



**Mugacha t/a Galaxy Auctioneers v Global Trucks Limited (Miscellaneous Civil Application E365 of 2020) [2024] KEHC 13099 (KLR) (Civ) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13099 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
MISCELLANEOUS CIVIL APPLICATION E365 OF 2020**

**CW MEOLI, J**

**OCTOBER 31, 2024**

**BETWEEN**

**S T MUGACHA T/A GALAXY AUCTIONEERS ..... APPLICANT**

**AND**

**GLOBAL TRUCKS LIMITED ..... RESPONDENT**

**RULING**

1. By the Notice of Motion dated 6<sup>th</sup> September, 2024 (the Motion), Global Trucks Limited (hereafter the Respondent) seeks leave to appeal out of time from the ruling of this court delivered on 31<sup>st</sup> July, 2024; an order setting the timelines during which the appeal may be instituted; and a further order to stay execution of the judgment entered on 7<sup>th</sup> November, 2023 pending the hearing and determination of the intended appeal. The Motion is expressed to be brought under Sections 1A, 3 and 3A of the *Civil Procedure Act* (CPA); Order 22, Rule 22; Order 42, Rule 6; Order 50, Rule 5 and Order 51 of the Civil Procedure Rules (CPR); Rule 11(4) of the Advocates Remuneration Order; and Articles 47 and 159(2)(d) of *the Constitution*.
2. The grounds on the face of the Motion are amplified in the supporting affidavit sworn by the Respondent's Director, Moses Movoko, who averred that the Respondent is aggrieved by the subject ruling and desires to lodge an appeal. The deponent states that the delay in lodging the appeal was unintentional and occasioned by the fact that the ruling was delivered in the absence of the Respondent, and without notice. That the Respondent only became aware of the ruling upon being served with warrants of attachment of movable property, in execution of the decree. It is also averred that the intended appeal raises arguable grounds. Further that, that unless the order for enlargement of time sought is granted, the Respondent will suffer grave prejudice through what he terms as extortion by S.T. Mugacha T/A Galaxy Auctioneers (hereafter the Applicant), having proclaimed 17 of the



Respondent's properties worth over Kshs. 5,000,000/- while only two (2) of its properties would satisfy the decree.

3. In the same breath, the deponent states that unless the stay sought is granted, the intended appeal will be rendered nugatory as the judgment sum is substantial, while the Applicant's means to make refunds, should the appeal succeed, are unknown. And that, the Applicant does not stand to suffer any prejudice that cannot be compensated by way of costs, if a stay is granted.
4. The Applicant opposed the Motion by way of a replying affidavit sworn by his advocate, Joseph Makumi, on 12<sup>th</sup> September 2024. Therein, the advocate deposed that the Respondent had no excuse for failing to attend court for delivery of the ruling on 31<sup>st</sup> July, 2024 because notice of the ruling notice had previously been served upon it on 29<sup>th</sup> July, 2024 with an affidavit of service on record evidencing the same. The advocate therefore deposed that no reasonable explanation has been given to warrant extension of the timelines for lodging an appeal.
5. Concerning stay of execution, counsel swore that execution is a lawful process and that in the present instance, the Respondent has not satisfied the conditions attaching to the grant of stay, adding that there is no legal requirement for the Applicant to demonstrate its means. Counsel finally deposed that should the court be inclined to grant the orders sought; it should be on the condition that the Respondent deposits the entire decretal sum of Kshs. 1,324,991/- into court or in an interest earning account, within 14 days from the date of the ruling. And further, that the Respondent be ordered to file and serve a notice of appeal within a similar period of 14 days. Otherwise, the Applicant's advocate urged that the Motion be dismissed with costs.
6. From the court proceedings on 3<sup>rd</sup> October, 2024 the Respondent was granted corresponding leave to file a supplementary affidavit. The parties also agreed to have the instant Motion determined on the basis of the affidavit material on record. Nevertheless, at the time of this ruling, the Respondent had not filed a supplementary affidavit.
7. The court has therefore considered the rival affidavit material on record. Two substantive prayers are in the motion, the foremost seeking leave to appeal out of time. The power of the court to enlarge time for filing an appeal out of time is expressly donated by Section 95 of the CPA as read with Order 50, Rule 6 of the CPR. The principles governing leave to appeal out of time are well-settled. A 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 was in pari materia with 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 general 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. 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....”

See also *Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 Others* [2019] eKLR.

