI GALGALO ..... APPLICANT**

**AND**

**ENOCK KALO TADI ..... RESPONDENT**

**RULING**

1. The Applicant has filed an application dated 6<sup>th</sup> December 2023 seeking for the following orders:
  - (1) Spent
  - (2) Spent
  - (3) That the Honourable Court be pleased to grant the applicant leave to file appeal out of time against the judgment delivered by Hon. Ombinja (RM) on 21<sup>st</sup> January 2021.
  - (4) That the Honourable Court be pleased to issue an order for stay of execution of the judgment entered and delivered herein against the applicant on 21<sup>st</sup> January 2021 and subsequent decree of 13<sup>th</sup> September 2023 in Civil Appeal No.12 of 2018 pending the hearing and determination of the intended appeal.
  - (5) That the costs of the application be provided for.
2. The application was based on grounds stated on the face of the application and supported by the affidavit of the applicant sworn on the 6<sup>th</sup> December 2023. The grounds in support of the application are that the court has issued a decree against a judgment dated 27<sup>th</sup> August 2018 yet the said judgment was set aside by the trial court on the 19<sup>th</sup> May 2021 and another issued on 21<sup>st</sup> January 2021.
3. The Applicant further averred that he was to call additional witnesses in his defence but that before the application was made to the trial court he was detained arising from a judgment in Meru High



Court Criminal Case No.16 of 2019 and as a result communication between him and his advocate, Mr. Halake, was cut. That upon release from custody he was served with a Notice to Show Cause dated 22<sup>nd</sup> July 2022. That that is when he learnt that judgment was delivered against him. That he filed an application dated 21<sup>st</sup> November 2022 seeking that he be allowed to conclude his defence but the application was dismissed on 27<sup>th</sup> June 2023. That he subsequently sought for resources to find an advocate to initiate an appeal but before he could do so he was on the 2<sup>nd</sup> December 2023 served with a decree dated 13<sup>th</sup> September 2023. That he attended court on the day summoned but received an emergency and left court before his matter was called out. A warrant of arrest was issued against him.

4. The Applicant further deposed that he has an arguable appeal with high chances of success. That the intended appeal will be rendered nugatory if the prayers sought are not granted.
5. The application was opposed by the respondent vide his grounds of opposition dated 13<sup>th</sup> December 2023 and his replying affidavit of even date.
6. The respondent deposed that the applicant has not given sufficient reason for delay in filing the appeal within the time stipulated by the law. That in the trial before the lower court, both of them attended the full hearing before Hon. Ombinja wherein they tendered their testimonies, were cross-examined and judgment was delivered in the respondent's favour on 21<sup>st</sup> November 2021. That on 5<sup>th</sup> December 2023, the matter came up for the applicant to show cause but the Applicant was absent despite being served. The court issued a warrant of arrest against him. That he was shocked when the applicant served him with the present application.
7. It was the contention of the respondent that the same advocate who was representing the applicant at the lower court is the same one appearing in this application. Therefore, that the allegation that he was seeking for an advocate to file the appeal is not true. It was the position of the respondent that the application is an afterthought and a misuse of the judicial process. That the delay is unexplainable and inexcusable. That there is no legal or valid reason to justify the granting of the orders sought. That the same is made in bad faith and is only meant to delay the respondent from enjoying the fruits of his judgment.

## Submissions

8. The court gave directions that the matter be canvassed by way of written submissions. Counsel for the Applicant Mr. Behailu, failed to file submissions despite being indulged by the court on several occasions to do so. Counsel for the Respondent, Mr. Odhiambo, did comply with the directions of the court and filed his submissions.
9. Counsel for the Respondent submitted that the application has not met the threshold for granting of orders for stay of execution as stipulated under Order 42 Rule 6 of the *Civil Procedure Rules*, 2010, which are: explanation for the delay, proof of substantial loss and offer for security. It was submitted that the applicant has not demonstrated that he will suffer substantial loss if the prayers sought are not granted. Neither has he offered security for due performance of the decree. That in the premises the orders sought should not be granted.
10. As regards the application for leave to file the appeal out of time, the respondent referred to the case of *Thuita Mwangi v Kenya Airways Ltd* (2003) eKLR where the factors to be considered in that kind of application were said to be: the period of delay, the reason for the delay and the prejudice which could be suffered by the respondent if the application is granted.
11. It was submitted that the applicant filed an application before the lower court seeking to set aside the judgment and the decree on the ground that he had not concluded his defence as he was placed in



