



**Motorology Limited & another v Ngugi (Suing on Behalf of the Estate of Stephen Kariuki Ngugi)
(Miscellaneous Civil Case E029 of 2024) [2024] KEHC 8020 (KLR) (27 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 8020 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS CIVIL CASE E029 OF 2024
FN MUCHEMI, J
JUNE 27, 2024**

BETWEEN

MOTOROLOGY LIMITED 1ST APPLICANT

PETER MUTUNDU MUTHEE 2ND APPLICANT

AND

**SERAH NJERI NGUGI (SUING ON BEHALF OF THE ESTATE OF STEPHEN
KARIUKI NGUGI) RESPONDENT**

RULING

Brief facts

1. The application dated 27th February 2024 seeks for orders for leave to file an appeal out of time against the judgment in Ruiru SPMCC No. E628 of 2022 delivered on 23rd November 2023. The applicants further seek for orders for stay of execution in respect of the judgment delivered on 23rd November 2023 pending the hearing and determination of the intended appeal.
2. The respondent opposed the application and filed a Replying Affidavit dated 15th May 2024.

Applicants' Case

3. The applicants state that judgment in Ruiru SPMCC No. E628 of 2022 was delivered on 23rd November 2023 where the trial court found in favour of the respondent and awarded her damages for pain and suffering at Kshs. 30,000/-, loss of expectation of life at Kshs. 100,000/-, loss of dependency at Kshs. 2,000,000/- and special damages at Kshs. 59,250/-. Being aggrieved with the said judgment, the applicants are desirous in lodging an appeal against the said judgment but the statutory period within which an appeal should be filed has already lapsed. The applicants state that upon delivery of the judgment, their advocates sought to obtain a copy of the judgment but their efforts were defeated.



4. The applicants state that the stay of execution granted in the matter lapsed and unless stay of execution is granted they stand to suffer irreparable loss and damage. Further, the applicants state that they have brought the application promptly and without unreasonable delay.
5. The applicants are apprehensive that the respondent will execute the decree at any moment which will render the intended appeal nugatory. The applicants further aver that they have an arguable case with overwhelming chances of success. Furthermore, no prejudice shall be suffered by the respondent which cannot be compensated by way of damages. The applicants state that they are ready, willing and able to furnish security in the form of a bank guarantee.

The Respondent's Case

6. The respondent opposes the application and states that it is merely a delaying tactic and a waste of the court's precious judicial time. The respondent states that the applicants are not serious with prosecuting their intended appeal as they have never complied with the court orders for depositing the decretal amount in court made on 8th April 2024.
7. The respondent states that the cause of delay by the applicants is an afterthought as they did not avail any evidence to show that the trial court did not avail to them the judgment in good time. The respondent argues that the trial court, Ruiru Law Courts is one of the most efficient if not the most efficient court in the Republic. Further, the respondent states that her advocates applied for typed copy of the said judgment on 23rd November 2023 and the same was availed to them on 30th November 2023 which is within seven (7) days. Thus, the respondent states that it is very unlikely that the court delayed in furnishing the applicants with a copy of the said judgment.
8. The respondent further argues that on 23rd November 2023 upon delivery of the judgment, the applicants were granted thirty days stay of execution which was more than enough time for them to put their house in order and file their appeal within the said duration. That notwithstanding, the respondent states that the proposed memorandum of appeal does not raise strong grounds of appeal particularly in paragraph 6 of their memorandum of appeal, the applicants state that the magistrate erred in law and in fact in unduly disregarding their evidence yet they are fully aware that despite participating in the trial, they failed to call any defence witness and therefore no evidence from them was adduced in court.
9. The respondent states that the applicants have not shown good and sufficient cause for not filing the appeal in time and as such, intended appeal the same should not be admitted out of time. The respondent states that as the judgment creditor, she is entitled to enjoy the fruits of her judgment and it is unfair to have the same postponed in order to accommodate the indolent applicants.
10. Directions were issued that the application be canvassed by way of written submissions and from the record only the respondent complied by filing her submissions on 12th June 2024. The appellants on the other hand had not filed their submissions by the time of writing this judgment.

