



REPUBLIC OF KENYA



**Chizi & 2 others v Naserian Security Services Ltd & another (Civil Appeal E777 of 2021) [2023] KEHC 1181 (KLR) (Civ) (17 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1181 (KLR)

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

**CIVIL**

**CIVIL APPEAL E777 OF 2021**

**DO CHEPKWONY, J**

**FEBRUARY 17, 2023**

**BETWEEN**

**SHEILLA MWERO CHIZI ..... 1<sup>ST</sup> APPELLANT**

**DAVID MANASSES JURIA ..... 2<sup>ND</sup> APPELLANT**

**NICODEMUS NZOKA MAINGI ..... 3<sup>RD</sup> APPELLANT**

**AND**

**NASERIAN SECURITY SERVICES LTD ..... 1<sup>ST</sup> RESPONDENT**

**LAZARUS SIMIYU OPICHO (SUED AS AN INDIVIDUAL AS WELL AS  
OFFICIAL OF FUNGUO RESIDENTS ASSOCIATION) ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling determines the appellants amended notice of motion application dated November 30, 2021 which seeks the following orders:-
  - a. Spent;
  - b. Spent;
  - c. That the Appellants/Applicants' appeal be admitted out of time
  - d. That there be a stay of execution of the ruling of Hon. J. A. Aduke(RM) made on October 21, 2021 and subsequent order given on October 22, 2021 in Civil Suit MCCC E7441 of 2020 at Milimani Commercial Court pending hearing and determination of the appeal.
  - e. That the cost of this application be provided.



2. The application is premised on among other grounds that the decision was made without Notice to the parties despite the court having directed that it would issue a Notice for its delivery. That the Applicants learnt of the decision late in the day on 15<sup>th</sup> November, 2021 from the e-Filing Portal through their advocates who immediately applied that they be supplied with the ruling and the same was availed on the 18<sup>th</sup> November, 2021. Thereafter, before proper instructions to appeal could issue from the Appellants, the timelines for filing an appeal had lapsed. The Appellants attribute the delay in filing an appeal on the delay in supply of the ruling. That the Appellants are aggrieved by the impugned decision of trial court because it instructs them to provide records of an Association they are not officials to. Therefore, it is their contention that if stay of execution is not granted, the Appellants are likely to be cited for contempt owing to their inability to comply with the ruling and directions of the court.
3. The application is further supported by the Affidavit of the Appellants' advocate on record, M/S Morris Peter Kinyanjui, wherein he confirms that the trial court had directed that the ruling would be delivered on Notice but no Notice was issued. Thus the ruling was delivered in the absence of the Appellants and they learnt of it on 17<sup>th</sup> November, 2021 after the Advocate had searched for it on the e-Filing Portal on 15<sup>th</sup> November, 2021. He further avers that the ruling was signed on 17<sup>th</sup> November, 2021 but was delivered on 15<sup>th</sup> October, 2021.
4. The deponent states that the Appellants ceased to be officials of the Association in question and handed their mandate to the succeeding Committee and cannot therefore access the Mpesa and Bank Records.
5. The Respondents opposed the application vide their Grounds of Objection dated March 29, 2022 and the Replying Affidavit sworn on 29<sup>th</sup> March, 2022 by the 2<sup>nd</sup> Respondent, Lazarus Simiyu Opicho. The Respondents' case is that the Appellants were officials of the 1<sup>st</sup> Respondent until sometimes in October, 2020 when they resigned. Consequently, the 2<sup>nd</sup> Respondent was elected as the Chairman of the 1<sup>st</sup> Respondent and part of his duties is to ensure that all the 1<sup>st</sup> Respondent's affairs are accounted for. It is averred that during and after their term of office, the Appellants failed to account for details and or give statements for Mpesa Paybil No.841500 for period between January, 2019 to June, 2021 showing payments made to 1<sup>st</sup> Respondent's members for that period. According to the Respondents, the 1<sup>st</sup> Respondent maintains an account with Co-operative Bank and Bank Statements thereof show that the Appellants did not deposit any money for the period between January, 2019 and June, 2021.
6. The Respondents aver that the Applicants have turned down any invite for discussions on the issue thus necessitating the suit before the lower court seeking for accounts under order 20 rule 1 of the Civil Procedure Rules, vide an application dated June 29, 2021. The said application was allowed by court on 21<sup>st</sup> October, 2021 and the Respondents aver that the orders sought would deny them the fruits of their ruling. The 1<sup>st</sup> Respondent would also be unable to pay the requisite bills for security and garbage collection if the orders sought are granted(sic).
7. The application was canvassed by way of written submissions as per the court's directions issued on March 30, 2022. As the record reflects, both parties complied with the Appellants/Applicants filing a set of submissions dated 10<sup>th</sup> May, 2022 whilst the Respondents submissions are dated May 13, 2022. I have read through the filed submissions and find that they reiterate the grounds adduced in the respective submissions as summarized above and there is therefore no need to reproduce the same here.



