



**Directline Assurance Company Limited v Nzioka (Civil Appeal
E257 of 2022) [2023] KEHC 1133 (KLR) (Civ) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1133 (KLR)

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

**CIVIL
CIVIL APPEAL E257 OF 2022**

JN MULWA, J

FEBRUARY 23, 2023

BETWEEN

DIRECTLINE ASSURANCE COMPANY LIMITED APPELLANT

AND

DANIEL NZIOKA RESPONDENT

RULING

1. By a Notice of Motion dated 27th April 2022, the Applicant/ Appellant sought nine (9) orders which have been repetitively drawn as they can all be summarised into three: Firstly, for leave to appeal out of time against a Ruling delivered by Hon. P. Muholi (PM) on 11th March 2022 in Milimani CMCC No. E9259 of 2021 - Daniel Nzioka v Directline Assurance Company Limited, and for the Memorandum of Appeal filed on 26th April 2022 to be deemed as properly filed. Secondly, a stay of execution of the lower court's Ruling of 11th March 2022 pending the hearing and determination of its intended Appeal. Thirdly, the costs of this application abide by the outcome of the intended Appeal.
2. The application is brought under Sections 1A, 1B, 3A, 63(e), 65(1) (b), 67, 79G & 95 of the *Civil Procedure Act*, Order 42 Rule 6, Order 50 Rule 5 and Order 51 Rule 1 of the *Civil Procedure Rules*. It is predicated on the grounds set out on its face and the Supporting Affidavit of Kelvin Ngure, the Deputy Claims manager of the Applicant Company.
3. The Respondent opposed the application by way of a Replying Affidavit sworn on 16th May 2022.
4. The application was canvassed through oral arguments which this court has considered alongside the parties respective Affidavits in support of and against the application.



5. The issues that arise for determination are: whether the applicant has made out a case for leave to appeal out of time; whether the applicant has satisfied the conditions for stay of execution pending appeal; and, what are the appropriate orders as to costs.

Leave to appeal out of time

6. Generally, appeals from the subordinate courts to the High Court are supposed to be filed within 30 days after the lower court's decision. However, the said timeline is not cast on stone. Section 79G of the *Civil Procedure Act* provides thus:

“79G. 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 been 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.”

7. Section 95 of the *Civil Procedure Act* donates power to the court to enlarge time for any action. It provides thus: -

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

8. The factors to be considered when determining whether or not to enlarge time to file appeal were set down by the Court of Appeal in the case of *Leo Sila Mutiso v Rose Hellen Wangeri Mwangi* Civil Application No. 255 of 1997 as:

- a. The length of the delay;
- b. The reason for the delay;
- c. The chances of the appeal succeeding if the application is granted; and
- d. The degree of prejudice to the respondent if the application is granted.

9. As regards the length and reason for delay, it is common ground that the Ruling in the lower court was delivered on 11th March 2022 and the instant application was filed on 27th April 2022 after the time for filing the appeal had lapsed, by 11 days. As for the reason for the delay, the Applicant explained that the ruling was initially scheduled for delivery on 2nd February 2022 but was not delivered as scheduled since the magistrate seized of the matter was transferred. The Applicant has annexed a Notice issued in the lower court to that effect on 25th January 2022 (See annexure “KN-6”). Also annexed is an email dated 2nd February 2022 from the Applicant's advocates addressed to the lower court, inquiring whether the matter had been mentioned before the Chief Magistrate for directions on delivery of the Ruling (See annexure “KN-7”). The Applicant stated that the Ruling was eventually delivered on 11th March 2022 without any notice to parties and in the absence of both parties. Further, that it only became aware of the Ruling upon being served with warrants of attachment on 25th April 2022 by the Respondent. The Respondent has not disputed this position. In the premises, the court finds that the slight delay in filing the appeal has been satisfactorily explained.



On the chances of success of the intended appeal, I have looked at the draft Memorandum of Appeal annexed to the Applicant's Affidavit (See annexure "KN-10"). The Applicant is aggrieved by the learned magistrate's decision to strike out its Statement of Defence which in its view raises triable issues. Without going into the merits of the matter, this court finds that the intended appeal is not a frivolous one.

10. Lastly, I find that in the circumstances of this case, the Respondent does not stand to suffer any prejudice if leave is granted to the Applicant to appeal out of time.
11. For the foregoing, the court finds that the Applicant has made out a case for the grant of leave to appeal out of time.

Stay of execution pending the hearing and determination of the intended appeal.

12. Under Order 42 Rule 6(2) of the Civil Procedure Rules, the conditions necessary for the grant of stay of execution are that:
 - (a) the court must be satisfied that substantial loss may result to the applicant unless the order is made
 - (b) the application has been made without unreasonable delay; and
 - (c) The applicant must offer 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.

13. As regards substantial loss, the Applicant avers that the Respondent has already proceeded to proclaim its goods hence there is imminent danger of execution against its properties. The Applicant contends that the Respondent is not a man of means so if paid the decretal sum of Kshs. 1,982,188.85, it may not recover the sum in the event that its intended appeal is successful. It is well settled that where an Applicant expresses such reasonable fears, the evidential burden of proof shifts to the Respondent to controvert the same by way of Affidavit evidence as that is a matter that is peculiarly within his or her knowledge, see *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR.

14. The Respondent herein has not controverted the Applicant's assertion by demonstrating his ability to refund the decretal sum in case the Appeal is successful. The court is therefore satisfied that the Appellant stands to suffer substantial loss if stay of execution is denied, and that the application was filed timeously.

15. On security, the Applicant has stated that it is willing to give security for the due performance of the decree as may be directed by this court. Learned counsel Ms. Awino submitted that the Respondent is ready to furnish a bank guarantee in that regard. On the other hand, the Respondent argues that the Applicant should be ordered to deposit the decretal sum in a fixed deposit joint account in the names of both advocates, failure to which execution should proceed. Ms. Nyanjiru, Advocate for Respondent, stated that the proposed bank guarantee is not sufficient security and urged that one half of the decretal amount should be released to the Respondent.

16. The Ruling of the lower court was in respect to an interlocutory application as the matter had not proceeded to full trial on merits. In the premises, the court holds the view that this is a proper case where a bank guarantee will suffice as security rather than releasing part of the decretal amount to the Respondent and/or depositing part or the entire amount in a bank account. This limb has therefore been satisfied.



17. Consequently, the court holds that the Applicant has satisfied the conditions necessary for the grant of stay of execution pending appeal.
18. For the foregoing, the court allows the Applicant's application dated 27th April 2022 upon the following conditions:
 - 1) The Applicant shall file and serve its Memorandum of Appeal within 7 days of this ruling.
 - 2) The Record of Appeal shall be filed and served within 60 days thereafter,
 - 3) The Applicant shall provide a suitable Bank guarantee from a reputable bank to secure the entire decretal sum of Kshs. 1,982,188.85 within 30 days from date of this ruling.
 - 4) In default of order (1), (2) and (3) above, the stay orders shall lapse automatically.
 - 5) There shall be no orders as to costs of the application.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF FEBRUARY 2023.

J. N. MULWA

JUDGE.