custody over a criminal matter. The trial court delivered a ruling over the application on 27<sup>th</sup> June 2023. The applicant filed the instant application on 6<sup>th</sup> December 2023. It was submitted that the instant application was filed 2 years after delivery of the judgment and 5 months and 10 days after the delivery of the ruling of 27<sup>th</sup> June 2023. That there was no explanation for the delay. That the applicant was jolted into action after being served with the Notice to Show Cause.

12. It was submitted that extension of time is an equitable remedy reserved for deserving cases. That since the applicant has failed to demonstrate a good and sufficient cause for not filing the appeal in time, the same ought not be granted.
13. On the issue of prejudice, the Respondent submitted that the respondent will suffer prejudice if extension of time is granted as the suit was instituted in court in the year 2018 and the applicant has been filing applications to delay execution proceedings at the lower court. It was submitted that the applicant will not suffer any prejudice as he was given a fair opportunity to be heard at the lower court. The Respondent urged the court to dismiss the application with costs.

### **Analysis and Determination**

14. I have considered the grounds in support of the application, the grounds in opposition thereto and the submissions. It is however to be noted that it is Counsel Halake who appeared for the Applicant at the lower court while Counsel Behailu appeared for the Applicant in this application. The issues for determination in the application are:
  - (1) whether the application has met the threshold for grant of leave to file appeal out of time.
  - (2) Whether the application has met the conditions for grant of stay of execution pending hearing and determination of the intended appeal.

### **Leave to file appeal out of time.**

15. Section 79G of the *Civil Procedure Act* requires that appeals from subordinate courts to the High Court be filed within 30 days of the delivery of the judgment or order. However, this court has wide discretion to enlarge time under Section 95 of the *Civil Procedure Act* and Order 50 Rule 6 of the *Civil Procedure Rules*, 2010. The same provide as follows:

#### Section 95. Enlargement of time

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

#### Power to enlarge time [Order 50, rule 6.]

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 power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

16. The factors that the court has to consider in deciding on whether or not to grant an application to file an appeal out of time are as was laid out in the case of *Leo Sila Mutiso vs. Rose Hellen Wangari*



Mwangi cited with approval by the Court of Appeal in Thuita Mwangi v Kenya Airways Ltd [2003] eKLR 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.”

17. The Supreme Court of Kenya in the case of Nicholas Kiptoo Arap Korir Salat v IEBC & Others [2014]eKLR set the following guidelines for consideration in an application for enlargement of time:

- “(1) 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;
- (2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- (3) Whether the court should exercise discretion to extend, is a consideration to be made on a case to case basis;
- (4) Whether there is a reasonable reason for the delay, the delay should be explained to the satisfaction of the court;
- (5) Whether there will be any prejudice suffered by the Respondent if the extension is granted;
- (6) Whether the application has been brought without undue delay; and
- (7) .....

18. It is therefore incumbent in an application for enlargement of time for the applicant to demonstrate that the application has been made without undue delay, the explanation for the delay and that there will be no prejudice suffered by the Respondent if leave to file the appeal out of time is granted.

19. The judgment that is the subject of the intended appeal in this matter was delivered on 21<sup>st</sup> January 2021. The application for leave to file appeal out of time was made on 6<sup>th</sup> December 2023. There was therefore a delay of close to 2 years before the application was made.

20. The explanation the applicant has given for the delay is that in the course of the hearing at the lower court he was remanded at Meru High Court over a murder charge that he was facing and he lost communication with his advocate. That when he was released he was served with a Notice to Show Cause dated 22<sup>nd</sup> July 2022. That that is the time he learnt that a judgment had been delivered against him. That he filed an application dated 21<sup>st</sup> November 2022 seeking to be allowed to conclude his defence but the application was dismissed by the trial court on the 27<sup>th</sup> June 2023. He later filed the instant application on 6<sup>th</sup> December 2023.