## Analysis and Determination

8. I have carefully considered the application at hand, the affidavits sworn in support and in rebuttal of the same, the submissions by the parties and the law. From all these, the two issues crystalizing for determination are:-
  - a. Whether Applicants are entitled to an extension of time to lodge the intended appeal; and,
  - b. Whether the Applicants have made a case for stay of execution as sought.
9. On the first issue of whether the Applicants are entitled to extension of time to lodge an appeal, the operative provision of law guiding in answering the question is section 79G of the [Civil Procedure Act](#) which provides as follows:-

“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”.
10. A copy of the impugned ruling shows that it was delivered on 21<sup>st</sup> October, 2021 allowing the Respondents’ application dated 29<sup>th</sup> June, 2021 seeking for orders of accounts under order 20 rule 1 of the [Civil Procedure Rules](#). The Appellants aver that the trial court had directed that it would deliver the said ruling on Notice but none was issued. Although the parties did not annex the proceedings from the trial court, the Respondents have not disputed the assertion that the trial court had directed that it would issue a Notice of Delivery of ruling but failed to do so.
11. Section 79G above shows that whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion which must, just like any other discretion, be exercised judiciously based on fixed judicial principles and not whimsically or capriciously. It aims to establish sufficient reason or a good cause in exercising the discretion therefore squarely lies with the Applicant. Therefore, where the Applicant establishes sufficient reason free from negligence, inaction and want of bonafides on its part, then the court should adopt a liberal construction approach to advance substantive justice. While expounding on the subject further, the court in the case of *First American Bank of Kenya Ltd – vs- Gulab P. Shah & 2 others* [2002]1EA 65, laid out some of the legal factors to be considered against an application for extension of time to appeal and these are:-
  - a. The length and explanation if any for the delay;
  - b. The merits of the contemplated appeal, whether the same is arguable or frivolous; and,
  - c. Whether or not the Respondent can adequately be compensated in cost for any prejudice that he might suffer as a result of favourable exercise of the courts discretion.
12. Considering the above principles against the facts of the present case, with regards to whether there was delay and the explanation advanced, it is not in dispute that the ruling having been delivered on 21<sup>st</sup> October, 2021, the present application was filed on 30<sup>th</sup> November, 2021. There was therefore a delay of about Nine (9) days after the expiry of the provided timelines for filing an appeal. The explanation for that delay as earlier pointed out is attributed to court’s failure to issue Notice of Delivery of ruling. The Applicants submitted that the trial court had directed that it would issue the ruling on Notice only for the Applicants’ Advocate to stumble upon the ruling on the e-Filing platform on November 18,



2021. Those facts were deponed on oath and the Respondent having failed to rebut them on oath, this court presumes that they express the true position. I am therefore persuaded that had the court issued notice of delivery of ruling, the Applicants would have filed their appeal on time. I find the explanation tenable and the delay of Nine(9) days excusable.

