



**Little Sisters of St Francis of Assisi (Sued as the registered trustee of St Anthony Health Center v Kariuki (Miscellaneous Civil Application E047 of 2022) [2023] KEHC 375 (KLR) (30 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 375 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS CIVIL APPLICATION E047 OF 2022**

**TM MATHEKA, J**

**JANUARY 30, 2023**

**BETWEEN**

**LITTLE SISTERS OF ST FRANCIS OF ASSISI (SUED AS THE REGISTERED TRUSTEE OF ST ANTHONY HEALTH CENTER) ..... APPLICANT**

**AND**

**LYDIA NJOKI KARIUKI ..... RESPONDENT**

**RULING**

1. By a motion dated 16<sup>th</sup> May, 2022, brought pursuant to Order 44 Rule 6(1), Order 50 Rule 5 & Order 51 Rule 1 of the *Civil Procedure Rules* 2010 and Sections 3A, 79G, 95 and 63(e) of the *Civil Procedure Act*, the Applicant seeks the following orders:-
  1. Spent
  2. That the Honorable court be pleased to grant stay of execution of the decree in Nakuru Civil Suit No. 758 of 2019 pending the hearing and determination of this Application.
  3. That the Honorable Court be pleased to grant leave and extend time to the Applicant to file its Appeal out of time in respect to Nakuru Civil Suit No. 758 of 2019.
  4. That the Honorable court be pleased to grant stay of execution of the decree in Nakuru Civil Suit No. 758 of 2019 pending the hearing and determination of the intended Appeal herein.
  5. That Costs of the Application be in the cause.
2. The Application is based on grounds that the respondent filed a suit in Nakuru Civil Suit No. 758 of 2019 against the Applicant and the court after determining the matter delivered its judgement on 5<sup>th</sup> October 2021 in their absence wherein the respondent was awarded Kshs. 80,000/= as general damages and the applicant ordered to bear the costs for replacement of the respondent's lost tooth together



with costs and interest; that after the aforesaid judgement was communicated to the applicant's insurance company, they delayed in filing an appeal in time due to internal workings of the company that requires deliberations and approvals before further instructions; that the Applicant and/or its insurance company is dissatisfied only with the lower court's decision on the order for replacement of the lost tooth as it was not pleaded and wishes to appeal against the same and thus seeks leave to file appeal out of time as the time within which to do so has since lapsed; that the stay of execution orders issued by the lower court has since lapsed and the applicant is now facing execution as a Notice to Show Cause why it should not be committed to civil jail has been issued requiring it to comply by 24<sup>th</sup> May, 2022 failure to which warrants of arrest shall be issued against it to its detriment and whilst its intended appeal is pending hearing and determination; that the applicant's appeal is arguable with high chances of success and if orders sought herein are disallowed and the appeal succeeds, the applicant stands to suffer substantial and irreparable loss as it would not be able to recover the decretal amount from the Respondent; that it is in the interest of justice that this matter be heard without further delay; that it is imperative that execution proceedings be stayed pending the hearing of this application and the intended appeal lest the intended appeal will be rendered nugatory; that no prejudice shall be occasioned on the respondent if orders sought are granted; and that the applicant is willing to abide by any such conditions as may be imposed by this court.