21. Whether or not to allow an application for leave to file an appeal out of time lies at the discretion of the court. Where there is delay, the same has to be explained to the satisfaction of the court.

22. I have perused the record of the lower court and noted that the Applicant gave his defence in court upon which his counsel, Mr.Halake closed their case. The court then gave a date for judgment. The



same was delivered on the 21<sup>st</sup> January 2021 in the presence of Mr. Halake. The Applicant did not turn up for judgment though the judgment date was given in his presence.

23. From the above, it is clear that the allegation that the applicant was prevented from calling witnesses because he was remanded over a murder case in the course of the hearing is false. His case was closed by his counsel in his presence and there was no indication to the court that he was to call witnesses. If he was thereafter remanded over a murder case, he has not indicated the date when he was remanded. Neither has he indicated the date when he was released. Even after being released, he did not contact his counsel to inquire on the fate of the judgment. Neither did he find out with the court what became of the judgment yet judgment date was given in his presence. It is not until when he was served with the Notice to Show Cause that he took action by filing the application dated 21<sup>st</sup> November 2022. After the said application was dismissed he stayed for another 5 months before filing the instant application. There is no plausible explanation for the delay. In the premises the Applicant has not given reasonable and satisfactory explanation for failure to file the appeal within the time stipulated by the law. The application ought to be dismissed on this ground.

### **Stay of Execution**

24. An Applicant for stay of execution pending an intended appeal has to satisfy the conditions set out in Order 42 Rule 6(2) of the *Civil Procedure Rules*, 2010. These are that:

- (1) The application was brought without unreasonable delay.
- (2) The Applicant will suffer substantial loss unless the orders sought are granted.
- (3) The Applicant has given security for due performance of the decree as may be binding on him.

25. The application herein was filed nearly 2 years after delivery of the Judgment. The application was thus not brought without unreasonable delay. No reasonable explanation has been given for the delay.

26. On the second condition, an applicant is required to demonstrate that he/she will suffer substantial loss if the orders sought are not granted. In the case of *Samvir Trustee Limited v Guardian Bank Limited* Nairobi (Milimani) HCCC 795 of 1997, Warsame J. (as he then was) held as follows on the question of substantial loss:

For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...

27. In the case of *Rhoda Mukuma v John Abuoga* [1988] eKLR the court emphasized the centrality of substantial loss thus;

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

28. The Applicant has neither in his grounds in support of the application nor in his supporting affidavit touched on the issue of suffering substantial loss if the application is not allowed. The claim is on a money decree. It has not been shown that there is a loss to be prevented by allowing the application.

29. The third condition for grant of stay of execution pending an intended appeal is that the applicant has to offer security for due performance of the decree. This is meant to give the Respondent something



to fall back to in the event that the appeal is not successful. In *Arun C. Sharm v Ashana Raikundalia T/A/Rairundalia & Co. Advocates & 2 Others* [2014] eKLR, the court stated:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor...”

30. The applicant in this matter has not offered security for due performance of the decree. In the absence of this he does not deserve the exercise of this court’s discretion in his favour. The application is for dismissal.

31. I am alive to the fact that in an application such as the one before me, the court is called upon to balance the competing interests of the two parties where one party is exercising its undeniable right of appeal and the other which has a judgment in its favour. This position was aptly articulated in the case of *Kenya Commercial Bank Ltd v Sun City Properties Ltd & 5 Others* [2012] eKLR where it was held:

“In an application for stay, there are always two competing interest that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should always be balanced.

32. In the instant matter, the Application has not met the threshold for grant of leave to file appeal out of time and for grant of stay of execution pending the hearing and determination of an intended appeal. If there was any issue in the manner the decree was drawn that is something to be taken up with the trial court. The upshot is that the application dated 6<sup>th</sup> December 2023 is unmerited and is dismissed with costs to the Respondent.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT MARRSABIT THIS 24TH MAY 2024**

**J. N. NJAGI**

**JUDGE**

In the presence of:

Miss Kerubo for Appellant

No appearance for Respondent

Court Assistant Jarso

30 days R/A.

