



REPUBLIC OF KENYA



**Oile v Juma (Civil Appeal E786 of 2022)
[2023] KEHC 1297 (KLR) (Civ) (24 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1297 (KLR)

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

CIVIL

CIVIL APPEAL E786 OF 2022

JK SERGON, J

FEBRUARY 24, 2023

BETWEEN

EUNICE BELLA OILE APPELLANT

AND

LAMECH SHIYUKAH JUMA RESPONDENT

RULING

1. This ruling is predicated on the Notice of Motion dated October 6, 2022 brought by the appellant/ applicant and supported by the grounds set out on its body and the facts stated in the affidavit of the applicant. The applicant sought for an order for leave to appeal out of time/extension of time to file an appeal against the judgment and decree delivered on August 17, 2022 in Milimani SCCCOMM E3025 of 2022 and a further order for a stay of execution of the aforementioned judgment pending the hearing and determination of the appeal. The applicant also sought an order to the effect that the memorandum of appeal on record be deemed as having been duly and properly filed.
2. To oppose the said Motion, the respondent swore a replying affidavit on November 24, 2022.
3. The instant Motion was dispensed with through oral arguments whereby the parties' respective advocates chose to rely on the respective documents filed and on record.
4. I have considered the grounds laid out on the body of the Motion; and the facts deponed in the supporting and replying affidavits.
5. The orders being sought in the Motion are two-fold: first is the order seeking for enlargement of time to appeal and for leave to appeal out of time against the impugned judgment and decree.
6. Section 79G of the *Civil Procedure Act* stipulates that an appeal against the decision of a subordinate court shall be lodged within 30 days from the date of the decree or the order being appealed against.



The provision further stipulates that an appeal can be admitted out of time where sufficient cause has been shown.

7. Moreover, under the provisions of Section 95 of the *Civil Procedure Act* and Order 50, Rule 6 of the *Civil Procedure Rules*, the courts have power to enlarge the time required for the performance of any act under the Rules even where such time has expired.
8. In the case of *Tbuita Mwangi v Kenya Airways Ltd* [2003] eKLR the Court of Appeal illustrated the conditions to be met in deciding whether to extend the period for filing an appeal out of time and which I shall address hereunder.
9. Under the first condition touching on length of delay, the applicant on the one part states that there has been no undue delay in bringing the instant Motion, whereas the respondent states that the applicant is guilty of laches and hence the instant Motion ought to be dismissed with costs.
10. While it is apparent from the record that no copy of the impugned judgment was availed to this court, it is not in dispute that the impugned judgment was delivered on August 17, 2022 while the Motion was brought less than two (2) months later. In my mind, I do not find the delay to be inordinate.
11. Concerning the reasons for the delay, the applicant explained that her advocate is yet to receive certified copies of the impugned judgment, decree and typed proceedings to enable them file the appeal in good time. The respondent did not address this specific subject but states that the Motion is frivolous, vexatious and intended to delay the realization of the fruits of his judgment.
12. Upon considering the explanation given by the applicant, I find the same to be reasonable in the present circumstances.
13. In respect to the condition on whether or not an arguable appeal exists, it is the applicant's assertion that she has an arguable appeal which raises valid points of law and fact and has high chances of success. The respondent on the other hand contends that the appeal does not disclose any arguable grounds and therefore has no reasonable chances of success, adding that the trial court arrived at a well-reasoned decision.
14. Upon my perusal of the grounds of appeal raised in the memorandum of appeal annexed to the Motion, I note that the appeal is challenging the finding of the trial court on issues pertaining to the law, evidence and facts. I am therefore satisfied that the applicant has demonstrated arguable points of law and fact in her intended appeal.
15. The final condition on prejudice was not addressed by any of the parties.
16. Suffice it to say that while it is clear that the judgment was entered in favour of the respondent who would therefore be entitled to the fruits of his judgment, it would not be in the interest of justice to lock out the applicant who is aggrieved by the judgment of the trial court. I therefore find it reasonable for the applicant to be given the opportunity of challenging the subordinate court's decision on appeal.
17. The second order sought is for a stay of execution of the decree pending appeal, provided for under Order 42, Rule 6(2) of the *Civil Procedure Rules* which sets out the conditions to be satisfied for such an order to be granted.
18. The first condition being that the application must have been brought without unreasonable delay has already been discussed hereinabove.
19. The second condition touches on substantial loss to be suffered by an applicant.



20. The applicant on her part is apprehensive that unless an order for a stay of execution is granted, the respondent will proceed to execute the decree, thereby rendering the appeal nugatory and further causing her to suffer irreparable loss.
21. The respondent is of the view that he ought to proceed with execution of the decree.
22. The relevance of substantial loss in any application for a stay of execution was aptly addressed in the Court of Appeal case, namely *Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu Karuga* (1982-1988) 1 KAR 1018 thus:

“Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented...”
23. Furthermore, the legal position is that substantial loss entails that which has to be prevented by maintaining the status quo of the parties involved, otherwise the appeal will be rendered nugatory.
24. Upon considering the rival positions above, I am of the view that in the circumstances of this case, the applicant has reasonably demonstrated the manner in which she stands to suffer substantial loss if an order for a stay of execution is denied.
25. Under the final condition which is the provision of security for the due performance of the decree or order, the applicant states that she is ready and willing to comply with the conditions to be set by this court. The respondent did not offer any response on this subject.
26. Notwithstanding the fact that none of the parties gave suggestions on a suitable means of provision of security, going by the averments on record, it is apparent that the decretal sum is not colossal in nature. I will therefore exercise my discretion upon taking into account the prevailing circumstances.
27. The upshot therefore is that the Notice of Motion dated October 6, 2022 is hereby allowed thus giving rise to issuance of the following orders:
 - i. The appellant/applicant is given leave of 14 days to file an appeal out of time.
 - ii. There be an order for stay of execution of the judgment and decree issued on August 17, 2022 in Milimani SCCCOMM E3025 of 2022 pending the hearing and determination of the intended appeal on the condition that the applicant deposits the entire decretal sum in an interest earning account in the joint names of the advocates appearing in this appeal within 45 days from the date of this ruling. In default the stay order shall automatically lapse.
 - iii. Costs of the Motion shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2023.

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J. K. SERGON

JUDGE

