



REPUBLIC OF KENYA



KENYA LAW
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**Great Rift Express Shuttle Services Ltd & 3 others v Wamatoi (Civil Miscellaneous
E156 of 2024) [2024] KEHC 11473 (KLR) (30 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11473 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL MISCELLANEOUS E156 OF 2024**

DK KEMEL, J

SEPTEMBER 30, 2024

BETWEEN

**GREAT RIFT EXPRESS SHUTTLE SERVICES LTD 1ST APPLICANT
SAMUEL KIARIE 2ND APPLICANT
MATUNDA (FRUITS) BUS SERVICES LTD 3RD APPLICANT
PATRICK KARERI 4TH APPLICANT**

AND

LILIAN NEKESA WAMATOI RESPONDENT

RULING

1. Vide an application dated 28th June 2024, the Applicants herein seek orders for leave to appeal out of time and orders for stay of execution pending the hearing and determination of their intended appeal.
2. The application was premised on the grounds on the face of the motion and the supporting affidavit sworn by Mary Ongong'a, the Advocate on record for the Applicants, on 28th June 2024, wherein she averred inter alia; that the judgement and decree of the Court was issued on 22nd May 2024 and that the delay in lodging an appeal against the same was occasioned by internal processes of transmission of communication of the Judgement from the advocate to the client and transmission of instructions from the client to the advocate; that this application has been filed without any delay and that any delay in filing is excusable and has been explained; that the Directline Assurance will suffer irrecoverable loss unless the order of stay of execution is issued in that should the intended appeal succeed, it will be well-nigh impossible to retrieve the decretal amount from the decree holder who has failed to reveal his financial status. She urged this Court to issue the orders sought as no prejudice will be occasioned upon the decree holder.



3. Opposing the application, the Respondent filed grounds of opposition on 19th July 2024, wherein she stated that the Applicants application is frivolous, vexatious, and scandalous and an abuse of Court process. She noted that the Applicants have not issued a detailed explanation for their delay to appeal and that the availed draft memorandum of appeal raises no arguable issues. She urged this Court to dismiss the application with costs.
4. The application was canvassed by way of written submission. Both parties duly complied.
5. I have considered the application for extension of time to file an appeal and stay, grounds thereof, supporting affidavit and annexures. I have also considered the grounds of opposition and submissions together with case law cited by both learned counsels.
6. The main issue for determination is whether the Applicants have demonstrated that the orders of stay of execution pending appeal and extension of time to file their appeal are merited.
7. The principles governing leave to appeal out of time are settled. The successful applicant must demonstrate “good and sufficient cause” for not filing the appeal in time. In *Thuita Mwangi v Kenya Airways* [2003] eKLR, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which is similar to Section 79G of the *Civil Procedure Act*, reiterated its decision in *Mutiso v Mwangi* [1997] KLR 630 as follows:

“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 generally the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

8. 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 include;

1. 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;
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 the discretion to extend time, is a consideration to be made 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.
7.”



9. It is not disputed that the judgment of the lower Court was delivered on 22nd May 2024 and that the Applicants instructed their Counsel to appeal on both liability and quantum. According to the Applicant's Counsel, the delay to file their appeal was occasioned by the communication processes between the client and the Advocate.
10. They then filed the present application on 1st July 2024 and thus the delay herein is approximately one month and one week which in my view is not inordinate.
11. Further, while the discretion of the Court is unfettered, a successful applicant is obligated to adduce material upon which the Court should exercise its discretion, or in other words, the factual basis for the exercise of the Court's discretion in his favor. On the question of the exercise of judicial discretion, the Supreme Court observed in the case of [Telkom Kenya Limited V. John Ochanda and 996 Others](#) [2015] eKLR that:

“In instances where there is delay in filing the notice of appeal, this Court has inherent jurisdiction to admit such appeal, provided sufficient explanation is proffered for the cause of delay. The design and objective of the Supreme Court Rules is to ensure accessibility, fairness and efficiency in relation to this Court. Parties should comply with the procedure, rather than look to the Court's discretion in curing the pleadings before it. This Court's position is that the circumstances of each case are to be evaluated, as a basis for arriving at a decision to intervene, in instances where full compliance with procedure has not taken place..

It is this Court's position of principle that prescriptions of procedure and form should not trump the primary object of dispensing substantive justice to the parties. However, the Court will consider the relevant circumstances surrounding a particular case and will conscientiously ascertain the best course.....”

12. With regard to the request for stay of execution pending appeal, the parameters to be taken into account by the court in determining such an application are contained in Order 42 Rule 6(2) of the [Civil Procedure Rules](#), which provides as follows –

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- (2) 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.

13. Will the Applicants suffer substantial loss if the stay orders sought are not granted? This a money decree for an amount which has been determined by the trial court and that the intended appeal is on liability and quantum. The Applicants may stand to suffer substantial loss if stay is not granted. On the other hand, on appeal on the quantum, the Respondent also stands to suffer prejudice if no amount is paid to her in the meantime. There is therefore need to balance both parties' interest.
14. It has not been demonstrated for instance that the Respondent may not refund the decretal sum if the Applicants are successful in their appeal. Neither has he demonstrated his pecuniary capacity. It is noted from the draft memorandum of appeal by the applicants that the appeal is solely on quantum and not on liability and hence it is obvious that the Respondent is not likely to come out empty handed



at the conclusion of the appeal. I find that it is fair and just that an order that the Applicants pay half the decretal sums together with assessed costs to the Respondent while the balance be deposited into a joint interest earning account in the names of both advocates pending determination of the appeal. The applicants will be granted leave to lodge their appeal out time as well as an order for stay of execution of the decree. This arrangement takes care of the parties concerns.

15. In view of the foregoing observations, the Applicants' application dated 28.6.2024 is allowed in the following terms:

- a) The Applicants are hereby granted leave to file and serve their memorandum of appeal within 14 days from the date hereof.
- b) An order of stay of execution of decree in Bungoma CMCC No. 170 of 2020 pending the determination of the intended appeal is hereby granted upon the Applicants paying half the decretal sums plus assessed cost to the Respondent while the balance shall be deposited into a joint interest earning account in the joint names of both Advocates within thirty (30) days from the date hereof failing which the stay shall lapse.
- c) The costs of the application shall abide in the appeal.

Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF SEPTEMBER 2024

D. Kemei

Judge

In the presence of :

No appearance Ongonga for Applicants

Miss Wanyama for Respondent

Kizito Court Assistant

