



**Osman & another v Kiema (Miscellaneous Application E002 of 2023)
[2024] KEHC 13788 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13788 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS APPLICATION E002 OF 2023
MW MUIGAI, J
OCTOBER 31, 2024**

BETWEEN

AHMED MAALIM OSMAN 1ST APPLICANT

JAMAL MOHAMED 2ND APPLICANT

AND

BONIFACE MULWA KIEMA RESPONDENT

RULING

Pleadings

1. Vide a Notice of Motion filed on 13th June, 2023 brought under Sections 1A and 3A of the [Civil Procedure Act](#), Order 42 Rule 6 and order 51 Rule 1 of the Civil Procedure Rules and other enabling laws, the Applicants sought the following orders that:
 1. Spent
 2. That pending the hearing and determination of this application, this honourable court be pleased to set aside the entire judgement entered against the applicants on the 30th day of March 2023 by Hon Suter in Mavoko Civil suit No E23 of 2020 and issue an order for stay of execution of the entire judgement and decree against the applicants.
 3. That pending the hearing and determination of this application, this honourable court be pleased to grant the applicants leave to appeal out of time against the entire judgement delivered on the 30th day of March 2023 by Hon Suter in Mavoko Civil suit No E23 of 2020.
 4. That pending the hearing and determination of the intended appeal, this honourable court be pleased to set aside the entire judgement entered against the applicants on the 30th day of March 2023 by Hon Suter in Mavoko Civil suit No E23 of 2020 and issue an order for stay of execution of the entire judgement and decree against the applicants



5. That pending the hearing and determination of the intended appeal, this honourable court be pleased to grant the applicants leave to appeal out of time against the entire judgement delivered on the 30th day of March 2023 by Hon Suter in Mavoko Civil suit No E23 of 2020.
6. That the cost of this application be provided for.

Supporting Affidavit

2. The application was supported by Supporting Affidavit of Ahmed Maalim Osman. He deposed that the Respondent was awarded on 30/3/2023 Ksh.1,499,275/- with Costs and interest. There is imminent threat of execution by the Respondent as they had been reaching out to the respondent with the view of coming to an amicable solution on how to settle the decretal sum but has all been in vain. That the applicant's advocates received a copy of the judgement late after numerous attempts to obtain them and that the delay in filing was occasioned by factors and reasons beyond the advocates control. That the appeal was arguable and meritorious and will be rendered nugatory if the orders sought are not granted.
3. The Applicant averred that they will be greatly prejudiced if the judgment sought to be set aside and stayed are not granted yet no prejudice will be suffered by the respondent herein if the application is allowed.
5. The matter was canvassed by way of written submissions.

Submissions

The Appellant/Applicant's Submissions

6. The Appellant/Applicant filed his written submissions dated 1st September, 2023 and submitted that the main issue in contention was the conditions for stay to be set in the matter
7. It was submitted that the delay in filing this application was occasioned by the court itself and can be demonstrated by various attempts on the part of the applicant's advocates to obtain a copy of the judgement and proceedings. Reliance was placed in the case of Utali Transport Company Limited & 3 others vs NIC Bank & another (2014) eKLR and the case of Florence Hare Mkaha v Pwani Tawakal Mini Coach & another [2014] eKLR.
8. It was submitted that on substantial loss, the applicant stands to suffer irreparable loss if stay is not granted, they were fearful and apprehensive that if stay is not issued there will be nothing stopping the respondent from initiating the execution process.
9. On security for due performance, reliance was placed on the case of Focin Motorcycle Co. Ltd vs Ann Wambui Wangui & Another [2018] eKLR and the case of Mathu vs Gichimu [2004] eKLR.
10. It was submitted that the applicants have demonstrated good will that they do not intend to deny the respondents the fruits of his judgement and are willing to deposit security for due performance of the decree which is half of the security to be deposited in court and the other to be deposited in a joint interest earning account of the parties' advocates.
11. However the applicants submitted that they were likely to suffer substantial loss if they pay the respondent half of the decretal sum since the respondent's source of income is unknown and they cannot ascertain whether is a person of means and thus he may not be in a position to refund the money in the event the appeal succeeds.



12. Reliance was placed in the case of *Benisa Limited v John Ngotho Maina* [2022] eKLR and the case of *Direct Line Assurance Company limited v Michael Njima Muchiri & Another* [2020] eKLR.
13. Lastly on substantial loss, reliance was placed on the case of *Sewankambo Dickson vs Ziwa Abby* HCT-00-cc 0178 of 2005.
14. The Applicants submitted that they had demonstrated the conditions of stay namely that they will suffer substantial loss, that they were willing to furnish security for due performance and that the application was brought timely save for the delay caused by the court's registry.