3. The Application is supported by an affidavit of Sr. Consolata Mbaika Katua an Administrator with the Applicant sworn on 16<sup>th</sup> May 2022 reiterating the above grounds.
4. The Application is opposed vide the Respondent's grounds of opposition dated 30<sup>th</sup> May, 2022 on the following grounds:-
  1. That the Application is an afterthought hence an abuse of the court process.
  2. That the Application has not met the threshold laid down by the law.
  3. That the Application has been brought after undue delay.
  4. That the Application is meant to dethrone the Respondent from the Judgement seat hence denying the Respondent the fruits of her judgement.
  5. That the Application is malafides.
5. The Application was canvassed by way of Written Submissions. Only the Applicant's submissions are on record.
6. The Applicant reiterated the averments in its Supporting Affidavit and implored this court to enlarge time for filing the appeal as provided for under Section 95 of the *Civil Procedure Act* and Order 50 Rule 5 of the *Civil Procedure Rules* 2010.
7. The applicant argued that the factors to be considered by the court in determining whether to grant leave to appeal out of time were laid down by the Court of Appeal in the case of *Mwangi v Kenya Airways Ltd* [2003] eKLR cited with approval in *Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another* [2018] eKLR as:-
  - a. The period of delay;
  - b. The reason for the delay;
  - c. Whether the appeal is arguable;
  - d. The degree of prejudice which could be suffered by the Respondent if the extension is granted;



- e. The importance of compliance with time limits to the particular litigation or issue; and
  - f. The effect if any on the administration of justice or public interest if any is involved.
8. On the period of delay, the applicant submitted that after delivery of the judgment on 5<sup>th</sup> October 2021 they paid part of decretal sum of Ksh. 149,172/= on 6<sup>th</sup> April 2022 and a month later after negotiations on the additional sums fell through, it filed this application. The applicant submitted that considering the nature of this matter and the parties involved the delay is reasonable and excusable.
  9. On the reasons for the delay the applicant submitted that the main reason for delay was due to lack of knowledge of delivery of the Judgment since the same was delivered in their absence and non-materialization of negotiations afterwards.
  10. On whether the appeal is arguable the applicant submitted that their appeal has high chances of success. That the trial court erred by awarding the respondent future medical expense and ordering the applicant to replace the lost tooth without any justification.
  11. On the degree of prejudice that the Respondent will suffer if the extension is granted the applicant submitted that there is no evidence that the respondent will suffer prejudice if this application is allowed.
  12. As to whether the applicant has complied with the time limits on this issue the applicant submitted that complying with time limits is vital and that the period within which to file appeal has lapsed hence the reason why it seeks leave to file the same. That Granting the orders will be just and will enable it exercise its right of appeal.
  13. Finally, the applicant submitted that granting the orders sought will be in the interest of justice and it will enable it ventilate its appeal on merit.
  14. Regarding the for stay of execution pending appeal, the applicant submitted that the law on this is found under Order 42 Rule 6 of the [Civil Procedure Rules](#) 2010.
  15. The applicant submitted that it will suffer substantial loss if it was to pay the entire decretal sum and the appeal succeeds as it will be impossible to recover the same from the respondent who is a man of straw.
  16. On the issue of unreasonable delay, the applicant reiterated the aforesaid reason for delay.
  17. On security, the applicant submitted that it willing and able to furnish any security that the court will direct.
  18. The applicant thus prayed that the application be allowed.

### **Analysis and Determination**

19. The issues that arise for determination are: -
  1. Whether the Application has met the threshold for grant of stay pending appeal.
  2. Whether the applicant should be granted leave to lodge appeal out of time.



## Whether the Application has met the threshold for grant of stay pending appeal.

20. The statutory basis for stay of execution is Order 42 rule 6(2) [Civil Procedure Rules](#) which lays down the conditions which a party must establish in order for a court to order stay of execution. The rule provides: -

“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.”

21. The applicant is supposed to prove that substantial loss may result unless the order is made. That the application has been brought without unreasonable delay and they can abide by such security as maybe ordered by the court.

22. These principles were enunciated in [Butt v Rent Restriction Tribunal](#) [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that: -

- a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
- b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge’s discretion.
- c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
- d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the [Civil Procedure Rules](#), can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.

23. Having the aforesaid in mind, the conditions, prerequisite to granting of stay Orders as set out by order 42 Rule 6 of the [Civil Procedure Rules](#).

