



**Okoth & another v Ahmed & another (Miscellaneous Civil Application  
E001 of 2023) [2023] KEHC 1145 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1145 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
MISCELLANEOUS CIVIL APPLICATION E001 OF 2023  
RE ABURILI, J  
FEBRUARY 23, 2023**

**BETWEEN**

**JOSEPH ODUOR OKOTH ..... 1<sup>ST</sup> APPLICANT**

**NAM RAJOPE SUPPLIES AND SERVICES ..... 2<sup>ND</sup> APPLICANT**

**AND**

**HAWA SHARIFF AHMED ..... 1<sup>ST</sup> RESPONDENT**

**ABDINOOR SHARIFF HASSAN ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Ruling on Leave to Appeal out of Time and Stay of Execution Pending Appeal**

1. The applicants are Joseph Oduor Okoth and Nam Rajope Supplies and Services whereas the Respondents are Hawa Shariff Ahmed and Abdinoor Shariff Hassan (suing as the legal representative of the estate of Abdirahman Shariff Hussein).
2. By a Notice of Motion dated 24/1/2023 filed under Certificate of urgency and supported by the affidavit of Nyangi Sophias Waisiko advocate, the applications pray for leave of this court to appeal out of time against the whole judgment of Hon. J.P. Nandi Principal Magistrate, delivered on 8/12/2022 at Bondo.
3. The applicants also pray for stay of execution of decree emanating from the said judgment in Bondo PMCC No. E12/2022 pending hearing and determination of this application and the appeal as intended.
4. They also pray that the Memorandum of appeal annexed be deemed to be duly filed and served and costs of the application be provided for.



5. In the grounds and supporting affidavit of Nyangi Sophia Waisiko advocates, the applicants assert and it is deposed on their behalf that Judgment was delivered on 8/12/2022 after which the advocate's offices closed for December Holidays on 16/12/2022 and only opened on 16/2/2023.
6. That the clients send an email on 5/1/2023 instructing the advocate to appeal but that by that time, they had not resumed hence the delay. That the decree is in imminent execution and that the applicants will suffer substantial loss if execution is carried out.
7. That mistake of counsel should not be visited on the applicants to deny them the opportunity to challenge the trial court's judgment.
8. That they are willing to abide by any reasonable and just condition that the court may impose in allowing the application.
9. That the appeal has high chances of success and that it will be rendered nugatory if the application is not granted.
10. The applicants have annexed copy of judgment in the lower court and Memorandum of Appeal.
11. Opposing the application, the Respondents who were the Plaintiffs and decree holders in the lower court filed their Replying affidavit sworn by the second Respondent Abdinoor Shariff Hassan on 31/1/2023. In his deposition, he challenges the applicants' counsel for not annexing evidence of instructions to appeal from the client as no email or letter of instructions was attached.
12. That the annexed Memorandum of Appeal touches on issues of liability and evidence yet liability and evidence were entered and or admitted by consent of the parties, as shown by copy of judgment annexed hence the same is not appealable. That such an appeal has no chances of success and is therefore a waste of court's judicial time and delay of justice.
13. That the application is extremely frivolous, and waste of court's time and abuse of court process since the matters being raised on appeal were all determined by consent of the parties.
14. That the court should dismiss the application or if it is minded to allow it then the Respondents should be directed to deposit the decretal sum to the court or the same be deposited in the advocate's joint interest earning account to be opened.
15. The application was argued orally yesterday 22/2/2023.
16. Both counsel for the respective parties, Ms. Nyangi and Mr. Odinga submitted on behalf of their respective clients, reiterating the contents of their pleadings and affidavits which I have reproduced above hence there is no need to repeat them. I shall therefore proceed to determine the merits of the Notice of motion dated 24/1/2023 and as I do so, the main issue that emerges for determination is whether the applicants deserve leave to appeal out of time and if so, whether they are entitled to an order staying execution of decree in Bondo PMCC E12/2022 pending the hearing and determination of the intended appeal; and if so, on what terms.
17. Commencing with the first limb of the application as its result will determine whether or not stay of execution as sought is available, the applicants pray for leave to file appeal out of time from the judgment and decree of the lower court wherein they are defendant's/judgment debtors whereas the Respondents herein are Plaintiffs/decreed holders.
18. The question is whether leave sought is deserved.



