



Uwowo Savings and Credit Society Limited v Agasa (Suing as administrator of the Estate of Collins Jumba - Deceased) (Miscellaneous Civil Application E003 of 2021) [2024] KEHC 13519 (KLR) (30 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13519 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
MISCELLANEOUS CIVIL APPLICATION E003 OF 2021**

JN KAMAU, J

OCTOBER 30, 2024

BETWEEN

UWOWO SAVINGS AND CREDIT SOCIETY LIMITED APPLICANT

AND

ERICK ALUMASA AGASA (SUING AS ADMINISTRATOR OF THE ESTATE OF COLLINS JUMBA - DECEASED) RESPONDENT

RULING

1. In its Notice of Motion dated 2nd February 2024 and filed on 5th February 2024, the Applicant herein sought for orders that it be granted extension of time to enable it comply with the orders of 24th March 2023 that were given by Musyoka J.
2. Maureen Tesot, the Applicant's Advocate, swore an Affidavit on behalf of the Applicant in support of the said application.
3. The Applicant was aggrieved by the Judgment delivered on 30th July 2021 by Hon R. Ndombi in Vihiga PMCC No 74 of 2019. It filed an application dated 18th January 2021 seeking leave to file an appeal out of time. The said application was first placed before Farah J before it was taken over by Musyoka J. He was transferred to Busia High Court.
4. It wrote a letter inquiring on the status of the Ruling and towards the end of January 2024, its Advocate's clerk got a copy of the Ruling that was delivered on 24th March 2023 by Musyoka J. He had allowed its said application on condition that it filed a memorandum of appeal and deposit half of the decretal sum in court within thirty (30) days from the date of the Ruling. It failed to comply with the aforesaid conditions in good time as the Ruling was delivered in their absence and without notice.
5. It asserted that access to justice and fair hearing for all was guaranteed and unlimited under Article 48 and 50 of *the Constitution* of Kenya, 2010. It was apprehensive that the Respondent would commence



- execution against it at any time as there was no stay of execution of the lower court judgment and taxed costs.
6. It was keen on filing and prosecuting an appeal and sought the indulgence of this court not to be ousted from the seat of justice. It was emphatic that it had an arguable appeal and should be given an opportunity to have the same prosecuted and determined on merits. It contended that it would suffer irreparable loss, prejudice and harm if the orders sought were not granted. It asserted that no prejudice would be occasioned on the part of the Respondent.
 7. It added that it had brought the application without unreasonable delay and it was in the interest of justice that the orders sought be granted.
 8. Okwaro Winnie Anono, the Respondent's Advocate swore a Replying Affidavit on 19th February 2024 on behalf of the Respondent and in opposition to the present application. The same was filed on 21st February 2024.
 9. The Respondent averred that the application was destitute of merit, misplaced and had been brought in bad faith with the aim of delaying the cause of justice. He pointed out that the Applicant wrote its letter 2nd December 2023 and received in court on 13th December 2023 eight (8) months after the Ruling was delivered. He pointed out that as the file was last seen in court on 6th June 2023 as per the Applicant's letter, this was an indication that the file was available for perusal and alluded the failure to do so was due to the Applicant's laxity.
 10. He argued that it had been ten (10) months since the Judgment in the matter was delivered and the Applicant had failed to show sufficient cause why it failed to comply with the Ruling on time. He added that the said orders that were issued were self-executing and as such this court was functus and ought not entertain the application herein.
 11. He was categorical that whilst the Applicant had stated that it was keen in prosecuting the Appeal, it had not demonstrated any attempt to obtain proceedings with a view of compiling a record of appeal and/or the said Ruling.
 12. It was his case that the Applicant had continued to enjoy interim orders of stay for three (3) years thus denying him the fruits of his litigation. He termed the application as frivolous and pointed out that it had no chances of succeeding. He further contended that the Applicant had moved the court with unclean hands, its application was bad in law as it was guilty of laches and urged this court not to be seen to aid the indolent but to dismiss the same with costs.
 13. The Applicant's Written Submissions were dated 8th March 2024 while those of the Respondent were dated 22nd March 2024. However, they did not bear a court stamp. In view of the fact that documents were being filed through the e-filing platform, this court admitted the same as there was a likelihood of the Registry having omitted to stamp the same. This Ruling is based on the said parties' Written Submissions which they relied upon in their entirety.

Legal Analysis

14. The Applicant basically reiterated its averments in its submissions. It invoked Article 50(1) of *the Constitution* of Kenya and urged the court to allow its application. It added that the Respondent had not adduced any prejudice he may suffer if the application is not allowed.
15. On his part, the Respondent invoked Section 79G of the *Civil Procedure Act* and placed reliance on the case of *Dilpack Kenya Limited vs William Muthama Kitonyi* [2018] eKLR where it was held that an applicant seeking enlargement of time to file an appeal must show that he has a good cause for