## Substantial loss

24. Under this head, an applicant must clearly state what loss, if any, they stand to suffer. This principle was enunciated in the case of [Shell Ltd v Kibiru and Another](#) [1986] KLR 410 Platt JA set out two different circumstances when substantial loss could arise as follows:-

“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 this 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... ”

25. 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. ”

26. 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 LJ in *Wilson v Church* (No.2) (1879) 12 ChD 454 at page 458 where he said: -

“I wish to state my opinion that when a party is appealing, exercising his undoubtedly right of appeal, this court ought to see 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.”

27. The applicant states that it stands to suffer substantial loss as it is apprehensive that if the respondent is paid the decretal sum, it will not be in a position to recover the same if the appeal succeeds. In the case of National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another (2006) eKLR the Court of Appeal stated that:

“This court has said before and it would bear repeating that while the legal duty is on an Applicant to prove the allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such Applicant to know in detail the resources owned by a Respondent or the lack of them. 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”.

28. The respondent has not controverted this position and hence the possibility that the Applicant will suffer substantial loss if stay is not granted as the respondent might not be in a position to refund the decretal sum if the Appeal succeeds is not farfetched.



## Undue delay

29. The Application herein was not filed timeously. The Judgment of the lower court was delivered on 5<sup>th</sup> October, 2021 while the instant application was filed on 18<sup>th</sup> May, 2022. The Applicant has explained that the delay in filing this application was occasioned by lack of knowledge of delivery of the Judgment and timely communication about the judgment as it was delivered in their absence. Though there is no lower court record to ascertain this position the Respondent has not controverted the same. The position that there were negotiations which never materialized has also not been disputed. Based on the explanation the delay herein was not inordinate.

## Security for costs

30. The applicant ought to satisfy the condition of security. In the persuasive decision of in *Arun C. Sharma v Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 Others* [2014] eKLR the court stated: -

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the *Civil Procedure Rules* acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

31. The Applicant submitted that it will abide by the orders of this court on the same. This condition has therefore been met.
32. The applicant has partly paid the decretal sum to the Respondent. It is therefore deserving of the orders of stay of execution sought.

## Whether the applicant should be granted leave to lodge appeal out of time.

33. Leave to appeal out of time or an extension of time to carry out any Act provided by Civil Procedure is a matter of discretion.
34. The exercise of that discretion is underpinned by some considerations like length of delay and reasons for the same, substance of the intended appeal and if prejudice will be occasioned to the opposite party or parties.
35. In *Nicholas Kiptoo Arap Korir Salat v The Independent Electoral And Boundaries Commission & 7 Others* [2014] eKLR the court stated: -

“... It is clear that the discretion to extend time is indeed unfettered.

It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. “We derive the following as the underlying principles that a court should consider in exercising such discretion: -Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court; Whether the court should exercise the



discretion to extend time, is a consideration to be made on a case-to-case basis; Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court; Whether there would be any prejudice suffered by the respondent, if extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

36. Under Section 79G of the *Civil Procedure Act*, which section 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 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”

37. Counsel herein has attributed the delay to lack of knowledge of delivery of the Judgement.;that the decision by the lower court was delivered in their absence;that when they learnt about the judgment they partly paid the same and commenced negotiations on the additional costs but negotiations failed. The Respondent has not controverted this position. There is a sufficient explanation for not filling appeal in time.

38. The applicant has established the requisite grounds for this prayer.

39. In the upshot the application is merited and the following orders issue.

- a. Leave to file the appeal out of time is allowed. The applicant to file and serve the Record of Appeal within 30 days hereof.
- b. The application for stay of execution be and is hereby allowed pending the hearing and determination of the appeal
- c. The applicant to deposit the balance of the decretal sum together with the costs awarded by the subordinate court in a joint interest earning account in the names of both counsel within 30 days hereof.
- d. In default of any of the orders herein above the stay of execution will automatically lapse.
- e. Costs of this appeal to abide the outcome of the Appeal.
- f. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA EMAIL THIS 30<sup>TH</sup> DAY OF JANUARY, 2023.**

**MUMBUA T. MATHEKA,**

**JUDGE.**

C/A Jennifer

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