9. The Supreme Court in the case of *Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The Court stating inter alia that:

“(T)he 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. ....”

See also *County Executive of Kisumu v County Government of Kisumu & 8 Others* [2017] eKLR.

10. In this case, the ruling in question was delivered on 31<sup>st</sup> July, 2024 whereas the instant Motion was brought on or about the 6<sup>th</sup> of September, 2024. In the court’s view, the delay of slightly over one (1) month is not inordinate. Concerning the reasons for the delay, the court considered the explanation given by the Respondent, namely, want of notice of the ruling date. To which the Applicant answered that the Respondent’s failure to attend court for delivery of the ruling was inexcusable and unjustified in any event, since notice of the ruling date had been served upon its advocates.
11. The record indicates that at the hearing of the motion giving rise to the subject ruling on 11<sup>th</sup> June, 2024, both parties were represented by their respective counsel, and at the close of proceedings, the court scheduled the ruling for 29<sup>th</sup> July, 2024. On 29<sup>th</sup> July, 2024 the court postponed the ruling to 31<sup>st</sup> July, 2024. The record shows that once again, both parties were represented by their respective counsels on the said date, Mr. Osoro shown as representing the Respondent. He was absent on 31.07.2024.



12. The Applicant's counsel exhibited in his replying affidavit a copy of the ruling notice dated 29<sup>th</sup> July, 2024 coupled with email correspondence and an affidavit of service as J.M. 1a, 1b and 1c respectively, evidencing prior service of notice of the ruling date of 31.07.2024 upon the Respondent's advocate. Hence, the Respondent has not shown candour by deposing to the contrary. Besides, even in the absence of notice, the counsel for the Respondent, if diligent, could have inquired from the court registry of the next ruling date. Evidently, the Respondent's assertions are flimsy and sound more like excuses than solid reasons for delay.
13. Regarding the consideration whether or not the intended appeal arguable, it is noteworthy that the intended appeal is against the ruling delivered by this court on 31<sup>st</sup> July, 2024. Hence, the issue would be properly a preserve of the Court of Appeal. But suffice it to state all that the Respondent was required to demonstrate is that the appeal raises matters worthy of the consideration of the appellate court. The Court of Appeal in *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited* [2020] eKLR stated that such appeal "need not succeed so long as it raises a bona fide issue for determination by the Court."
14. Further, the Court emphasized the right of appeal in the following terms:
- "Turning to the request to allow the applicant to exercise his now undoubted constitutionally underpinned right of appeal, the position is.... crystallized .... in the case of *Richard Ncharpi Leiyagu vs. IEBC & 2 Others* (supra); *Mbaki & Others vs. Macharia & Another* [2005] 2EA 206; and the Tanzanian case of *Abbas Sherally & Another vs. Abdul Fazaiboy*, Civil Application No. 33 of 2003; for the holding inter alia that:
- (i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;
  - (ii) the right to be heard is a valued right; and
  - (iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice..."
15. The Applicant has not demonstrated the likelihood of undue prejudice, that cannot be compensated by way of costs, if the motion is allowed. And has in the alternative given the condition that the Respondent ought to deposit the decretal sum if the motion were to be allowed. Thus, while it is apparent that the reasons explaining the delay in filing the Motion are unsatisfactory, the court noting the brief period of delay and absence of proof that the Applicant will suffer prejudice beyond compensation through costs, will in furthering the Respondent's constitutional right of appeal, nevertheless exercise its discretion in favour of the Respondent. Thus, allowing the prayer for leave to file appeal out of time.
16. The second prayer seeks stay of execution pending appeal. It is trite that the courts have discretionary power to grant an order for a stay of execution of a decree or order pending appeal and which discretion ought to be exercised judicially. See *Butt v Rent Restriction Tribunal* (supra). Order 42, Rule 6 of the CPR stipulates that:
- “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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. Having already addressed the first condition touching on whether the Motion has been brought without unreasonable delay, the second condition for consideration here is whether the Respondent has demonstrated the likelihood of suffering substantial loss if stay is denied. The importance of this consideration in an application for stay of execution was underscored by the Court of Appeal case in the renowned case of *Kenya Shell Ltd v Kibiru & Another* [1986] KLR 410 as follows:

“Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented...”

18. The Court proceeding to state on the question that:

- “ 1. ....
2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.
3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.
4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.”

