



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kahoro v Mwangi (Civil Appeal 371 of 2023) [2024] KEHC 8028 (KLR) (27 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 8028 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL 371 OF 2023  
FN MUCHEMI, J  
JUNE 27, 2024**

**BETWEEN**

**MICHAEL GACHANGA KAHORO ..... APPLICANT**

**AND**

**MICHAEL NG'ANG'A MWANGI ..... RESPONDENT**

**RULING**

**Brief facts**

1. The application dated October 9, 2023 seeks for orders of leave to file an appeal out of time against the judgment in Ruiru SPMCC No. E602 of 2022 delivered on July 12, 2023 and further seeks for orders of stay of execution in respect of the same judgment pending the hearing and determination of the intended appeal.
2. The respondent opposed the application through his replying affidavit sworn on October 24, 2023.

**Applicant's Case**

3. The applicant states that judgment in Ruiru SPMCC No. E602 of 2022 was delivered on July 12, 2023 whereas the court found in favour of the respondent and awarded him general damages of Kshs. 500,000/- and special damages of Kshs. 64,755/- Being aggrieved with the said judgment, the applicant states that he is desirous to lodge an appeal against the said judgment. However, the statutory period within which to file an appeal has already lapsed. The applicant states that upon delivery of the judgment, his advocates sought to obtain a copy of the judgment but their efforts were defeated as the Honourable magistrate retained the file in chambers since the date of delivery of the judgment. The applicant further states that his advocates obtained the copy of the judgment on September 27, 2023 which was after expiry of time to file an appeal.
4. The applicant states that orders of stay of execution granted in the court below lapsed before he filed the intended appeal. As such, unless this application is allowed, he stands to suffer irreparable loss and



damage. The applicant states that he has brought the application promptly and without unreasonable delay.

5. The applicant states that he is apprehensive that the respondent will execute the decree which will render the intended appeal nugatory. The applicant further avers that he has an arguable case with overwhelming chances of success and that no prejudice shall be suffered by the respondent which cannot be compensated by way of damages.
6. The applicant states that the insurance company, Directline Assurance Limited is willing and able to furnish the court with a bank guarantee from Family Bank as security of the performance of the decree.

### **The Respondent's Case**

7. The respondent opposes the application on the premise that it is misconceived, vexatious, an afterthought and an abuse of the court process.
8. The respondent states that judgment was delivered in Ruiru SPMCC No. E602 of 2022 on 12<sup>th</sup> July 2023 in the presence of the applicant advocate. Furthermore, the applicant sought and was granted 30 days stay of execution on the material day.
9. The respondent further states that upon request for a copy of the judgment and decree on July 20, 2023 the same was issued to them on July 26, 2023 as well as a copy of the decree. This was after the respondent paid further court fees of Kshs. 26,718/-. The respondent then wrote to the applicant's counsel on 2<sup>nd</sup> August 2023, asking the applicant to settle the decretal amount. On August 15, 2023, the respondent states that he filed a declaratory suit against the applicant's insurance and served the applicant's counsel on August 17, 2023.
10. The respondent states that the applicant's insurer, Directline Assurance Co. Ltd did not enter appearance in the declaratory suit. On September 19, 2023, the respondent requested for judgment to be entered in his favour. On September 3, 2023, the applicant's insurer filed a memorandum of appearance and defence without making an application to set aside the interlocutory judgment which was already in place.
11. From the foregoing, the respondent argues that it is not true that the reason for filing the appeal out of time is because the applicant could not get a copy of the judgment on time. The applicant has not annexed any evidence to demonstrate that he applied for a copy of judgment.
12. The respondent further argues that the applicant is trying to stay proceedings and set aside the interlocutory judgment in Ruiru SPMCC No. E353 of 2023 through the back door and that it will be prejudicial to him for he is entitled to the fruits of his judgment. Furthermore, the respondent states that litigation must come to an end as the application intends to frustrate him by delaying execution. The respondent states that after filing the declaratory suit the applicant's counsel initiated negotiations on settlement of the parent suit but for him when negotiations failed, this application was filed.

### **The Applicant's Submissions**

13. The applicant relies on section 3A of the *Civil Procedure Act* and the case of *Wachira Karani vs Bildad Wachira* (2016) eKLR and urges the court to exercise its wide powers under section 3A of the *Civil Procedure Act* to admit the appeal herein for hearing and thereafter proceed to hear and determine it on merits so as to ensure the ends of justice be met. The applicant further relies on section 95 of the *Civil Procedure Act* and submits that he should not be denied the opportunity to prosecute his appeal or driven from the wheels of justice unless his appeal is found not to be arguable.



14. Relying on the case of *Gianfranco Manenthi & another vs Africa Merchant Assurance Company Ltd* [2019] eKLR, the applicant submits that he is ready and willing to provide security for the performance of the decree through a bank guarantee from Family Bank.
15. The applicant further relies on the case of *Bake 'N' Bite (Nrb) Limited vs Daniel Mutisya Mwalonzi* [2015] eKLR and submits that the appeal is arguable and raises serious points of law and fact that warrant the court's intervention. The applicant argues that his main ground of appeal is the excessive award made by the lower court which was not proportionate to the injuries suffered by the respondent and which was not in tandem with the conventional awards given for similar injuries.
16. The applicant relies on order 42 rule 6 of the *Civil Procedure Rules* and submits that it has satisfied the conditions under which the court will grant orders of stay of execution.

