



Miles Construction Ltd & another v Musango & another (Suing in their capacities as legal representatives of the Estate of Joseph Musyoka Musango) (Miscellaneous Civil Application E037 of 2024) [2024] KEHC 13787 (KLR) (31 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13787 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS CIVIL APPLICATION E037 OF 2024
MW MUIGAI, J
OCTOBER 31, 2024**

BETWEEN

MILES CONSTRUCTION LTD 1ST APPLICANT

MUKUTI KILONZO 2ND APPLICANT

AND

BERNARD MUMO MUSANGO 1ST RESPONDENT

JONATHAN MUSEMBI MUSANGO 2ND RESPONDENT

**SUING IN THEIR CAPACITIES AS LEGAL REPRESENTATIVES OF THE
ESTATE OF JOSEPH MUSYOKA MUSANGO**

RULING

Notice Of Motion

1. *Vide* an application dated 6.05.2024 under Order 42 Rule 1 & 2, Order 51 Rule 1, Order 50 Rule 1 & 5 of the Civil Procedure Rules, Section 3 and 3A, 79G of the Civil Procedure Act s, Article 159 (2) (d) of the Constitution of Kenya, 2010 the Applicants seeks the following orders, that;
 - a. Spent
 - b. Spent
 - c. This court to grant a stay of execution of the judgment of 19th December 2023 pending the hearing and determination of this Application and the Applicants intended Appeal.
 - d. The court to grant the intended Appellants leave to file a memorandum of Appeal as per the attached draft against the decision and judgement of Hon. R.W. Gitau Senior Resident



Magistrate in *Mavoko CMCC E515 of 2022* delivered on 19/12/2023 and that time for filing and serving the Memorandum of Appeal be extended

- e. The costs of the application be provided for.
2. The Application is supported by the Affidavit of Kenneth Muriithi, the assistant legal claims officer of Britam General Insurance Company Limited who stated that they insured the Applicants against the claim and have been handling it on their behalf thus he had authority to swear the affidavit. It was contended that judgment was entered against the Applicants on 19.12.2023 with liability apportioned at 100% against the Defendants and quantum of damages of Kshs 632,550 plus costs and interest. He stated that they crave to appeal out of time and stand to suffer irreparable loss and embarrassment since the Respondents advocates have commenced extraction of the decree and at any moment will commence execution rendering the application nugatory.
3. It was deposed that he took time to study the judgment and by the time he was giving instructions to his advocate, the time for filing the application had lapsed. He stated that they were appealing against the quantum which they found excessive. In addition, that the insurer was willing to abide by the terms as the court may order and are willing to provide security for the entire decretal sum.

Replying Affidavit

4. Jonathan Musembi Musango filed a Replying affidavit dated 29.02.2024 and contended that the application ought to have been filed within 30 days from the date of Judgement which period lapsed on 19.01.2024, a month from the date of the Application. He stated that the paragraphs are an admission of indolence, that the Applicants had no arguable appeal and have not demonstrated to what extent execution of judgment will render the appeal nugatory. The Respondent contended that the application is meant to deny him from enjoying the fruits of justice and that the applicants had not made any adequate proposal on security for costs. He asked the court to dismiss the application
5. The application was canvassed by way of written submissions.

Applicants Submissions Dated 12.03.2014

6. The Applicant relied on the case of *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries commission and 8 others*, Application no 16 of 2023 and submitted that the application was filed without undue delay as under order 50 Rule 4 of the *Civil Procedure Rules*, time stopped running from 21.12.2023 to 13.01.2024 meaning that the application was filed 3 days outside the time frame. He submitted that the reason for the delay was that Kenneth Mwititi took some time to analyse and seek further instructions as the insurance usually receives many claims at the beginning and close of the year.
7. Thirdly, it was submitted that no prejudice will be suffered if the orders sought are granted nor will he suffer substantial loss. It was contended that the Respondent did not furnish the court with an affidavit of means to show that they are capable, in the event of a successful appeal, to pay all or part of the decretal amount. The applicant contended that it was ready to offer security by depositing the decretal amount in court in the form of an insurance bond within 45 days of the order. Reliance was placed on the cases of *Kiambu transporters vs Kenya Breweries* [1997] eKLR and *G.N. Muema P/A (SIC) Mt view Maternity & Nursing Home vs Miriam Maalim Bisbar & Another* [2018] eKLR.

Respondent Submissions Dated 4.04.2024

8. The Respondent submitted on three issues. First, while relying on the case of *Mwangi vs Kenya Airways Limited* [2003], *County Executive of Kisumu vs County Government of Kisumu & 8 Others*, Civil Application no 3 of 2016 and *Dilpack Kenya Limited vs William Muthama Kitonyi* [2018]



eKLR, *Njoroge vs Kimani* [2022] eKLR it was that submitted that whereas time stopped running as per order 50 rule 4, the applicant had not demonstrated what bottlenecks prevented him from filing the appeal within time and the application was calculated to deny, delay, embarrass and/or prejudice the Respondents herein in pursuit of the fruits of judgment. It was contended that the appeal applicants have not demonstrated the merits and/or arguability of the intended appeal. The court was urged to find the delay as inexcusable.