Determination

15. I have considered the application, affidavits in support and in opposition to, submissions and the authorities relied upon.
16. The application is premised on Order 42 rule 6(2) of the Civil Procedure Rules, 2010 provides that: -

“No appeal or second appeal shall operate as a stay of execution or proceedings 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 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.
17. It therefore follows that no appeal or second appeal will operate as a stay. A party must show sufficient reasons why stay orders should be granted. See *Vishram Ravji Halai vs. Thornton & Turpin* Civil Application No. Nairobi 15 of 1990 [1990] KLR 365.
18. The Court, in *RWW vs. EKW* [2019] eKLR, addressed its mind to the purpose of a stay of execution order pending appeal, in the following words:

“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.”
19. The only issue necessary for determination would be whether the application seeking stay of execution is merited.



Substantial Loss

20. On the first condition, the court in *Tropical Commodities Suppliers Ltd and Others vs. International Credit Bank Limited (in liquidation)* (2004) E.A. LR 331, defined substantial loss in the sense of Order 42 rule 6 as follows:-

“...Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”

21. In *Masisi Mwita vs. Damaris Wanjiku Njeri* [2016] eKLR, Mativo J relied on the case of *Equity Bank Ltd vs. Taiga Adams Company Ltd*, [2006] eKLR to explain the onus of the Applicant where the court stated a follows: -

“...The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is execution is carried out—in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse- as/he is a person of no means. Here, no such allegation is established by the appellant.”

22. In *National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & another* [2006] eKLR Court of Appeal held thus:

“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...”

23. The Applicant’s contention is that they were likely to suffer substantial loss if they pay the respondent half of the decretal sum since the respondent’s source of income has not been demonstrated and thus they cannot ascertain if they are persons of means and that the applicants were apprehensive that the respondent may not be in a position to refund the monies paid in the event that the appeal succeeds.

24. Odunga J. in *George Kimotho Ilewe Annastacia Wanza Muthuka & Joseph Mutuku Ngewa (suing as legal representatives of the estate of Judy Kioo Wanza – deceased)* stated that:-

“It is not enough to simply speculate that the Respondent, a successful litigant would not be able to refund the decretal sum. As far as the Court is concerned, she is a successful litigant and is entitled to the sum decreed in her favour. Similarly, there is no allegation that the payment of the said sum would ruin the applicant’s business.” See in *Bungoma High Court Misc Application No 42 of 2011 - James Wangalwa & Another vs. Agnes Naliaka Cheseto and James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR.

25. Gichuhi, Ag.JA (as he then was) in *Kenya Shell Limited vs. Kibiru* [1986] KLR 410, at 417 held:

“It is not sufficient by merely stating that the sum of Shs. 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”



26. It therefore follows that the Applicant must demonstrate the loss he/she would suffer if the decretal sum is paid to the Respondent.
27. The Court notes that despite the Respondent not stating in his affidavit whether he is capable of refunding the decretal amount or furnishing the court with documentary evidence if paid to him, the Applicant has not demonstrated what substantial loss he will suffer. The Applicant has simply stated that the respondent is a person of unknown means and was apprehensive that if the decretal sum is paid out, the appeal will be rendered an academic exercise.
28. The Court is of the view the Applicant/Appellant has not demonstrated the substantial and/or irreparable damage and loss they will suffer. The ground thus fails.

Unreasonable Delay

29. On the second condition, the Applicant stated that his application for stay of execution was filed without unreasonable delay or undue delay. The court notes that the judgment of the Trial Court was entered on 30.03.23 and the application was filed on 13. 06.23. A month and some few days later is not unreasonable delay.
30. The Court finds that there is no undue delay in filing the application herein.

Furnish Security

31. The Applicant stated that they have demonstrated good will that they do not intend to deny the respondents the fruits of his judgment and are willing to deposit security for due performance of the decree which is half of the security to be deposited in court and the other to be deposited in a joint interest earning account of the parties' advocates
32. The Court in *Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & another* [2018] eKLR, stated that:-

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

33. It follows therefore that it is the discretion of the court to determine the security.
34. Whether the Applicant/Appellant should be granted leave to appeal out of time.
35. Section 79G of the *Civil Procedure Act* which provides 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.”



36. The Court of Appeal in *Thuita Mwangi vs Kenya Airways Ltd* [2003] eKLR, Court observed factors to consider in exercising the discretion on whether to extend time to file an appeal out of time 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 Respondent if 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.
37. It was submitted that the delay in filing this application was occasioned by the Court itself and can be demonstrated by various attempts on the part of the applicant's advocates to obtain a copy of the judgment and proceedings.

Disposition

In the premises: -

- a. Appeal to be deemed as filed as Court grants time to file out of time.
- b. There will be a stay of execution pending the appeal on condition that the Applicant remits to the Respondent half of the decretal sum and balance of the decretal sum be secured by a valid bank guarantee issued within 90 days from the date hereof and in default, the application for stay shall stand dismissed.
- b. The costs of this application abide the outcome of the appeal.

It so ordered.

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

M.W. MUIGAI

JUDGE

