



**Modern Ways Limited v Ngugi (Civil Appeal E380 of 2023)
[2024] KEHC 10675 (KLR) (16 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10675 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E380 OF 2023
DO CHEPKWONY, J
AUGUST 16, 2024**

BETWEEN

MODERN WAYS LIMITED APPELLANT

AND

ELIUD NDUNG’U NGUGI RESPONDENT

RULING

1. What is before this court for determination is the Notice of Motion Application dated October 2, 2023 which seeks the following orders:
 - a. Spent.
 - b. Spent.
 - c. That leave be granted to the applicant to file an appeal out of time.
 - d. That there be stay of execution of the decree herein pending the hearing and determination of the appeal against the judgment and order of the Honourable court against the appellant.
 - e. That costs of this application be provided for.
2. The application is based on the grounds set out on its face and the Supporting Affidavit of Rovina Koske sworn on the even date. The Applicant states that the stay of execution and time to appeal granted by the lower court lapsed on 23rd September, 2023 and the Respondent is threatening to execute the decree. That its instructing client has instructed him to lodge the appeal against the judgment of the court.
3. It is the applicant’s case that it will suffer substantial loss, will be highly prejudiced and that the appeal will be rendered nugatory if the decree is executed and yet the appeal has a high chance of success. And the applicant states that it is ready to make an undertaking on security and abide by any conditions



that the court may set. The applicant holds that the respondent may not be able to refund the decretal amount in the event the appeal succeeds. The applicants has urged that the delay was not inordinate and should allow the application as prayed.

Response.

4. In opposing the application, the Respondent filed Replying Affidavit which was sworn by Morris M. Karigi, the Respondent's Advocate on 16th October, 2023. According to the defendant the application is a non- starter, and has been brought in bad faith, such that it is a waste of judicious time and only meant to clog the justice system. The Respondent also argues that the application has not invoked the enabling provisions of the law for the prayers sought to appeal out of time and furthermore, there is no explanation given for the delay, the judgment was delivered on 23rd August, 2023. The Respondent avers that the Appellant has been enjoying stay of execution from that time until 23rd September, 2023, when the same lapsed.
5. The Respondent states that the applicant has not shown any sufficient cause for stay of execution since it is a lawful process that is sanctioned by law. He behets that the application is only meant to delay the enjoyment of the fruits of judgment as the appeal has no chance of succeeding. He holds that the litigant and not their advocate, should follow up and check on the progress of their case.
6. The Respondent goes on to state that the applicant has not attached any letter requesting for typed proceedings from the trial court so as to show his intent to prosecute the appeal expeditiously. He argues that no stay of execution can be issued without a substantive appeal on record, hence the applicant ought to first seek leave to appeal before getting stay of execution orders. That therefore, it would be in the interest of justice that the application is dismissed with costs.
7. Upon considering the application on 9th October, 2023 the court directed the same to be canvassed by way of written submissions which where confirmed on 13th December, 2023.
8. The court has read through the applicant's submissions dated 3rd November, 2023 and that of the respondent's submissions dated 30th November, 2023 and find that both reiterate their arguments for and against in the application. Supporting affidavit and the replying affidavit and the main issue at hand is whether the application has merits to warrant the orders sought.

Analysis and determination

9. Having read through the Notice of Motion application, the Supporting affidavit and replying affidavit alongside the written submissions filed by counsel for either party herein, I find the main issue for determination being whether the application has merit to warrant the orders being sought by the applicant, which are;
 - a. Leave to appeal out of time.
 - b. For stay of execution pending the hearing and determination of the appeal.
10. The law on time to file appeals and extension of time to file appeal is provided under Section 79G of the [Civil Procedure Act](#). It states that:

“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 to the appellant 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.”

11. In fact itsinto action, the court in the case of [Edith Gichungu Koine v Stephen Njagi Thoithi](#) [2014]eKLR addressed the various factors that ought to be considered by the courts in granting leave to appeal out of time in the following manner,

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

12. These factors were also discussed by the Court of Appeal in the case of [Thuita Mwangi v. Kenya Airways Ltd](#) [2003] eKLR. as follows:

- “i) The period of delay;
- ii) The reason for the delay;
- iii) The arguability of the appeal;
- iv) The degree of prejudice which could be suffered by the if Respondent the extension is granted;
- v) The importance of compliance with time limits to the particular litigation or issue; and
- vi) The effect if any on the administration of justice or public interest if any is involved.”

13. In this particular case, having read through the proceedings of the trial court, the court has established that the Application herein is dated 2nd October, 2023. In that case, the against the judgment which was delivered on 23rd August, 2023. The Appeal ought to have been filed by 23rd September, 2023 but instead it was filed on 3rd October, 2023 which was about 10 days after. The court finds that the period of delay of ten (10) days is not inordinate. On this observation, the Court proceeds to allow the prayer for leave to appeal out of time.

14. The next issue for determination is whether the court should grant stay of execution orders as sought. The law on stay of execution is enshrined under the provisions of Order 42 Rule 6 of the [Civil Procedure Rules](#) which provides as follows:

Order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides:

“No order for stay of execution shall be made under sub rule (1) unless—

- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant”



15. Be that as it may, the purpose of an application for stay of execution pending appeal the court in the case of [RWW v EKW](#) [2019] eKLR, where it stated as follows:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

16. From this provision, it is set trite law that for a court to grant stay of execution, three conditions must be met:

- a. The application has been made without unreasonable delay.
- b. The Applicant will suffer Substantial loss, and
- c. The Applicant has offered security for due performance of the decree.

17. On the first condition, the court has already found that the application was made without unreasonable delay, hence the first condition has been met by the applicant’s side.

18. On the second condition of substantial loss, the applicant has only stated that it is likely to suffer substantial loss but has not substantiated or what substantial loss it is likely to suffer, it is not enough to simply state it. The court in the case of [Kenya Shell Limited v Benjamin Karuga Kibiru & another](#) [1986] eKLR held,

“Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”

19. The court agrees with the case of Kenya Shell supra that without the evidence of the substantial loss one is likely to suffer, it is difficult to grant the stay orders as there is no sufficient reason that has been advanced or demonstrate to show why the Respondent should be kept away from its judgment.

20. Lastly, is the issue of security for the due performance, where from the pleadings, the Applicant has not offered any form of security, it has simply stated that it is willing to abide by the terms that shall be set by the court. The issue of security was explained in the case of [Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd](#) [2019] eKLR, held:

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the [Civil Procedure Rules](#), it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails...”

21. The upshot, based on the above finding and the applicant having satisfied one out of the three conditions, the Court finds that the orders of stay of execution may issue, but on the following terms;



- a. The Leave be and is hereby granted to the applicant to file an appeal out of time against the judgment delivered in Limuru CMCC No. E386 of 2022 on condition that the Applicant deposits the entire decretal amount in Court within 30 days from the date herein.
- b. The applicant to file and serve his Memorandum of Appeal within fourteen (14) days from the date hereof.
- c. Failure to comply with Orders (a) and (b) herein, the application shall be deemed as dismissed and the Respondent be at liberty to proceed with execution.
- d. Mention on 18/9/2024 for parties to confirm compliance and take directions on hearing of the appeal.

It is so ordered.

RULING DATED AND SIGNED AT KIAMBU THIS 16TH DAY OF AUGUST, 2024.

D.O. CHEPKWONY

JUDGE

In the presence of;

Martin - Court Assistant

Mr. Ombati holding brief for Mr. Njagi counsel for Respondent

Non-appearance for the Applicant

