



REPUBLIC OF KENYA



KENYA LAW
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**Ndungu & another v Ngure (Miscellaneous Civil Case
E042 of 2024) [2024] KEHC 8024 (KLR) (27 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 8024 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS CIVIL CASE E042 OF 2024
FN MUCHEMI, J
JUNE 27, 2024**

BETWEEN

PATRICK KAMAU NDUNGU 1ST APPLICANT

MICHAEL NJOROGE 2ND APPLICANT

AND

GEORGE GATETE NGURE RESPONDENT

RULING

Brief Facts

1. The application dated 9th April 2024 seeks for orders of leave to file an appeal out of time against the judgment in Ruiru SPMCC No. E244 of 2022 delivered on 14th February 2024. The applicant 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 a Replying Affidavit sworn on 22nd April 2024.

Applicant's Case

3. The applicants state that in the judgment in Ruiru SPMCC No. E244 of 2022 delivered on 14th February 2024, the court below found in favour of the respondent and awarded him general damages at a sum of Kshs. 200,000/- and Kshs. 3,790/- as special damages. Being aggrieved with the said judgment, the applicants are desirous to lodge an appeal against the said judgment but the statutory period within which to file the appeal 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. The applicants aver that they received a copy of the judgment from their advocates one and a half months after judgment was delivered.



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 brought this application promptly and without unreasonable delay. The applicants state that the decree is for a substantial sum of money and if paid to the respondent, the applicants are apprehensive that they will not be able to recover the said sum.
5. The applicants are apprehensive that the respondent will execute the decree at any moment which will render the intended appeal nugatory as the respondent has taken out warrants of attachment and a proclamation notice was served upon them. The applicants further aver that they have an arguable case with overwhelming chances of success. Further that no prejudice shall be suffered by the respondent that cannot be compensated by way of damages. The applicants state that they are ready, willing and able to furnish such reasonable security within such time as the court may direct.

The Respondent's Case

6. The respondent opposes the application and states that the current proceedings are just one of the schemes by the judgment debtors and their insurer to defeat the execution process and delay the decree holder the fruits of his judgment.
7. The respondent argues that the applicants are not honest for they have not explained when they received the copy of the judgment or showed any effort to follow up on the judgment from court by attaching a correspondence to the court requesting for proceedings. The respondent further states that his advocates wrote to the applicants' advocates on 26th February 2024 informing them about the judgment and attaching a copy together with their tabulated costs. The applicants received the said letter on 27th February 2024 and stamped on the copy which was retained by the respondent. As such, the respondent states that the applicants' advocates were aware of the said judgment from 27th February 2024 but never bothered to advise their client to appeal or pay the claim.
8. The respondent states that equity aids the vigilant and not the indolent and further that the applicants' advocates have not come to court with clean hands. As such, the applicants ought not to be shielded by the provisions of Article 50 and 159(2)(b) of the *Constitution* which encompasses fair hearing and substantive justice being met. The respondent further states that he stands to suffer irreparable loss should execution not proceed.
9. Directions were issued that the application be disposed of by way of written submissions and from the record, it was only the respondent complied by filing his submissions on 4th June 2024. By the time of preparing this ruling, the applicants had not filed their submissions.

The Respondent's Submissions

10. The respondent submits that the judgment in Ruiru SPMCC No. 244 of 2023 was delivered on 14th February 2024 in the absence of both parties. The respondent submits that he obtained a copy of the judgment and served the same upon the applicants' advocates on 27th February 2024, which was received and the official stamp affixed.
11. The respondent relies on Section 79G of the *Civil Procedure Act* and submits that the applicants have not given good or sufficient reasons to justify granting orders to appeal out of time. The applicants failed to attach a draft memorandum of appeal to shed some light on the nature and substance of the intended appeal.
12. The respondent relies on the provisions of Order 50 Rule 4 of the *Civil Procedure Rules* and submits that after delivery of the judgment on 14th February 2024, a copy was served on the applicants' advocates



on 27th February 2024. As such, the applicants had sufficient time within which to file the appeal within the prescribed 30 days. The applicants having been aware of the judgment in good time, the delay was inordinate and deliberate and therefore not excusable.

13. The respondent argues that the intended appeal does not have high chances of success as the applicants have not demonstrated the existence of any unusual or exceptional circumstances to justify being granted the orders sought. According to the respondent, the applicants' failure to attach a copy of the court's judgment does not work in their favour for it would have shed light on whether magistrate failed to consider their side of the case. To support his submissions, the respondent relies on the cases of *Vegpro Kenya Limited vs Susan Wanja* Miscellaneous Application No. 14 of 2017, High Court at Nairobi and *Nicholas Kiptoo arap Korir Salat vs IEBC & 7 Others* (2014) eKLR.

Issues for Determination

14. The two main issues for determination herein are:-
- a. Whether the court should exercise its discretion to grant the applicants leave to file their appeal out of time;
 - b. Whether the applicants have met the prerequisite for grant of stay of execution pending appeal;

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 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.
17. 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.
18. 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.”

19. It is not in dispute that the judgment was delivered on 14th February 2024 and the applicants filed the current application on 9th April 2024. This is approximately one month and 25 days outside the time limited for filing an appeal. The applicants have merely stated in their affidavit that their advocates sought a copy of the judgment after it was delivered but their efforts were defeated but have not explained whether they faced any difficulties in obtaining a copy of the judgment. As such I have stated, the applicants did not adduce any evidence to show that it is the court that failed to process their request on time. The date that the judgment was received was not disclosed for reasons known to the applicant. The fact that the respondent’s advocates served on them a copy of the judgment vide their letter dated 26th February 2024 and 27th February 2024 was not denied. I am convinced that the applicants’ advocates were aware of the judgment from 27th February 2024 and that there was sufficient time to prepare and file the intended appeal on time. The delay of 1 month and 25 days may not be inordinate but in the instant case, the applicants have not given any plausible explanation on the reasons for the delay. All considered, I find that the applicants have not established that this court should exercise its discretion to enlarge time.
20. Having found that the first prayer to extend time to appeal has failed, it is my view that there is no need to delve in to the 2nd prayer seeking for stay of execution pending appeal for the reason that there is no intended appeal.
21. I find no merit in this application and it is accordingly dismissed with costs to the respondent.
22. It is hereby so ordered.

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

F. MUCHEMI
JUDGE