19. Section 79G of the *Civil Procedure Act* stipulates the timelines for filing of civil appeals from the subordinate courts to the High Court which is thirty (30) days from the date of the Judgment/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. The proviso to this section states 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.
20. The power to enlarge time for filing of appeals is discretionary and which discretion must be exercised in line with the established legal principles. The factors to be taken into account in determining the merits of such application are now settled by the Supreme Court as set out in the case of *Nicholas Kiptoo Arap Korir Salat v IEBC* [2014]eKLR as cited in various cases including *Susan Ogutu & 2 Others v Doris Odindo Omolo*[2019]eKLR (CA) that:
- “...In an application for extension of time, the single Judge has discretion. I am aware that the discretion is to be exercised judiciously and not whimsically or capriciously. The guiding principles on the issue of extension of time was laid out by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v IEBC*.
- The Supreme Court aptly stated that extension of time is not a right of a party; a party who seeks extension of time has the burden of laying a basis to the satisfaction of the court, or paramount importance, the reasons for the delay must be explained to the satisfaction of the court.
- Further, the application for extension must be brought without undue delay and it must be demonstrated if the Respondent will not suffer if extension is granted.”
21. In *Edith Gichugu Koine vs. Stephen Njagi Thoitthi* [2014] eKLR, where Odek, JJ.A (as he then was)stated as follows:
- “Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others...”
22. In *Omar Shurie v Marian Rashe Yafar* (CA 107/2020) the Court of Appeal reiterated the factors that determine grant of leave to appeal out of time as follows:
- a. the length of the delay;
  - b. the reason for the delay;
  - c. the chances of the appeal succeeding if the application is granted;
  - d. the degree of prejudice to the Respondent if the application is granted.
23. On the length of delay, the judgment and decree sought to be impugned was rendered on 8/12/2022 vide Bondo PMCC E12/2022. It follows that an appeal ought to have been filed to the High Court on or before 7/1/2023. The last day which was the 30<sup>th</sup> day was on 7/1/2023, a Saturday.



24. However, because the last day falls on a Saturday, and January 8, 2023 is a Sunday, then the applicants ought to have filed their appeal on January 6, 2023 a Friday or latest on January 9, 2023 a Monday. This is in line with Order 50 Rule 3 of the *Civil Procedure Rules* which provides that:
- “where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof, such act or proceeding cannot be done, or taken on that day, such act or proceedings shall so far as regards the time of doing or taking the same be held to be duly done or taken if done or taken on the day on which the offices shall next be open.”
25. This application was filed on 26/1/2023, 19 days after the last day when the appeal ought to have been filed.
26. The question is whether the delay was inordinate. Before I determine whether the delay which is apparent was inordinate, it is important to further read Order 50 Rule 4 of the Civil Procedure Rules which provides that:
- “Except where otherwise directed by a Judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or doing of any other act: provided that this rule shall not apply to any application in respect of a temporary injunction.”
27. From the above provisions, it follows that since the 30 days fell within the 23 days excluded by Order 50 Rule 3 of the *Civil Procedure Rules* for filing of the appeal which is a pleading, it follows that the appeal should have been filed by 23/1/2023 which was the last (30<sup>th</sup> day), excluding the period (days) December 21, 2022 and January 13, 2023 both days inclusive.
28. Order 50 Rule 6 of the *Civil Procedure Rules* further empowers the court to enlarge time filed for doing any act or taking any proceedings under the Rules, which enlargement can be ordered although the application for the same is not made until after the expiry of the time appointed or allowed; and the costs of such application shall be met by the party applying, unless the court orders otherwise.
29. Further, Section 95 of the *Civil Procedure Act* which is not a procedural provision, stipulates that:
- “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.”
30. From the above substantive provisions of the *Civil Procedure Act* whose procedure is found in Order 50 of the *Civil Procedure Rules*, I am satisfied that the applicant herein filed this application only two days late. The application ought to have been filed by 23/1/2023 and not 7/1/2023 as per the provisions of Order 50 Rule 4 of the *Civil Procedure Rules*.
31. Accordingly, I find that the delay of 2 days was not inordinate.
32. On the reasons for the delay, counsel for the applicant has belaboured to explain to court that they closed their offices for Christmas holiday from 16/12/2022 until 16/1/2023 when they reopened and that their client send instructions to appeal the judgment via email during the office closure period hence they could only access the office email after January 16, 2023.



