



REPUBLIC OF KENYA



Tumaz and Tumaz Enterprises Limited v Gas Kenya Limited (Civil Case E965 of 2024) [2024] KEHC 16360 (KLR) (Civ) (19 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16360 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL CASE E965 OF 2024**

TW OUYA, J

DECEMBER 19, 2024

BETWEEN

TUMAZ AND TUMAZ ENTERPRISES LIMITED APPLICANT

AND

GAS KENYA LIMITED RESPONDENT

RULING

1. The intended appeal is against the judgement of delivered on 9th October 2024 by the Chief Magistrate Court in Nairobi Civil Suit No. MCCC/1890/2020 G4S Kenya Limited Vs Tumaz and Tumaz Limited. The applicant/intended has filed this application under certificate or urgency dated 18th October 2024 seeking orders for:
 1. That this application be certified as urgent and service thereof of be dispensed with in the first instance.
 2. That pending hearing and determination of this application inter partes, this Honourable court be pleased to issue orders of stay of execution of the Judgement which was delivered on 9th October 2024 by Honourable Lucy Ambasi (CM) at the Chief Magistrate Court at Nairobi in Civil Suit No MCCC/1890/2020 G4s Kenya Limited Vs Tumaz And Tumaz Limited.
 3. That upon grant of leave to appeal, the Memorandum of Appeal filed within be deemed as duly filed.
 4. That the costs of this Application do abide the result of the said Appeal.
2. And was supported with grounds that:



- a. That vide a plaint dated 19th March 2020, the respondent herein filed a suit in the chief magistrate court at Milimani Law courts against the applicant/intended appellant seeking judgement in the sum of Kshs 17659,459.48/=, costs of the suit and interest.
 - b. That upon service, the applicant entered appearance on 17th August, 2020 and filed its statement of defence and counterclaim for a sum of Ksh. 363,800 and general damages for breach of contract.
 - c. That the matter proceeded to trial and the respondent herein adduced one witness but the Applicant could not secure the attendance of their witness.
 - d. That the court found the respondent had proven its case on a balance of probabilities of its entitlement to the prayers sought in the plaint after declaring that the defendant's counterclaim and further stating that it was unsupported by any evidence and there by dismissed it.
 - e. That the Applicant/ intended Appellant intendeds to appeal the said judgment which appeal has an overwhelming chance of success should the appeal be heard and determined.
 - f. That unless orders sought herein are granted in favour of the Applicant/ intended Appellant, the Applicant will suffer irreparable loss and damage and the intended appeal will be rendered otiose.
 - g. That the applicant/ intended Appellant's Memorandum of Appeal annexed herein raises arguable issues with high chance of success.
 - h. That the Applicant/ intended Appellant's has filed the application without inordinate delay.
 - i. That it is in the interest of justice that stay orders be issued and leave be granted to the Applicant to file their Appeal.
 - j. That the respondent/intended respondents will not be prejudiced in any way of the orders sought herein are granted.
3. The applicant also filed a supporting Affidavit sworn on 18th October 2024 by one: Evans Wakwa as the operations manager for the applicant.
 4. At the first instance on the 23rd October the court granted interim orders on 23rd October 2024 for stay of execution allowing the parties to exchange responses and submissions and the parties were to appear for inter partes hearing on 20th November 2024. On the said date the matter was set down for ruling after parties had complied. The matter is for determination of the application.
 5. The matter is now for determination. The gist of the Notice of Motion Application is for leave to appeal and that the memorandum filed herewith to be deemed as duly filed.
 6. The respondent herein had initiated a suit against the applicant seeking judgement in the sum of Ksh 17,659,459.48 with costs of the suit and interest. The applicant entered appearance on 17th August 2020 filing a defence and counter claim of Kshs. 363,800 and general damages for breach of contract. The matter proceeded for trial but the Applicant could not secure the attendance of their witnesses. The court found in favour of the respondent granting the prayers sought and dismissing the applicant's counter claim.
 7. The applicant seeks to appeal against the judgment and therefore prays for stay of execution and leave to appeal and to admit the Memorandum of Appeal as duly filed.



8. The impugned judgement was delivered on 9th October 2024 by Hon. Lucy Ambasi (CM) in Civil Suit No CMCC 1890/2020. The applicant made this application on 18th October 2024 being nine (9) days after the judgment.
9. The respondent has raised grounds of opposition to the effect that the application is pervious, vexatious and an abuse of the court process for reasons that:
 - a. Section 79G of the [Civil Procedure Act](#) provides that an appeal to the High court shall be filed within a period of 30 days from the date of the decree or order appealed against.
 - b. The Judgement was delivered on 9th October and an appeal ought to have been filed by the applicant by 9th November 2024.
 - c. The applicant did not require leave of the court to file an appeal. This application is a nonstarter designed to cause the respondent unnecessary anxiety triable and expenses.
10. That the application is tantamount to trifling with the court as it fails to appreciate the provisions of section 7G of the [Civil Procedure Act](#) and ought to be struck out.

Determination

11. The parties were of the view that the matter is straight forward and that court should make a determination based on the pleadings filed by the parties without filing of submissions.
12. The court observes that leave that this appeal was lodged on the 18th October 2024 together with a Memorandum of Appeal sought to be deemed as duly filed. This was nine (9) days after the judgment date. The applicant was well within the 30 days period to file a Memorandum of Appeal and did not require leave of the court to do so. This is in line with the provisions of the [Civil Procedure Act](#) Section 79G which provides that:

“ Every appeal from the subordinate court to the High Court shall be filed within a period of 30 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 appelland of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appelland satisfies the court that he had good and sufficient cause of not filing the appeal in time.”
13. The court notes that the 30 days window had lapsed as at the time of hearing and determination of this application. This being the case and considering the grounds of opposition filed by the respondent, the applicant ought to have reconsidered the application to seek for leave to appeal out of time which is well within his rights but he failed to do so.
14. The court cannot grant orders which are not available to the applicant or which are superfluous and of no consequences. The court can neither purport to grant orders which are not sought for.
15. For the above reasons this court is constrained to dismiss the instant application which costs to the respondent. The applicant is at liberty to seek orders for leave to file suit out of time in the proper manner. The court takes note that the interim stay orders granted on 18th October 2024 lapsed after 30 days and no prayer had been made to extend the same.

Determination

16. Based on the above, this court orders that:



This application is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19TH DAY OF DECEMBER, 2024

ROA 14 days.

HON. T. W. Ouya

JUDGE

Respondent.... Andiwo

Applicant.....Chiriswa H/B Maruja

Court AssistantMartin