13. The second issue is on whether the intended appeal is arguable or frivolous. In this respect, the Applicants submitted that the trial court misdirected itself by ordering them to produce records of an entity they are not officials of. According to the Applicant, sometimes in June, 2020 they resigned as officials of the 1<sup>st</sup> Respondent and they are not legally capable of obtaining the records for the 1<sup>st</sup> Respondent. In my view, an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court. A single bonafide arguable ground of appeal is therefore sufficient to draw a conclusion that the intended appeal is not frivolous. Whether or not the Appellants are legally capacitated to produce the 1<sup>st</sup> Respondent's records having resigned from its management, is in my opinion a bonafide and arguable ground of appeal in the instant case. It therefore cannot be gainsaid that the intended appeal is frivolous.
14. Lastly, on whether the Respondent is likely to suffer loss which is beyond pecuniary compensation if the court exercises its discretion in favour of the Applicants, this court stands guided by the Obiter in the case of *Chemwolo & Anor. -vs- Kubende* [1986-1989]EA 74, where it was held thus:-

“Unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs since the courts exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline”.
15. Thus, where it is not shown that there is fraud or intention to overreach given that the court is persuaded that the innocent party may adequately be compensated in costs, the Applicants ought to be granted a chance to proceed on merit of their case. In the present case, the Respondents have not shown or even contended that they may suffer prejudice which or that cannot be compensated by an award of costs. I am also unable to find any prejudice beyond the cure of an award of costs that may befall the Respondents if the Appellants are allowed to lodge their appeal out of time.
16. The second issue for determination as highlighted above is whether the Applicants have made a case for stay of execution of the ruling pending the appeal. The principles guiding the grant of stay of execution pending appeal are well settled and reproduced under order 42 rule 6(2) of the Civil Procedure Rules which provides as follows:-
  - (2) No order for stay of execution shall be made under subrule (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.
17. Order 42 rule 6(2) reproduced above, shows that the High Court's jurisdiction and power to grant stay of execution pending appeal is fettered by three (3) conditions namely; establishment of sufficient cause, satisfaction of substantial loss, furnishing of security and also of importance, the satisfaction that the application was made without unreasonable delay. In the foregoing, I wish to add that these conditions must be considered alongside the court's overriding objectives as stipulated in sections 1A and 1B of the *Civil Procedure Act*, so that the conclusion or decision arrived at furthers this court's overriding objectives.



18. Whether the Applicants have met the conditions under order 42 rule 6, it is their submissions that they are unable to comply with the order directing them to produce records of a Society they are no longer officials of. According to them, the current officials have the exclusive authority to source the records. Further, the Applicants have argued that they are likely to suffer substantial loss and be cited for contempt of Court Orders for failing to give records which are beyond their control. On the other hand, the Respondents have incessantly submitted that the Appellants have never accounted for the monies collected between January, 2019 and June, 2021. So that the fact that they have failed to hand over the Account Books and the Bank Statements, implies that they never made deposits for monies collected during their term in office.
19. It is worth-noting that the order in question is not a money decree and the issue for depositing security in due performance of the decree does not arise. In my view therefore, besides considering the conditions under order 42 rule 6(2) of the Civil Procedure Rules, this court should be guided by the overriding principles of proportionality and equality of arms in the aim of placing the parties herein on equal footing and see where the scales of justice lie. In so doing, the court ought to also consider the likely consequence of granting the stay or not doing so and lean towards a determination which is unlikely to lead to undesirable outcome.
20. With the above in mind, and while considering that the decision subject of the intended appeal seeks to compel the Appellants to produce documents or records in line with order 20 rule 2, of the *Civil Procedure Rules*. Further, considering that the Appellants contentions that they are not in position of accessing the accounts being sought, I am of the view that granting stay would result to lesser risks of injustice than failing to grant such stay.
21. In the premises, I find the Appellants' application merited and the same is allowed in terms of the following orders:-
  - a. Time be and is hereby extended to the Applicants to lodge their appeal out of time. The appeal shall be filed within Thirty (30) days from the date hereof.
  - b. That pending the hearing and determinations of the intended appeal or pending further directions of this court, there shall be stay of execution of the trial court's decision dated October 21, 2021.
  - c. The costs of this application shall abide the outcome of the intended appeal.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2023.**

**D. O. CHEPKWONY**

**JUDGE**

**In the presence of:**

Mr. Kinyanjui counsel for Appellant/Applicant

Court Assistant - Simon