The Respondent's Submissions

11. The respondent relies on Section 79G of the *Civil Procedure Act* and submit that although the applicants claim that their advocates requested for a copy of the judgment from the trial court, and that the same was not furnished to them in good time thus occasioning the delay in filing the appeal, the applicants did not produce any evidence to support their allegations. No certificate of delay was obtained to demonstrate delay on party of the court.



12. The respondent further relies on Order 42 Rule 2 of the *Civil Procedure Rules* and submits that one does not need to necessarily file the memorandum of appeal together with a copy of the impugned order since the order can be filed later. In the circumstances, the respondent argues that the applicants should have filed their memorandum of appeal without the typed judgment if they were serious about filing an appeal. The fact that this initiative was not taken up leaves one to conclude that the intended appeal is nothing but an afterthought meant to frustrate the respondent in her quest to enjoy the fruits of her judgment.
13. Relying on the cases of *Mombasa County Government v Kenya Ferry Services & Anor* (2019) eKLR and *Attorney General v Law Society of Kenya & Another* [2017] eKLR, the respondent submits that during the delivery of the said judgment on 23rd November 2023 the counsel for the applicants, Ms. Terer was present in court and was thus in a position to seek instructions from her client to appeal. Thus, the respondent argues that the excuse that the applicants are giving is not good and sufficient cause for filing the appeal out of time.
14. The respondent further argues that Ruiru Law Courts is one of the most efficient courts in this country. The respondent said that she obtained a typed copy of the said judgment on 23rd November 2023 and it was availed to her within 7 days. Thus, the respondent argues that it is very unlikely that the said court delayed in furnishing the applicants with a copy of the said judgment. Thus, the explanation given by the applicants for the delay in filing the appeal is not convincing nor is it satisfactory.

The Law

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

15. 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.

16. 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 he has 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.
17. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salatv 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.

18. Similarly, in the case of *Paul Musili Wambuu 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.”

- 19. It is clear that judgment herein was delivered on 23rd November 2023 and the applicants filed the current application on 8th March 2024. This is approximately three (3) months and 15 days outside the time limited for filing an appeal. The applicants have stated in their affidavit that the delay was caused by the court registry. From the record, the judgment was delivered in the presence of both advocates with Miss Terer present for the applicants. Furthermore, the trial court granted the applicants thirty (30) days stay of execution.
- 20. On further perusal of the record, the applicants have not annexed any evidence to show when they applied for a copy of the judgment. Additionally, the applicants did not clearly state when the date they received a copy of the judgment. Furthermore, the record shows that the respondent applied for a typed copy of the judgment on 23rd November 2023 and the same was availed to them on 30th November 2023, within seven (7) days. Thus, this court is not convinced that the delay was occasioned by the court registry. Delay of 3 ½ months may not be inordinate but the applicants have not given any plausible explanation on the reasons for delay. Accordingly, I find that the applicants have not established to the satisfaction of the court why time should be enlarged to enable them file their appeal.
- 21. On the issue of stay of execution, this court directed on 8th April 2024 that the applicants deposit the decretal amount in court within 30 days from the said date and in default the stay orders were to be vacated. The respondent states that the applicants did not deposit the decretal amount and neither has any evidence of such deposit been produced. As such, the interim orders for stay of execution were vacated upon expiry of time of making the deposit.
- 22. The respondent has been waiting to enjoy the fruits of her judgment for over seven (7) months to date. The appellant on the other hand has not shown any seriousness in pursuing his right to appeal. In balancing the interests of the parties, it is my view that the respondent has been prejudiced by the



delay. The applicant herein has not shown sufficient cause why this court should exercise its discretion to grant extension of time.

23. It is my finding that the applicant has failed to explain the delay in filing this application as well as the delay in filing the intended appeal. The remedy sought is not a right available to any party; but to a party who is diligent. The applicant cannot be said to be so diligent in any manner.
24. I find no merit in this application and I hereby dismiss it with costs to the applicant.
25. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 27TH DAY OF JUNE 2024.

F. MUCHEMI

JUDGE