19. The decision of Platt Ag JA, in the Shell case, in the court’s humble view set out two different circumstances when substantial loss could arise, and therefore giving context to the 4<sup>th</sup> holding above. The Platt Ag JA (as he then was) stated inter alia that:

“The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages. It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of



the Civil Procedure Rules was not met. There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty to the Applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts.”

20. The learned Judge continued to observe that:

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting 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.”

21. Earlier on, Hancox JA in his ruling observed that:

“It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would, render the appeal nugatory. This is shown by the following passage of Cotton L J in *Wilson -Vs- Church (No 2) (1879) 12ChD 454* at page 458 where he said:-‘I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory. As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.’”

22. The court considered the averments by the Respondent on the manner in which it would stand to suffer substantial loss, namely through the purported proclamation of its goods whose value exceeding the decretal sum owed, and the risk that the Applicant may not be able to refund the said sum upon payment, if the appeal succeeds. Thus rendering the intended appeal nugatory. On his part, the Applicant asserted that execution is a lawful process which ought to proceed.

23. On the one hand, a successful party is entitled to enjoy the fruits of his or her judgment barring a case being made to the court for the grant of stay pursuant to Order 42 Rule 6 of the CPR. The initial burden of proof of substantial loss is with the applicant who must show how the loss will occur; either by the applicant to recover any monies paid to the decree holder in satisfaction of the decree, or that the applicant shall experience difficulty in settling the decretal sums. Where as here, a claim is made that the Applicant’s means to refund the sums paid over, upon the appeal succeeding are unknown, the burden shifted upon him to demonstrate his means. Contrary to the averments made by counsel for the Applicant, that is the position as settled by the Court of Appeal in the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR*:

“Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...”

24. As stated in the *Shell* case, without a demonstration of substantial loss, it would be rare that any other event would render the appeal nugatory and justify keeping the decree holder out of its money. The decretal sum here is in excess of Kshs. 898,859.50 which was the judgment sum pursuant to taxation,



excluding interest. The amount is substantial. In the absence of proof of the Applicant's financial capacity or ability to refund this sum if called upon to do so, the court finds that the Respondent has reasonably demonstrated the likelihood of substantial loss. To say nothing of the Respondent's assertion that the value of the proclaimed property exceeds the decretal amounts.

25. Ultimately the Respondent's entitlement to pursue her undisputed right of appeal must be balanced against the Applicant's right as the decree holder. The words stated in *Nduhiu Gitahi & Another v Anna Wambui Warugongo* [1988] 2 KAR, citing the decision of Sir John Donaldson M. R. in *Rosengrens -Vs- Safe Deposit Centres Limited* [1984] 3 ALLER 198 and others, still hold true:

“We are faced with a situation where a judgment has been given. It may be affirmed, or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to give advantage the Defendant while giving no legitimate advantage to the Plaintiff... It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal...”

26. Thus, the court must balance the competing interest of the parties here. The Respondent is apprehensive that the appeal will be rendered nugatory if the orders sought are disallowed, hence occasioning substantial loss. At the same time, the decree-holder is entitled to a security for the eventual performance of the decree.
27. In this regard, the record shows that the Respondent complied with the orders earlier given by the court on 3<sup>rd</sup> October, 2024 requiring it to deposit the sum of Kshs.500,000/- into court as condition for granting an interim order of stay. The security was apparently deposited on 11<sup>th</sup> October, 2024. The Applicant on his part has proposed that the Respondent deposits the entire decretal amount stated to currently stand at Kshs. 1,324,991/-, as security.
28. Weighing all relevant considerations, the court is persuaded to grant the Notice of Motion dated 6<sup>th</sup> September 2024 in the following terms:
- a. Leave is granted to the Respondent to file an appeal out of time to the Court of Appeal, and in any event, not later than 14 days reckoned from today's date.
  - b. There shall be an order to stay execution of the judgment entered herein on 7<sup>th</sup> November 2023, on condition that, the Respondent shall within 30 days of today's date deposit into court a further sum of Kes. 400,000/- (Four Hundred Thousand) in order to raise the total security furnished to Kes. 900,000/- (Nine Hundred Thousand), and in default the stay order shall automatically lapse.
  - c. The costs of the Motion are awarded to the Applicant in any event.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 31<sup>st</sup> DAY OF OCTOBER 2024.**

**C.MEOLI**

**JUDGE**

In the presence of

Mr. Makumi for the Applicant/Respondent

N/A for the Respondent/Applicant

C/A: Erick