33. The Respondent has challenged the applicant who has not annexed any email or letter of instruction and submitted in argument that in any case, they should have filed the appeal immediately after the judgment.
34. In a rejoinder, Ms. Nyangi, submitted that they had to receive the judgment and convey it to their client who would decide whether to appeal or not.
35. Other than the depositions in the affidavit which is on oath, that their client send them an email of instructions to appeal during office closure period, there is no evidence of that email. The supporting affidavit by counsel only annexed copy of judgment as NSW1 and Memorandum of appeal as NSW2.
36. It is also not clear when the judgment was certified or obtained and transmitted to the client for perusal and instructions.
37. However, as I have stated in the preceding paragraphs, the delay of 2 days is by operation of law and is not inordinate whether explained or not. Further, although no email was annexed, I am inclined to believe counsel that they had to get copy of judgment, convey to their client who had the mandate to instruct them on whether to challenge the judgment.
38. It was not open to advocates who are not parties to the suit, in the absence of standing instructions to appeal, to file an appeal without their client's instructions as that has serious legal consequences when it comes to seeking for payment of legal fees by the client who never gave instructions to the advocate to appeal.
39. For the above reasons, I am satisfied with the reason given for the delay. On the chances of the appeal succeeding, the applicants have annexed to the supporting affidavit a Memorandum of appeal. Although the Respondents through their counsel argued that the appeal as intended has no chances of success, is frivolous and an abuse of court process and a waste of judicial time; as the parties had entered a consent apportioning liability and adduction of evidence (production of documents) by consent and that therefore the appeal does not lie, and albeit counsel for the applicant submitted that they were appealing against liability and quantum of damages, I have perused the draft Memorandum of Appeal dated 24/1/2023 and all the grounds of appeal which only challenge the award of damages not liability.
40. In any event, indeed, an appeal against liability would not lie as the parties agreed by consent to have liability apportioned. However, an appeal would lie against quantum of damages. The fact that the parties agreed to have evidence in support of the quantum of damages admitted as evidence by consent is in itself not the same as dictating to court what damages to award. There are principles for assessing damages and unless the parties themselves agree on quantum due and payable and record a consent, it is left to the trial court to apply those established legal principles and quantify or assess the damages.
41. In so doing, at times trial courts err hence a party who is aggrieved by the assessed damages may seek redress on appeal for enhancement or for reduction.
42. Examining the many - 7 grounds of appeal which can be coalesced into one - challenging the award of damages under the different heads, I am satisfied that the appeal as intended is not frivolous, abuse of court process or a waste of judicial time.
43. I am equally satisfied that the grounds of appeal disclose an arguable appeal. An arguable appeal is not necessarily one that must succeed. Nonetheless, it is not for this court at this stage to delve deep into the merits of the intended appeal as that would embarrass the court sitting on appeal should leave be granted and the appeal is filed and found to be merited.



44. On what prejudice the Respondent is likely to suffer if leave to appeal is granted, the Respondents have not demonstrated any such prejudice and I find none to be suffered.
45. On the whole, I find that the applicants have demonstrated to the satisfaction of this court that they deserve an opportunity to ventilate their grievances to the High Court, challenging the award of damages which they argue, was manifestly excessive in the circumstances of the case.
46. Consequently, I find the prayer for leave to appeal out of time is merited. It is hereby allowed. The terms of the said leave will be given after I determine the second limb of this application which is whether the applicants are entitled to an order for stay of execution of decree pending the filing, hearing and determination of the intended appeal pursuant to the leave which I have just granted above.
47. Therefore, on whether this court should grant stay of execution of decree pending appeal as intended, the purpose of an application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellants who is exercising their undoubted right of appeal are not prejudiced.
48. Order 42 Rule 6(2) of the *Civil Procedure Rules* sets out the principles guiding the grant of stay of execution of decree pending Appeal. The provision stipulates as follows:
- “No order for stay of execution shall be made under Sub Rule (1) unless -
- a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- b. 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.”
49. In *Winfred Nyawira Maina v Peterson Onyiego Gichana* [2015] eKLR, it was held that:
- “The foundation of the stay pending appeal is that the party is intending to file or has filed an appeal in the exercise of his constitutional right of appeal. He must, however, show sufficient cause and preponderantly, that, if his appeal succeeds, he will suffer substantial loss unless stay is ordered. Moreover, he must bring his application without unreasonable delay and give security sufficient to cover performance of the decree which may ultimately be payable by him. The Applicant filed the appeal in a supersonic speed but did act likewise to cover his back by applying for stay of execution pending appeal.”
50. In the addition, courts have held over time that stay may only be granted for sufficient cause and that the court in deciding whether or not to grant a stay and that in light of the overriding objectives under Section 1A & 1B of the *Civil Procedure Act*, is no longer limited to the foregoing provisions of Order 42 Rule 6(2) of the *Civil Procedure Act*.
51. Section 1A(2) of the *Civil Procedure Act* provides that:
- “The overriding objective of this *Act* and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the *Act*.
- The Court shall, in the exercise of its powers under this *Act* or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).”



