



Maegene t/a Manegene & Partners v Kimunge Limited (Miscellaneous Civil Application E563 of 2022) [2023] KEHC 1300 (KLR) (Civ) (23 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1300 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E563 OF 2022
JK SERGON, J
FEBRUARY 23, 2023**

BETWEEN

LILIAN WANJIKU MAEGENE T/A MANEGENE & PARTNERS APPLICANT

AND

KIMUNGE LIMITED RESPONDENT

RULING

1. This ruling relates to the notice of motion dated September 22, 2022 taken out by the applicant and supported by the grounds set out on its body and the facts stated in the affidavit of the applicant, who sought for an order for leave to appeal out of time against the judgment and decree in Milimani CMCC no 9290 of 2017 delivered on July 22, 2022 and a further order for a stay of execution of the aforesaid judgment pending the hearing and determination of the appeal.
2. The respondent resisted the motion by putting in the grounds of opposition dated October 11, 2022 raising a total of seven (7) grounds.
3. At the interparties hearing of the motion, the parties' respective advocates made brief arguments, choosing to rely mainly on the averments made in the respective affidavits and grounds of opposition.
4. I have considered the grounds laid out on the body of the motion; the facts deponed in the supporting affidavit; and the grounds of opposition.
5. Before I consider the merits thereof, I observed that the respondent by way of its grounds of opposition raised two (2) preliminary points to challenge the validity of the motion.
6. The first preliminary point is that the motion is unfounded in the absence of any appeal filed and hence the order for a stay of execution cannot be granted.



7. From my study of the instant motion and as earlier mentioned, among the orders sought is that of leave and/or the extension of time within which the applicant can file an appeal.
8. As I shall show below, the law permits a party to seek leave of the court and/or the extension of time within which to file an appeal, where such timelines have lapsed. Consequently, the first preliminary point fails.
9. Under the second preliminary point, the respondent argues that the applicant has not complied with the proviso of order 9, rule 9 of the *Civil Procedure Rules* and hence the motion is incompetent and ought to be struck out together with the notice of change of advocates on record.
10. Order 9, rule 9 of the *Civil Procedure Rules, 2010* stipulates that:

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

- a. upon an application with notice to all the parties; or
 - b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
1. Upon my study of the record, it is apparent that the applicant was at all material times represented by the firm of TK Rutto & Co Advocates in the suit.
 2. Upon my further study of the record, I note that the applicant availed a copy of the notice of change of advocates dated September 20, 2022 and which notice indicates that the aforementioned firm of advocates has been replaced by the firm of GN Githue & Co Advocates.
 3. I also note that the aforementioned notice of change of advocates was entered into by consent of the outgoing and incoming advocates, and bears signatures for the respective advocates.
 4. In view of all the foregoing circumstances, I am satisfied that the applicant complied with the provisions of order 9, rule 9 (supra) and I find the motion to be properly before this court. The second preliminary argument therefore similarly holds no water.
 5. On the merits of the motion, it is evident that the orders sought therein are two-fold. The first is the order seeking for leave to appeal out of time against the impugned judgment and decree.
 6. The provisions of section 79G of the *Civil Procedure Act* are clear that the timelines for lodging an appeal against the decision of a subordinate court are within 30 days from the date of the decree or the order being appealed against. Furthermore, under the provisions of section 95 of the *Civil Procedure Act* and order 50, rule 6 of the *Civil Procedure Rules*, the courts have discretionary power to enlarge the time required for the performance of any act under the Rules even where such time has expired.
 7. In the case of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR the Court of Appeal developed various conditions to offer guidance in deciding whether to extend the period for filing an appeal out of time.
 8. The first condition concerns itself with the length of delay. In her supporting affidavit, the applicant states that the delay in bringing the motion is not inordinate. In retort, the respondent argues that there has been a delay in bringing the instant motion.



9. Upon my perusal of the record, it is apparent that the impugned judgment was delivered on July 22, 2022 while the motion was brought two (2) months later. I therefore do not find the delay to be unreasonable.
10. Regarding the reason(s) for the delay, it is the assertion by the applicant that the delay was occasioned by the time taken by their advocate in obtaining a copy of the impugned judgment. The respondent on its part argues that no viable explanation has been given for the delay.
11. Upon taking into account the aforementioned averments, I find the explanation offered by the applicant for the delay to be reasonable in the circumstances.
12. On the principle touching on whether an arguable appeal exists, the applicant submits that she has an arguable appeal with overwhelming chances of success, whereas the respondent did not specifically touch on this subject.
13. Upon my perusal of the draft memorandum of appeal annexed to the instant motion, it is apparent that the intended appeal is challenging the finding of the trial court on both liability and assessment of damages on the basis of a dishonoured cheque. In the premises, I am satisfied that the applicant has raised arguable grounds in her draft appeal.
14. On the final condition touching on prejudice, the applicant is of the view that the respondent will not be prejudiced in a manner that cannot be adequately compensated by way of costs if the orders sought are granted. The respondent did not address me on this condition.
15. In the absence of any credible evidence of prejudice to be suffered by the respondent, I am convinced that it would not be in the interest of justice to deny the applicant an opportunity to challenge the trial court's decision on appeal. I therefore find it reasonable in the circumstances to extend the time required for the applicant to lodge their appeal.
16. The second order sought is that of a stay of execution of the decree pending appeal.
17. The guiding provision is order 42, rule 6(2) of the *Civil Procedure Rules* which sets out the following conditions in determining an application for stay.
18. The first condition stating that the application must have been made without unreasonable delay has already been addressed above.
19. The second condition touches on substantial loss to be suffered by an applicant. The applicant is apprehensive that unless an order for a stay of execution is granted, it is likely that she will not be able to recover the decretal sum from the respondent once the same is paid to them and the appeal succeeds, especially given that the decretal sum is colossal in nature. In reply, the respondent argues that the instant Motion is merely intended to delay the execution process.
20. The question on who has the burden of proof on the issue of refund of the decretal sum was aptly discussed by the Court of Appeal in the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR where it 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...”



- 31. In the absence of anything to indicate or ascertain the respondent’s financial capacity here and upon considering the interest of justice, I am satisfied that the applicant has reasonably shown the likelihood of substantial loss occurring should the order for a stay of execution be denied.
- 32. Under the final condition which is the provision of security for the due performance of such decree or order, the applicant has indicated her readiness and willingness to abide by the conditions which will be set by this court. The respondents did not address this condition.
- 33. Consequently, the motion dated September 22, 2022 is allowed thus giving rise to issuance of the following orders:
 - i. The applicant is granted leave of 14 days from today to file an appeal out of time.
 - ii. There be an order for a stay of execution of the judgment and decree issued on July 22, 2022 in Milimani CMCC no 9290 of 2017 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 and or firms of advocates within 45 days from the date of this ruling. In default, the stay order shall automatically lapse.
 - iii. Costs of the application to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2023.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondents

