**Mbukinya Success Limited v Ndoji & Atieno (Suing as the legal rep of the Estate of Melvin Otieno Ndonji (Deceased) & 2 others (Miscellaneous Civil Application E085 of 2022) [2023] KEHC 290 (KLR) (25 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 290 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**MISCELLANEOUS CIVIL APPLICATION E085 OF 2022**

**JN KAMAU, J**

**JANUARY 25, 2023**

**BETWEEN**

**MBUKINYA SUCCESS LIMITED ..... APPLICANT**

**AND**

**CELINE AKINYI NDOJI & EUNICE ATIENO (SUING AS THE LEGAL REP OF THE ESTATE OF MELVIN OTIENO NDONJI (DECEASED) .. 1ST RESPONDENT**

**CHARLES MAVUTSE GANIRA ..... 2ND RESPONDENT**

**MELVIN OTIENO NDONJI (DECEASED) ..... 3RD RESPONDENT**

**RULING**

## Introduction

1. In its notice of motion application dated February 11, 2022 and filed on March 11, 2022, the applicant sought orders for stay of execution of the judgment and/or decree in Kisumu CMCC No 463 of 2016 that was made on January 26, 2022 pending hearing and determination of the intended appeal and for leave to file an appeal out of time.

2. Joan Turgutt, advocate, swore an affidavit on February 11, 2022 in support of the said application on behalf of the applicant herein. The applicant averred that it instructed its advocates to appeal the issue of quantum. It explained that it filed an application for review dated February 4, 2022 because in its judgment, the trial court indicated it had not filed its submissions. It pointed out that its said application was dismissed *vide* a ruling that was delivered on March 2, 2022. It was therefore its contention that the said delay had been explained and was excusable.

3. It contended that the liability and quantum that was awarded by the trial court was excessive and that if execution proceeded, it stood to suffer irreparable loss and prejudice as the ability of the 1st respondents

to refund the decretal amount was unknown. It added that its intended appeal raised triable issues and was meritorious with high chances of success unless the proceedings herein were stayed, the suit (sic) stood to be rendered nugatory.

4. It averred that it was willing to provide a bank guarantee from Family bank as a security for stay of execution pending the hearing and determination of the appeal.

5. In opposition to the said application, the 1st respondents (sic) filed grounds of opposition dated April 25, 2022. They contended that the application was an abuse of the court process, a waste of judicial time, scandalous, vexatious and intended to frustrate them. They explained that the applicant was barred by the law from appealing against the decree dated January 26, 2022 having preferred a judicial review (sic) under order 45 of the *Civil Procedure Rules* and section 80 of the *Civil Procedure Act* against it and the application dismissed with costs.

6. They were emphatic that the application was bad in law and that justice delayed was justice denied. They urged the court to dismiss the said application.

7. They also filed a replying affidavit on April 25, 2022. The same was sworn by Celline Akinyi on even date. They asserted that the applicant ought to have filed an appeal against the said ruling of March 2, 2022 but that instead it filed an application seeking leave to appeal the trial court's judgment out of time.

8. They argued that the law only permitted a party to explore either an appeal or review and not both and as such the present application amounted to *res judicata*.

9. They added that the application was intended to frustrate them having waited since 2016. They asserted that litigation must come to an end. They urged the court not to entertain the said application so as to allow them enjoy the fruits of their judgment.

10. In response to the said application, the 2nd respondent swore his replying affidavit on April 20, 2022. The same was filed on May 4, 2022. He urged the court to direct that the applicant shoulder hundred (100%) per cent of the due debt (sic) pending the hearing and disposal of the appeal because he was a pauper and had no image in active employment (sic).

11. The aforesaid Joan Turgutt swore a further affidavit on June 7, 2022. The same was filed on June 10, 2022. The applicant reiterated the contents of its supporting affidavit and pointed out that it was granted leave to appeal against the ruling of the trial court dated March 2, 2022 hence the filing of a memorandum of appeal dated March 4, 2022 on March 11, 2022.

12. It emphasised that its application had sought review of the trial court's decision which had not relied on its written submissions and hence the same was not on merit. It added that the present application had sought leave to appeal against the decision of the trial court on the question of liability and quantum and hence the doctrine of *res judicata* was not applicable herein.

13. The applicant's written submissions were dated June 7, 2022 and filed on June 10, 2022. Those of the 1st respondents were dated June 8, 2022 and filed on June 14, 2022. Their list of authorities was dated June 14, 2022 and filed on June 15, 2022. The 2nd respondent's written submissions were dated and filed on June 20, 2022. This ruling is therefore based on the said written submissions which parties relied upon in their entirety.

**Legal Analysis**

14. The applicant raised different issues which this court deemed it prudent to address under distinct and separate headings.