52. As to what substantial loss is, it was held in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR that:

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

53. In this case, the applicant has simply stated that the Judgment was about to be executed to satisfy decree in favour of the Respondents and that they will suffer substantial loss if execution proceeds and the appeal has high chances of success and that it will be rendered nugatory if the application is not allowed.

54. Further, that it is in the interest of justice that the application be allowed. There is no demonstration of substantial loss being suffered if the payer for stay pending appeal is declined.

55. However, as earlier stated, in granting stay, the court should weight the right of the appellant to challenge the trial court’s decision against the success of the litigant who should not be deprived of his or their fruits of lawfully obtained judgment. The court also ensures that no party suffers prejudice that cannot be compensated by an award of costs.

56. As earlier stated, no substantial loss has been demonstrated.

57. On the question of delay, I have already pronounced myself that there was no inordinate delay in bringing this application in view of the provisions of the law cited and the explanation offered by the applicant’s counsel which I find plausible.

58. On the issue of security for costs, the applicants have stated that they are willing to abide by any reasonable and just condition that this court may impose on allowing the application.

59. In *Kenya Commercial Bank Ltd v Sun City Properties Ltd & 50 Others* where Mabeja J stated as follows and I agree:

“.....In an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should be balanced. In a bid to balance the two competing interests, the courts usually make an order for suitable security for due performance of the decree as the parties wait for outcome of the appeal...”[emphasis added].

60. Considering all the above, albeit no substantial loss has been demonstrated, damages in the sum of Kshs. 4,972,700/= is not petty cash at all, should the appeal succeed, as the Respondents have not sworn any affidavit of means to demonstrate that they would be in a position to refund the same to the applicants.

61. For all the above reasons, and in the interest of justice, so that the intended appeal may not be rendered nugatory should it succeed on quantum alone, as the parties entered judgment on liability, I make the following final orders:

1. I grant to the applicants leave to file their appeal from Bondo PMCC E12/2022 out of time;
2. The said appeal shall be filed and served upon the Respondents counsel within 15 days of today and in default, the leave so granted shall lapse;



3. The appeal shall be filed in a totally fresh file upon payment of the requisite assessed court fees;
4. There shall be stay of execution of decree in Bondo PMCC E12/2022 pending the filing, hearing and determination of the appeal as intended conditional upon the Applicants herein paying to the Respondents half of the decretal sum of Kshs. 4,972,700/= being Kshs. 2,486,350/= within twenty one (21) days of this Ruling;
5. The balance of Kshs. 2,486,350/= plus interest accrued and costs of the suit (as there is no evidence that the same has been assessed), shall be deposited in an interest earning account to be jointly opened and operated by the firm of Kiruki & Kayika Advocates for the applicants herein and Odinga & Odinga Advocates for the Respondents within 30 (thirty) days of this Ruling, and to be so held until the appeal if filed within the stipulated timelines is heard and determined or until the court orders otherwise.
6. In default of any of the conditions given above, all the substantive orders granted shall lapse and the Respondent/decreed holders shall be at liberty to execute decree for recovery of the entire decretal sum, interest and costs.
7. Each party to bear their own costs of this application.

62. I so order.

63. File closed.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2023**

**R.E. ABURILI**

**JUDGE**

