



REPUBLIC OF KENYA



**Day by Day Holdings Limited & 2 others v Mwendwa aka Patrick Mzizi Mwenda (Miscellaneous Civil Application 389 of 2023) [2024] KEHC 13250 (KLR) (29 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13250 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS CIVIL APPLICATION 389 OF 2023  
SM MOHOCHI, J  
OCTOBER 29, 2024**

**BETWEEN**

**DAY BY DAY HOLDINGS LIMITED ..... 1<sup>ST</sup> APPLICANT  
MOLO GROUP SACCO ..... 2<sup>ND</sup> APPLICANT  
JOSEPH MAINA MWANGI ..... 3<sup>RD</sup> APPLICANT**

**AND**

**PATRICK MZINZI MWENDWA AKA PATRICK MZIZI  
MWENDA ..... RESPONDENT**

**RULING**

1. By Notice of Motion Application dated 24<sup>th</sup> November, 2023 brought under Sections 1A, 1B, 3A 79G and 95 of the *Civil Procedure Act* and Order 42 Rule 6 (1), (2) & (7) Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, the Applicants moved this Court seeking the following orders that:-
  - a. Spent;
  - b. That the Honourable Court be pleased to grant the Applicant leave to Appeal out of time in respect to the judgment /decree delivered in Nakuru CMCC No. 58 of 2019 by Hon. Margaret Kyalo (PM);
  - c. Spent;
  - d. That the Honourable Court be pleased to grant an order of Stay of Execution of the Judgment and or Decree delivered on 12<sup>th</sup> October, 2023 and all consequential orders arising therefrom pending the hearing and determination of the intended Appeal herein;
  - e. This Honourable Court be pleased to issue an order for provision of a bank guarantee of the entire decretal sum pending the hearing and determination of the intended Appeal;



- f. The Honourable Court be pleased to issue any other order as it may deem just appropriate and expediate in the interest of justice; and
- g. Costs of this Application be provided for.

### **Applicant's Case**

2. The Application is on the strength on the grounds on its face and on the Supporting Affidavit of Cythia Kemunto, Advocate sworn on the same date.
3. She deposed that judgement in Nakuru CMCC No. 58 of 2019 was delivered on 12<sup>th</sup> October, 2023 in favour of the Respondent. That their client Directline Assurance Ltd was informed for instructions but unfortunately the claims officer who received the terms of judgement left the employment of the client.
4. She deposed further that she followed up with the client for payment of the claim and the client was dissatisfied with the judgment and instructed them to file an appeal. That by the time they got the instructions the 30 days period set for lodging of appeal had already lapsed.
5. It was also stated that they are apprehensive that the Respondent will commence execution proceedings thereby rendering the appeal nugatory. That the Applicant stands to suffer irreparable loss and damage if the Application is not allowed.
6. She averred that the Respondent's income is unknown hence if the decretal amount which is substantial is paid the Respondent may not be in a position to refund the same in the event the appeal succeeds. That they are willing to provide a bank guarantee for the decretal sum from Family Bank pending hearing and determination of the appeal.
7. She argued that the Applicant's right of appeal will be injured if the prayers sought are not allowed and the matter is preserved. That the Respondent will not be prejudiced in any way if the orders sought are granted and that the Applicant is willing to abide by the terms and conditions that will be imposed. The Application is made in utmost good faith and without undue delay.

### **Respondent's Case**

8. The Respondent opposed the Application by way of Replying Affidavit sworn on 9<sup>th</sup> January, 2024 wherein he stated that judgment was delivered in the presence of the Applicant's counsel and the application ought to be dismissed. That the Applicant has failed to meet the minimum threshold for enlargement of time and for grant of orders for stay of execution pending appeal.
9. He deposed further that his advocates sent a tabulated a bill of costs to them on 25<sup>th</sup> October, 2023 but they never responded. A reminder was sent on 17<sup>th</sup> November calling for payment with no response.
10. He argued that the Applicant never communicated any difficulties in making payments and the act of the Applicant to appeal out of time is an afterthought. He further argued that he is old and needed the money as he is ailing and undergoing expensive treatment. He also needed to fix some teeth as he is not able to smile in front of people. He is apprehensive that he will be exposed to irreparable health risks if the application is allowed.
11. That the Applicant has not offered any security and opposed the bank guarantee since the control of interest will be in the hands of the Applicant. He however proposed that half of the judgment sum plus costs be paid to him and the balance be deposited in joint interest earning account in both counsel name pending the outcome of the intended appeal.