- doing so. He also cited the case of First American Bank of Kenya Ltd vs Gulab P. Shah & 2 Others [2002] 1 EA 65 wherein the court set out the principles to be considered in deciding whether or not to grant enlargement of time included an explanation if any for the delay, the merits of the contemplated action, whether the matter was arguable one or a frivolous one and whether or not the respondent could adequately be compensated in costs for any prejudice he may suffer.
16. He argued that the delay herein was inordinate and that the Applicant had not given sufficient cause for the same. He was categorical that the Applicant had enjoyed the stay of execution for three (3) years hence had not met the threshold for grant of the orders sought.
 17. He further cited Order 42 Rule 6 of the Civil Procedure Rules 2010 and placed reliance on the case of Butt vs Rent Restriction Tribunal [1979] where it was held that the power of the court to refuse or grant stay of execution was discretionary and should be exercised in such a way not to prevent an appeal, secondly, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory, thirdly, an order of stay should not be denied merely because a better remedy may become available to the applicant at the end of the proceedings and finally, the court should consider the special circumstances of the case and its unique requirements.
 18. He also relied on the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR where it was held that substantial loss was what had to be prevented by preserving the status quo because such loss would render the appeal nugatory. He asserted that the Applicant had not demonstrated the prejudice it would suffer if the orders herein were not granted.
 19. He invited this court to balance his interests with those of the Applicant and added that the court ought not allow itself to be used to punish and/or delay him from enjoying the fruits of litigation. In this regard, he relied on the case of RWW vs EKW[2019]eKLR where it was held that the court in granting stay must balance the interests of the appellant with those of the respondent.
 20. He was emphatic that the Applicant had not demonstrated any efforts to even obtain the proceedings of the suit forming the subject of the intended appeal hence it could be construed that it was on a fishing expedition and/or was buying time.
 21. In his Ruling that was delivered on 24th March 2023, Musyoka J rendered himself as follows:-

“The Applicant is entitled to its day in court. I note that the memorandum of appeal discloses reasonable and arguable grounds. I am persuaded that this is a proper case for grant of the orders sought. Consequently, I do hereby allow the application dated 18th January 2021, subject to half of the decretal amount being deposited in court within 30 days. Leave to appeal is for 30 days.”
 22. A perusal of the proceedings of this court on 24th March 2023 showed that the Ruling was delivered in the absence of both parties. They read as follows:-

“24/3/23
Musyoka J.
Erick/CA
N/A for the parties
Ruling is delivered, dated and signed in open court.”



23. The Applicant filed this application on 5th February 2024. This was about ten (10) months and twelve (12) days. In the mind of this court, this was not so inordinate and/or unreasonable considering that it was not aware of the delivery of the said Ruling following his transfer. This delay was thus excusable.
24. Courts must therefore exercise great caution not to deny litigants their right to fair trial. Indeed, every party has a right to access any court or tribunal to have its dispute heard and determined in accordance with Article 50(1) of *the Constitution* of Kenya, 2010. Even where a party delays in doing an act, there is always a provision that would give it reprieve to seek justice.
25. Notably, Order 50 Rule 6 of Civil Procedure Rules empowers the court to enlarge the time to do a particular act. It stipulates as follows:-

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”
26. Against this backdrop, this court noted that in his Ruling, Musyoka J had found that the Applicant’s Memorandum of Appeal had disclosed an arguable appeal.
27. In cases such as this, the court was required to consider if the opposing side would suffer any prejudice if the orders sought were granted. This court did not see any prejudice that the Respondent would suffer or was likely to suffer if the Applicant herein pursued its constitutional right to be heard. If there was any prejudice, then the same could be compensated by way of payment of costs.
28. Taking all the factors hereinabove into account, it was the considered view of this court that it was in the interests of justice (emphasis court) that the Applicant be given an opportunity to have its case heard on merit as it would suffer prejudice if it was denied an opportunity to fully present its case to be heard on merit.
29. Indeed, the power to grant orders in the interest of justice and/or for the ends of justice (emphasis court) is well captured in Section 3A of the *Civil Procedure Act* that states that: -

“Nothing in the Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice (emphasis court) or to prevent abuse of the process of the court.”
30. Having said so, it was the Applicant’s responsibility to have followed up to check on its matter. Failure to do so in good time and bearing in mind the nature of the orders that were likely to be granted showed that it was indolent. It could therefore not be allowed to go scot free and had to pay throw away costs to the Respondent herein to compensate him for being taken back in litigation when they were expected to have presumed that there would be no further litigation in view of the long period the Applicant had taken to move the court. In determining the quantum of throw away costs, this court considered the fact that the Applicant was not aware when the aforesaid Ruling was delivered.
31. Turning to the issue of orders for stay, this court noted that the Respondent submitted on stay of execution whereas the Applicant only prayed that the orders of 24th March 2023 be extended to allow them file their intended appeal. Therefore, their arguments on the conditions to be met for an order of



stay of execution to be granted thus fell on the wayside. Be that as it may, it was prudent that the said orders be stayed pending the determination of the Appeal herein.

32. Further, this court was not functus officio with regard to hearing and determination of the application herein as the Respondent had argued as it took over the matter from Musyoka J. The present application was only seeking extension of time to comply with the orders he had issued.

Disposition

33. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Application dated 2nd February 2024 and filed on 5th February 2024 was merited and the Prayer No (3) be and is hereby allowed in the following terms: -

1. That there shall be a stay of execution of Judgment that was delivered by Hon Ndombi (SRM) on 30th July 2021 in Vihiga PMCC No 74 of 2019 pending the hearing and determination of the appeal on condition the Applicant shall deposit half of the decretal amount in court within thirty (30) days from the date of this Ruling.
2. For the avoidance of doubt, in the event, the Applicant shall default on Paragraph 33(1) hereinabove, the conditional stay of execution shall automatically lapse.
3. The Applicant be and is hereby directed to file and serve his Memorandum of Appeal within fourteen (14) days from the date of this Ruling.
4. The Applicant be and is hereby directed to file a Record of Appeal within ninety (90) days from the date of this Ruling.
5. This matter will be mentioned on 11th February 2025 to confirm compliance and/or for further orders and/or directions.
6. In view of the fact that the Applicant has taken back the Respondent to re-litigate the application dated 18th January 2021, and thus suffer costs, it is hereby directed to pay the Respondent throw away costs in the sum of Kshs 10,000/= within thirty (30) days from the date of this Ruling failing which the Respondent will be at liberty to commence legal proceedings for the recovery of the same in the normal manner.

34. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 30TH DAY OF OCTOBER 2024

J. KAMAU

JUDGE