**I. Res judicata**

15. The applicant cited section 7 of the *Civil Procedure Act* and submitted that the matter herein was not *res judicata* for the reason that its application dated February 4, 2022 at the trial court had sought orders to review the judgment that was delivered on January 26, 2022 which it argued did not bar it from appealing out of time and hence the present application was not *res judicata*.

16. To buttress its point, it relied on the case of *DSV Silo v The Owners of Sennar* [1985] 2 ALL ER 104 as was cited in *Bernard Mugi Ndegwa v James Nderitu Githae & 2 others* [2010]eKLR and the *Henderson v Hernderson* [1843]67 ER 313 where the common thread was that parties were required to bring their whole case for adjudication and that the same parties would not be permitted to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject of litigations in respect of matter which might have been brought forward as part of the subject in contest.

17. It contended that its draft memorandum of appeal was premised on three (3) grounds which were highly arguable and thus meritorious and urged the court allow it ventilate them.

18. On their part, the 1st respondents invoked section 80 of the *Civil Procedure Act* and order 45(2) of the *Civil Procedure Rules* which they argued that the provisions only allow a party to file review from an order which is not being appealed against. They were emphatic that when the applicant opted to file review, it locked itself from filing an appeal.

19. They objected to orders granting leave to the applicant as that would prejudice them. In this regard, they relied on the case of Misc Application No 66 of 2016 (UR 52/2016) *The Attorney General, Chief of Defence Forces and Army Commander Kenya Army v David Wanyonyi* (eKLR citation not given) where it was held that once a review application had been fully determined, one could not revert back to the appellate process.

20. They asserted that the applicant could only appeal against the refusal for a review order. They added that an appeal could only be allowed if the same had been lodged by another party to a suit other than the applicant. In this respect, they placed reliance on the case of *African Airlines International Limited v Eastern & Southern African Trade & Development Bank (PTA Bank)* [2003] KLR 140 where it was held that the courts' jurisdiction to hear a review was not taken away if after the review petition, an appeal was filed by any other party.

21. They also cited several cases among them the cases, *Gerald Kithu Muchanje v Catherine Muthoni Ngare & Another* [2020]eKLR and *Martha Wambui v Irene Wanjiru Mwangi & Another* [2015]eKLR where the common thread was that one could not exercise the right of appeal and at the same time apply for review of the same judgment/decree or order.

22. It was their submission that the applicant had not met the threshold required for leave to file an appeal out of time.

23. Section 80 of the *Civil Procedure Act* provides:-

> " Any person who considers himself aggrieved –
>
> a. by a decree or order from which an appeal is allowed by this act, but from which no appeal has been preferred; or
>
> b. by a decree or order from which no appeal is hereby allowed by this act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

24. Order 45 rule 1(a) and (b) of the *Civil Procedure Rules, 2010* stipulates as follows:-

> " Any person considering himself aggrieved—
>
> a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
>
> b. by a decree or order from which no appeal is hereby allowed,
>
> and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

25. Order 45 rule 2 of the *Civil Procedure Rules* further provides that:-

> " A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for review."

26. Further order 45 rule 6 of the *Civil Procedure Rules* stipulates that:-

> " No application to review an order made on an application for a review of a decree or order passed or made on a review shall be entertained."

27. The following deductions can be made from the provisions relating to applications for review. An aggrieved party can file an application for where:-

    a. an appeal is allowed but no appeal has been preferred.

    b. where an appeal is not allowed.

    c. where there has been discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made.

    d. on account of some mistake or error apparent on the face of the record

    e. for any other sufficient reason.

    f. an appeal has already been filed by another party.

28. The only time that an application for review cannot be made is when:-

    a. the ground of such appeal is common to the applicant and the appellant.

    b. being respondent, he can present to the appellate court the case on which he applies for review.

    c. an order has already been made on an application for a review of a decree or order.

29. It was apparent that the applicant herein sought an order for review of the judgment on account of there having been an error on the face of the court record for failing to consider its written submissions pursuant to the provisions of order 45 rule 1 (a) and (b) of the *Civil Procedure Rules*.

30. A perusal of the applicant's ground No 3 in its notice of motion application dated February 4, 2022 that was annexed to the present application and marked as annexture "JT- 1" showed that the applicant was granted leave to file its written submissions which were acknowledged by the trial court in open court on November 24, 2021 which was before December 17, 2021 when the judgment was slated for delivery but on which date, the said judgment was not delivered as the trial court was indisposed.