12. In the alternative, the Respondent also proposed that the entire judgement sum be deposited in the interest earning joint account in the name of both counsel at the Kenya Commercial Bank as a condition for grant of orders sought.
13. The directions of Court were that the Application be heard by way of written submissions. The Applicant filed submissions on 5<sup>th</sup> August, 2024 while the Applicant chose to rely on his Replying Affidavit.

### **Applicant's Submissions**

14. The Applicants submitted that this Court has Jurisdiction to grant stay. That the Application is premised on Order 42 of the Civil Procedure Rules, which specifies the circumstances under which either the Trial Court or an Appellate Court may order stay of execution of a decree or order pending an appeal and therefore the jurisdiction of the Court is expressly conferred. The Applicants relied on Global tours & Travels Ltd; Nairobi H.C Winding Up Cause No. 43 of 2000.
15. It was also submitted that the Appeal is arguable and raises trial issues with high chances of success with the Memorandum of Appeal filed in Kajiado High Court Civil Appeal No. E005 of 2021 raising issues that have merit mainly to include contention that the award of compensatory damages was in breach of the common law doctrine of stare decisis.
16. The Applicant further submitted that if the Stay of Execution is not granted, the Appeal will be rendered nugatory and Applicants will suffer irreparable damage as the Respondent may proceed to execute and relied on Butt-Vs-Rent Restriction Tribunal [1982] KLR 417, Nairobi Civil Application No. 238 of 2005 National Industrial Credit Bank Limited vs-Aquinas Francis Wasike & another (UR) as cited in Stanley Karanja Wainaina & another-vs-Ridon Anyangu Mutubwa [2016] eKLR to buttress that the onus lies on a Respondent to show proof of ability to refund the decretal sum were the Applicant to succeed and in Kenya Hotel Properties Limited-vs-Willesden Properties Limited Civil Application Nai No. 322 of 2006 reiterated by the Court of Appeal in House Finance Company of Kenya-Vs-Sharok Kher Mohamed Ali Hirji & another [2015] eKLR,
17. The Applicants submitted that the bank guarantee is sufficient security and that the ability to furnish security should not give an unfair advantage to the Applicants. That the Applicants business has been completely frustrated and affected due to the travelling directives and owing to the COVID -19 pandemic, the insurer is also cash-constrained and is unable to raise the decretal sum hence the bank guarantee proposal. Reliance was placed in Water Resources Management Authority-vs-Krystalline Salt Limited [2018] eKLR and Shanzu Beach Restort Limited -Vs-Crown Marble & Quartz Ltd [2020] eKLR,

### **Analysis and Determination**

18. Having considered the material placed before Court and the arguments propounded by both parties as well as the Applicants' submissions the issues for determination are thus: -
  - i. Whether the Applicants have met the threshold for grant of orders to enlarge time within which to file an appeal.
  - ii. Whether the grant of orders of stay of execution pending appeal is merited.
  - iii. Who bears costs of the Application.



### **Whether the Applicants have met the threshold for grant of orders to enlarge time within which to file an appeal**

19. The applicable law in challenging the decision of a Subordinate Court to the High Court and the mandate to extend time is found in Section 79G of the *Civil Procedure Act* which provides that an appeal may be admitted out of time if the Applicant provides a good and sufficient cause for not filing the appeal in time to the satisfaction of the Court.
20. The Trial Court's judgment was delivered on 12<sup>th</sup> October, 2023. The statutory period for filing an appeal lapsed on or about 13<sup>th</sup> November, 2023. The Application dated 24<sup>th</sup> November, 2023 was filed on 30<sup>th</sup> November, 2023 about 17 days after the statutory period of lodging an appeal.
21. The Supreme Court in *Nicholas Kiptoo Korir Arap Salat vs IEBC & Others* [2014] eKLR laid down the guiding principles applicable when dealing with such an application and among them was that the application has to be filed without unreasonable delay, the reason for delay had to be plausible to the satisfaction of the Court.
22. The Applicants' counsel averred that she followed up with the client but unfortunately the claims manager left the employment of their client Directline Assurance Company and the insurer. She also attributed the delay to receiving instructions from the client. Although the Applicants received communication to make good the decretal amount from the Respondent counsel.
23. It is my considered view that a delay of about 17 days is not inordinate and is excusable. Further I am of the opinion enlargement of time to appeal would not be to defeat justice or prejudice the Respondent in any way.