### **The Respondent's Submissions**

17. The respondent relies on Section 79G of the *Civil Procedure Act* and the case of *Stecol Corporation Limited vs Susan Awuor Mudemb* [2021] eKLR and submits that judgment was delivered on 12<sup>th</sup> July 2023 in the presence of one Mr. Terer holding brief for Mr. Njuguna. Further, the applicant sought stay of execution in the court below and was granted 30 days. Upon expiry, the applicant offered to settle the decree which he failed to honour.
18. From the record, it is apparent that the period upon which the applicant was supposed to bring the appeal ran between July 12, 2023 and August 12, 2023. However, the appellant did not file notice of appeal despite orders for stay of execution having been granted. The respondent submits that he proceeded to file a declaratory suit against the insurance upon expiry of the stay orders. Judgment was entered on September 19, 2023 after the applicant's insurance ignored to enter appearance. The respondent further submits that the applicant's insurer filed a memorandum of appearance and defence on September 3, 2023 without making an application to set aside interlocutory judgment thereafter, the applicant filed the instant application seeking for extension of time to appeal. Thus, the respondent argues that the applicant had no intention at all of bringing the current appeal and is simply buying time.
19. The respondent submits that the reasons for the delay by the applicant and contradictory and not plausible. The applicant claimed that he filed the appeal out of time because he could not get a copy of the judgment on time yet he failed to demonstrate that he sent any request to the court. The respondent argues that the reasons for delay are not only contradictory but invalid and that granting the orders sought will greatly prejudice him as it is almost a year since he received his judgment but has not been able to enjoy the fruits of the said judgment.
20. The respondent relies on the case of *Machira t/a Machira & Co. Advocates vs East African Standard* (No. 2) [2002] KLR 63 and submits that the court is called upon to balance the interest of the applicant seeking to preserve the status quo pending the hearing of the appeal and those of his as to whose position is likely to prevail. Relying on the case of *Joel Nderitu Ndiang'ui vs Ann Kabura Chomba* [2020] eKLR, the respondent argues that the applicant merely stated without demonstrating how he would suffer loss or what loss he would suffer in the event stay should not be granted. The respondent further submits that the provision of security by the applicant is a pre-condition for granting an order of stay which the applicant has failed to do.

### **Issues for determination**

21. The two main issues for determination herein are:-



- a. Whether the court should exercise its discretion to grant the applicant leave to file his appeal out of time;
- b. Whether the applicant has met the prerequisite for grant of stay of execution pending appeal;

## The Law

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

22. 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.

23. It is clear from the wording of section 79G of the *Civil Procedure Act* that before the court considers extension of time, the applicant must satisfy the court that that he has 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.
24. 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.



25. 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.”

26. The judgment was delivered on July 12, 2023 while the applicant filed the current application on October 9, 2023. This is approximately three (3) months outside the time limited for filing an appeal. The applicant has faulted the trial court for the delay in filing his appeal. He alleges that the magistrate locked the court file in her chambers following delivery of the judgment until September 27, 2023 when he was supplied with a copy of the judgment. The issue of delay of typed proceedings and judgment is a well-known thing in our legal system and courts have from time to time granted extension of time to appeal in cases where the delay was not caused by the party. This was stipulated by the Supreme Court in the case of *Hassan Nyanje Charo vs Khatib Mwashetani & 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.

27. 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.

28. In the present case, the trial court delivered its judgment on July 12, 2023 in the presence of both advocates. The court below further granted orders for stay for 30 days. The applicant filed the instant application on October 9, 2023 which is approximately 3 months after the requisite period. The applicant faulted the court for the delay in lodging the appeal but did not support his allegation with any evidence. The applicant did not obtain a certificate of delay to show that the registry took long to avail a copy of the typed judgment and proceedings. The applicant has stated that they received a copy of the typed judgment on September 27, 2023 but they filed their memorandum of appeal on October 9, 2023.

29. A declaratory suit against the applicant's insured was filed by the respondent and pleadings served to the applicant on August 17, 2023, a fact that was not refuted by the applicant. That notwithstanding, the applicant has given contradictory reasons for his delay. In his application he attributed the delay to the court registry but in his submissions, he stated that he was awaiting instructions to appeal. This



casts doubt on the credibility of the applicant herein. In my view, the applicant the applicant has not given any plausible explanation of the three (3) months delay in filing the memorandum of appeal. The delay of 3 months may not be inordinate but in this case, it is my considered view that the applicant has not explained the delay which is a requirement in an application of this nature.

30. The applicant having failed to satisfy this court that he has sufficient cause for enlargement of time to appeal, I hereby dismiss this application for lack of merit. This court will not deal with the second prayer for stay of execution pending appeal because there is no appeal in existence or any intended one.
31. The costs of this application shall go to the respondent.
32. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 27<sup>TH</sup> DAY OF JUNE 2024.**

**F. MUCHEMI  
JUDGE**