31. Notably, section 7 of the *Civil Procedure Act* cap 21 (laws of Kenya) provides that:-

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

32. The applicant had not sought to appeal against the decision of the trial court that was delivered on March 2, 2022 but rather, it sought to appeal against the substantive judgment on the issue of liability and quantum. These issues were as different as night and day and could not fall within the doctrine of *res judicata*. The 1st respondents' submissions that the present application was *res judicata* fell by the way side. The applicant's present application was therefore properly before court. Whether or not it was merited was a different matter altogether.

**II. Leave to appeal out of time**

33. The applicant invoked section 79 G of the *Civil Procedure Act* and argued that the delay in filing its appeal on time was not as a result of indolence but rather, it was because it instructed its advocates to appeal after the statutory period had lapsed. It added that in its impugned decision, the trial court had indicated that it had not filed its submissions whereupon it filed an application for review, which application was dismissed hence necessitating the filing of this application to seek leave of court to appeal the trial's court decision out of time.

34. It was its contention that a party should not be denied the right of appeal due to procedural technicalities of timelines. It argued that the delay was not inordinate and had been explained. In this regard, it placed reliance on the case of *Mwaura Muthumbi v Josephine Wanjiru Ngugi & another* [2018] eKLR where it was held that although statutory timelines were important to ensure the due and efficient administration of justice, they were not in themselves a core substantive value in the same sense. It therefore argued that failure to file an appeal out of time was an excusable omission which could be overlooked in the interests of justice.

35. That being said the guiding principles to be met in an application seeking leave of the court to file an appeal out of time/extension of time were then laid out in the case of *Thuita Mwangi v Kenya Airways Limited* [2003] eKLR and were reaffirmed in the case of *Growth Africa (K) Limited & Another v Charles Muange Milu* [2019] eKLR.

36. In exercising its discretion to allow an application seeking extension to file an appeal out of time, a court has to be satisfied that the omission or commission was excusable. In other words, there must be a plausible explanation for the delay in doing an act.

37. The explanation for the omission to file the appeal within the stipulated time was thus a plausible, excusable and satisfactory explanation for the delay in filing the appeal on time.

38. The decision the applicant intended to appeal against was delivered on January 26, 2022. The present application was filed on March 11, 2022. Two (2) months had since passed. As this court had found

the reason for the delay that was advanced by the applicant to have been excusable, it came to the firm conclusion that the length of the delay was not inordinate and/or unreasonable.

39. The court was not called upon to consider the merits or otherwise of the appeal at this juncture. Nonetheless, the applicant was called upon to demonstrate that it had an arguable ground of appeal. The court perused the draft memorandum of appeal that was annexed to its present application and noted that the intended appeal had essentially sought to challenge both award on liability and quantum.

40. The court found and held that the question as to whether or not the trial court appreciated the evidence that was adduced when making the award on general damages was an arguable ground of appeal that the applicant ought to be given an opportunity to canvass on merit.

41. In considering whether or not to grant an order for extension to do any act, the court also has to consider if the opposing side will suffer any prejudice if extension of time was granted. This court was not satisfied that the 1st and 2nd respondents would suffer any prejudice if the applicant exercised its constitutional right of appeal. If there was any prejudice, the respondents did not demonstrate the same.

42. Indeed, every party has a right to access any court or tribunal to have his or her dispute heard and determined in accordance with article 50(1) of the *Constitution* of Kenya. Even where a party delays in doing an act, there is always a provision of the law that would give it reprieve to seek justice. Notably, while section 79 G of the *Civil Procedure Code* provides for the period of thirty (30) days for an aggrieved party to lodge an appeal at the High Court, order 50 rule 6 of *Civil Procedure Rules* empowers the court to enlarge the time to do a particular act.

43. Notably, order 50 rule 6 of *Civil Procedure Rules* 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".

44. Taking all the factors hereinabove into account, it was the considered view of this court that the applicant ought to be given an opportunity to have its appeal heard on merit as it would suffer great prejudice if it was denied an opportunity to have its intended appeal heard on merit.

45. Going further, weighing the applicant's right to have its dispute determined fairly in a court of law as provided in article 50(1) of the *Constitution* of Kenya and the equally important 1st respondents' fundamental right that justice delayed is justice denied as stipulated in article 159(2)(b) of the *Constitution* of Kenya, this court determined that there would be more injustice and prejudice to be suffered by the applicant if it was denied an opportunity to ventilate his appeal on merit without an order for stay of execution pending appeal being granted herein.

**III. Stay of execution**

46. The applicant cited order 42 rule 6 (2) of the *Civil Procedure Rules* which sets out the conditions that an applicant must meet before an applicant was granted an order for stay of execution.

47. It argued that the 1st respondents' means of income was unknown and presumably insufficient as they had not filed an affidavit of means and that it was not guaranteed that they would will be in a position to refund it the judgment sum of Kshs 2,834,600/= plus costs and interests which was a substantial amount in the event it succeeded on appeal.