### **Whether the grant orders of stay of execution pending appeal is merited.**

24. The requirements set for issue of orders for stay of execution pending appeal are provided for under Order 42, Rule 6 (2) of the Civil Procedure Rules.
25. In *Jamii Bora Bank Limited & another v Samuel Wambugu Ndirangu* [2021] eKLR the Court set the conditions precedent for grant of such orders to wit:-
  - a. unless the order is not given, substantial loss may befall an Applicant;
  - b. the Application has been made without unreasonable delay; and
  - c. security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.
26. As regards delay, as stated hereinabove, the Application was filed about 17 days after the statutory 30 days' period of lodging an appeal. There was delay which the Applicants said was attributed to delay in receiving instructions. The delay which in the circumstances can be considered not inordinate or unreasonable.
27. Pertaining substantial loss, the Applicants contended that their Right to Appeal will be curtailed, the decretal amount was a substantial amount and the Respondent would be unable to refund the same that the appeal would this be rendered nugatory in the event that the Appeal succeeded.
28. There is no shortage of jurisprudence in this regard and Courts have held that it is simply not enough for an Applicant to state that he will suffer substantial loss without supporting those averments with facts. Further the Court in *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR, held that fear of execution cannot be considered as substantial loss.



29. Be that as it may, the Respondent did not rebut the assertion that his source of income is unknown or that he would not be in a position to refund the decretal sum should the appeal succeed. In *Kenya Orient Insurance Company Co Ltd vs Paul Mathenge Gichuki & Another* [2014] eKLR the Court state that;

“the burden of proof that the respondent can refund the decretal sum if the appeal succeeded shifted to the respondent the moment the appellant stated that it was unaware of the respondent’s resources”.

30. In the case of *G. N. Muema P/A (sic) Mt. View Maternity & Nursing Home v Miriam Maalim Bishar & Another* [2018] eKLR, the Court stated as follows:-

“... substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”

31. Seeking guidance from the immediately preceding judicial authorities, it is sufficed to say that no amount is too little or too much to be unrecoverable. The minute the Applicants expressed fear that the Respondent may not refund the decretal sum the Respondent had to address that but he chose to stay silent. In the event the appeal is successful recovery of the amount might be daunting task and would surely render the appeal nugatory.

32. As for security, Order 42 Rule 6 stipulates in mandatory terms that furnishing of security for the due performance of the judgment debt is a requirement for the grant of orders for stay. The Applicants have proposed to furnish a Bank Guarantee from Family Bank which from the look of things lapsed as at 6<sup>th</sup> July, 2024 because it was for a duration of 12 months from 6<sup>th</sup> July, 2024. The show of good faith in availing it can nevertheless go unnoticed despite it being stale and of no use in the present case. See *Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & another* [2018] eKLR.

33. The Respondent has sought half of the decretal amount be deposited in an interest earning joint account and the other half to be given to him to sort out medical bills or in the alternative, the full decretal amount be deposited in an interest earning joint account.

34. In weighing the rights of each party, I have to consider the Applicants’ right as a successful party to enjoy the fruits of his judgement and to have his dispute finalized and also the Respondent’s right to appeal and have their day in Court.

35. The long and short is that the Applicants stand to suffer injustice more if they are denied the opportunity to have their appeal heard on merit. Even if the prejudice that will befall the Respondent can be put right by an award of damages, there should be no relief without conditions

36. For the reasons I have set out above, the Notice of Motion dated 24<sup>th</sup> November, 2023 is allowed on the following terms:

- a. That leave is hereby granted to the Applicants to file an Appeal out of time in respect to the judgment /decree delivered in Nakuru CMCC No. 58 of 2019 by Hon. Margaret Kyalo (PM);
- b. The Applicants shall lodge an appeal within thirty (30) days from this Ruling and file the Record of Appeal within ninety (90) days of this Ruling;



- c. There shall be a stay of execution of the Judgement and or decree of the Honourable Court delivered on 12<sup>th</sup> October, 2023 pending the hearing and determination of the Applicant's appeal;
- d. The Applicants to deposit the full decretal amount in an interest earning joint account in the name of their respective advocates within Thirty (30) days of this Ruling;
- e. The Respondent shall have costs of this Application of Kshs 10,000 to be paid within thirty (30) days from this ruling;
- f. In default of any the orders in (b) (d) and (e) hereinabove the stay shall stand vacated and the Respondent shall be at liberty to execute;
- g. The costs of the application shall be in the cause.

It is so ordered.

**SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 29<sup>TH</sup> DAY OF OCTOBER 2024.**

**MOHOCHI S. M.**

**JUDGE**