9. Secondly, It was submitted that stay of execution of judgment should not issue as the Application had been brought inordinate delay, substantial loss has not been demonstrated and the court was urged to reject the submission that the Respondents will not be able to refund the decretal sum in the event the same is paid over to them as it does not justify stay of execution as stated in the case of *Nicholas Mutuku Mwasuma vs Patricia Mueni Kilonzi* [2022] e KLR. It was contended that failure to make a proposal on security was fatal as stated in the case of *Jamii Bora Bank & another vs Samuel Wambugu Ndirangu* [2012] eKLR.
10. Lastly, it was submitted that the costs should be awarded to the Respondents.

Determination

11. I have considered the Application, the Replying affidavit and the submissions thereto and find the issues for determination are;
 - a. Whether the Applicant should be granted leave to file the appeal out of time
 - b. Whether the court should exercise its discretion to grant the applicant leave to file his appeal out of time
12. On the issue of extension of time, Section 79G of the *Civil Procedure Act* 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 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. [emphasis added]
13. The principles applicable in such a case were espoused by the Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others* Supra as;

“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.
14. The judgment which is the subject of this application was delivered on 19.12.2023 while the subject application was filed on 14.02.2024. The parties are not in contention that time stopped running as provided in order 50 Rule 4 which provides that;
- “Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:
- Provided that this rule shall not apply to any application in respect of a temporary injunction.”
15. The applicant submitted that the delay was for three days. I have looked at the calendar and the number of days between the day judgment and delivered and the filing of the application is 33 days. For extension of time, it is expected that the application will be made before the expiry of the 30 days otherwise the court has nothing to extend, one can only extend a time that is running. Nonetheless, I will exercise my discretion and allow the applicant to file the memorandum of appeal within 14 days of this ruling.
16. On the second issue of stay pending appeal which is provided for under Order 42 Rule 6(1) and (2) of the [Civil Procedure Rules, 2010](#) provides as follows:
- “(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the Court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 - (2) No order for stay of execution shall be made under subrule (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.”
17. The first issue is whether the application has been filed without unreasonable delay. I have found that there was delay but it was not unreasonable. I must however point out that Kenneth Muriithi is not a party to the suit and thus did not have the locus standi to speak on behalf of the Appellant. The



insured should be able to speak for themselves and relay the relevant information. This bad practise must be condemned and needs to stop.

18. Secondly, the Applicant has stated that he stands to suffer loss if the orders sought are not granted as the Respondent is in the process of extraction of the decree and is at liberty to commence execution at any moment. Substantial loss was discussed in the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR, as:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

19. Similarly in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, it was observed that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

20. On the ability of the Respondent financial incapability of paying back the decretal sum being one of the reasons the orders should be granted, I beg to differ. The onus of proving the Respondent's inability goes beyond throwing an allegation without evidence. It is upon the Applicant who alleges the same to go ahead and prove it. Nonetheless, the court has settled this matter and stated that this should not be the reason an order of stay is granted. This was held in *Stephen Wanjobi vs. Central Glass Industries Ltd.* Nairobi HCCC No. 6726 of 1991, financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonourable miscreant without any form of income.
21. On the issue of security, the Applicant indicates that he is ready to comply with the orders of the court in the application and in the submissions refers about an insurance bond. Furnishing of security is key in getting orders of stay pending appeal. The Respondent on the other hand indicates that he is being denied from enjoying the fruits of the judgment the Court has a duty to balance the rights of both parties. The insurance bond proposal has not been provided for the court to peruse and there is no guarantee that the interests of the Respondents will be catered for.



22. In *Machira T/A Machira & Co Advocates vs. East African Standard* (No 2) [2002] KLR 63 it was held that:

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.

23. The decretal amount in this case is Kshs. 632,550 being general and special damages. The Applicant only takes issue with the quantum and has indicated that liability is not contested.

Disposition

24. In the circumstances, I hereby issue the following orders;

1. The Applicant is granted leave to file the appeal the memorandum of appeal within 30 days of this ruling.
2. Stay of execution pending the hearing and determination of the Appeal is granted on condition that the Applicant pay the Respondent ½ amount within 90 days and;
3. Deposit the outstanding amount balance in a joint interest earning account in the name of both advocates within 90 days failure to which the order of stay lapses.

It is so ordered.

RULING DELIVERED SIGNED & DATED IN OPEN COURT ON 31/10/2024 IN MACHAKOS HIGH COURT (VIRTUAL/PHYSICAL CONFERENCE).

M.W. MUIGAI

JUDGE

In the presence of

Mr. Geya - For the Appellant

No Appearance- For the Respondent

Geoffrey - Court Assistant