48. In this regard, it placed reliance on the case of *G N Muema P/A (sic) Mt View Maternity & Nursing Home v Miriam Maalim Bishar & Another* [2018] eKLR where it was held that in the absence of proof of the ability to pay back, courts are satisfied that an appellant would suffer substantial loss.

49. It was emphatic that denial of an order for stay of execution would be catastrophic to it as the 1st respondents would proceed to attach its property therefore visiting irreparable loss and damage upon it. It added as it had proved that the delay was not inordinate then an order for stay of execution should be granted.

50. It reiterated that it was willing to provide a bank guarantee as a form of security. In that respect, it relied on the case of *Justin Mutunga David v China Road and Bridge Corporation (K) Limited* [2019]eKLR where it was held that a bank guarantee was an unacceptable mode of furnishing security.

51. The 2nd respondent submitted that the applicant's application be disregarded and it be condemned to settle the whole decretal sum since it was the principal tort feasor.

52. Notably, before such an order for stay of execution pending appeal can be granted under order 42, rule 6(2) of the *Civil Procedure Rules*, an applicant has to demonstrate the following:-

1. That substantial loss may result unless the order is made.

2. That the application has been made without unreasonable delay.

3. Such security as the court orders for the due performance of the decree has been given by the applicant.

53. The three (3) conditions for the grant of an order for stay of execution must be met simultaneously as they are conjunctive and not disjunctive.

54. The decretal sum herein was Kshs 2,834,600/=. The 1st respondents did not file an affidavit of means to demonstrate that they would refund the applicant the said sum in the event he was successful in his intended appeal. The applicant expressed reasonable fear that they would not be able to pay it back the remaining decretal sum.

55. In this regard, this court had due regard to the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR where the 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..."

56. Further, as this very court held in the case of *G.N. Muema P/A(Sic) Mt View Maternity & Nursing Home v Miriam Maalim Bishar & another* (Supra), the rigmaroles of recovery of decretal sum by a successful appellant could amount to substantial loss.

57. In the absence of proof that the 1st respondents would be able to refund the applicant the entire decretal sum without any hardship, this court was not persuaded that it should order that the applicant release half of the decretal sum to the 1st respondents herein as there was likelihood of the applicant suffering

substantial loss. The applicant had thus satisfied the first condition of being granted an order for stay of execution pending appeal.

58. Having found that the present application had been filed without unreasonable delay, this court was satisfied that the applicant had met the second condition of being granted an order for stay of execution pending appeal.

59. The applicant's assertions that the 1st respondents ought to shoulder the decretal sum wholly because he was a pauper and not in employment negated the spirit of the objectives of the three (3) ingredients that an applicant had to satisfy before being granted an order for stay of execution.

60. Having said so, this court noted that the applicant had indicated that he was willing to provide security. It was therefore the considered opinion of this court that he had demonstrated that it had complied with the third condition of being granted an order for stay of execution pending appeal.

61. The above notwithstanding, this court took the view that security in form of a bank guarantee was not suitable considering that there were many challenges of enforcing an order against a party who was not a party to the proceedings herein. Further, the applicant had deposed in his aforesaid replying affidavit that he was not a man of means. This court therefore determined that the security to be furnished herein would be in form of money to safeguard the 1st respondents' interests.

**Disposition**

62. For the foregoing reasons, the upshot of this court's decision was that the applicant's notice of motion application dated February 11, 2022 and filed on March 11, 2022 was merited and the same be and is hereby allowed in the following terms:-

    1. The applicant be and is hereby directed to file and serve its memorandum of appeal within fourteen (14) days from the date of this ruling.

    2. The applicant be and is hereby directed to file and serve its record of appeal within one hundred and twenty (120) days from the date of this ruling.

    3. The deputy registrar High Court of Kenya Kisumu be and is hereby directed to facilitate the expeditious typing of the proceedings in the lower court to enable the applicant comply with the timelines within which to file its record of appeal as aforesaid.

    4. There shall be a stay of execution of the decree in Kisumu CMCC No 463 of 2016 on condition that the applicant shall deposit into an interest earning account in the joint names of its counsel and counsel for the 1st respondents herein a sum of Kshs 1,984,220/= being seventy (70%) percent of the decretal sum of Kshs 2,834,600/= within one hundred and twenty (120) days from the date of this ruling.

    5. For the avoidance of doubt, in the event, the applicant shall default on paragraph 62(4), the conditional stay of execution shall automatically lapse. The respondents shall be at liberty to take such appropriate action in the event the applicant shall default on paragraph 62(1) and (2) hereinabove.

    6. Either party is at liberty to apply.

    7. Costs of the application will be in the cause.

63. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF JANUARY 2023**

**J. KAMAU**

**JUDGE**