



REPUBLIC OF KENYA



**Wamaitha t/a Aliceshius Tours & Safaris v Kenya Ports Authority & another (Miscellaneous Civil Application 143 of 2022) [2023] KEHC 1510 (KLR) (24 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1510 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MISCELLANEOUS CIVIL APPLICATION 143 OF 2022  
DKN MAGARE, J  
FEBRUARY 24, 2023**

**BETWEEN**

**ALICE WAMAITHA T/A ALICESHIUS TOURS & SAFARIS ..... APPLICANT**

**AND**

**KENYA PORTS AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**CITI BANK NA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Once again I am required to make a ruling in a matter that one would think is rather obvious. Practice in the legal profession depends on fidelity to the rule of law and dispensation of justice expeditiously without undue regard to technicalities.
2. The application dated July 14, 2023 has its root in the consent order entered in the trial court in Mombasa CMCC 2598/2018 December 6, 2021. The court, adopted the court by the parties.
3. The consent granted the respondent stay of execution pending appeal from the judgment and decree of that court issued on September 21, 2021. The parties appear to have been under impression that the appeal will be or has been filed.
4. An appeal ought to be filed to the high court within 30 days by dint of section 79 G of the *Civil Procedure Act*. The section provides as doth:-

79G. Time for filing appeals from subordinate courts 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

5. The appeal from that judgement ought to have been filed by October 21, 2021. No such appeal was filed. The lower court granted the application for stay on condition that the respondent deposits in court a bank guarantee for due performance of the decree. The bank guarantee was given by the CITI Bank NA on February 2, 2022. When the same expired the respondent had the same extended from February 9, 2023 to February 9, 2024
6. The guarantee was to the effect that it was to be honoured if the demand under an in compliance is made on or before expiry.
7. The guarantee was for a total aggregate amount of Ksh 5,000,000/= covering the obligation under Mombasa CMCC 2598 of 2018 -Alice Wamaitha Mwangi t/a Aliceshius Tours and Safaris v Kenya Ports Authority.
8. The guarantee was to the effect that the bank will settle the amount if the demand is made or it is so ordered. The guarantee was sought as a condition for stay pending appeal. The stay itself was predicated on existence of the memorandum of appeal filed within the statutory period.
9. A period of over one year 5 months has passed since the delivery of the impugned judgment. To date there has been no appeal file. I am therefore obligated under section 63 b and e the [Civil Procedure Act](#) to issue appropriate orders. The section provides as follows:-
63. In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed—
  - b. Direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the court or order the attachment of any property
  - e. Make such other interlocutory orders as may appear to the court to be just and convenient.
10. With passage of time the applicant wished that matter be concluded in order for him to have his clients' pound of flesh. This is because, within the period in issue, the respondent did not file any memorandum of appeal even out of time with leave.
11. The main reason for not filing is the memorandum of appeal that proceedings were being typed. There is no requirement that proceedings be typed before filing an appeal. The net effect is that the order for stay of execution issued by consent has lapsed by dint of happening of an event, the declaration that there is no subsisting appeal. Without an appeal there is nothing to await. The decree holder can proceed forthwith and execute. For avoidance of doubt the order for stay of execution lapsed and is no longer in force.
12. This means that as a corollary, the guarantee is due and owing to the decree holder. There is nothing stopping exercise of the rights that have accrued from the consent.
13. As matters stand there is no appeal pending. The conditions for the enforcement of the decree in Mombasa CMCC 2598 of 2018 Alice Wamaitha t/a Aliceshius Tours and Safaris v Kenya Ports Authority have arisen. I therefore do not find any reason to hold the applicant any further.
14. Consequently, I allow the application dated July 14, 2022 in the following terms.



- a. The guarantee has now become payable under the decree in Mombasa CMCC 2598 of 2018 – Alice Wamaitha Mwangi t/a Aliceshius Tours and Safaris v Kenya Ports Authority.
- b. The 2<sup>nd</sup> respondent, Citi Bank, NA to unconditionally, without argument or cavil, release to the applicant’s advocates m/s Mogaka Omwenga, a lawful sum of Ksh 5,000,000/= which is now due under the guarantee. The payment be effected within 14 days in default execution to issue against the 2<sup>nd</sup> respondent.
- c. The amount specified in the guarantee in respect of the chief magistrate’s court at Mombasa Case No 2598 of 2018 – Alice Wamaitha Mwangi t/a Aliceshius Tours and Safaris v Kenya Ports Authority be deposited in the account number whose details are as hereunder.
- d. The 1<sup>st</sup> respondent to bear the bank’s costs and also to bear the applicants costs of Kshs 25,000/= for the application herein.
- e. The applicant is free to execute for the balance in the primary suit.

**DATED, ISSUED AND DELIVERED AT MOMBASA, VIRTUALLY 24<sup>TH</sup> FEBRUARY, THE YEAR OF OUR LORD TWO THOUSAND AND TWENTY-THREE.**

**HON. MR. JUSTICE DENNIS KIZITO MAGARE**

**JUDGE OF THE HIGH COURT, NAIROBI**

**In the presence of;**

Mr Omwenga advocate for the Applicant

Adhoc advocate for the Respondent

**Andrew and David Court Assistant.**

