



REPUBLIC OF KENYA



KENYA LAW
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**Muchiri v British American Insurance Co Ltd (Cause 63 of 2015)
[2023] KEHC 2963 (KLR) (29 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2963 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CAUSE 63 OF 2015
DKN MAGARE, J
MARCH 29, 2023**

BETWEEN

JOHN MARTIN MUCHIRI PLAINTIFF

AND

BRITISH AMERICAN INSURANCE CO LTD DEFENDANT

RULING

1. This is an application dated November 23, 2022 for stay pending appeal to the Court of Appeal and for same to extend time to lodge a Notice and record of Appeal to the Court of Appeal.
2. The application opposed by the Respondent who filed an affidavit on 3/2/2023. They allude to the 8 months' delay in filing the application stating that the delay is inexcusable. According to the Respondent the reasons given are not plausible since clients can be communicated to by other means.

Analysis

3. The record indicates that on 22/4/2022, the judgment was delivered in the presence of S Weloba for the Defendant, in the absence of Mr Tolo for the plaintiff. Mr Weloba sought 45 days stay of execution which he was duly given.
4. The Defendant got knowledge on the date of delivery of judgment. There is nothing stopping an advocate from filing a notice of appeal and a letter bespeaking proceeding while awaiting instructions.
5. From the narrative, the applicant allegedly became aware of the delivery of judgment on 22/6/2022. The Applicant sat on their rights till November, 2022 when they filed this application. There is no plausible explanation for the delay. I am thus not satisfied that the delay is explainable.
6. From the record, what seems to have woken the Applicant is the filing of the party and party bill of costs on 30/8/2022 and served on 6/9/2022 as per annexure JMM2 in the Respondent's affidavit. I do not find the applicant to have been diligent.



7. The second aspect is leave file the record of Appeal out of time. The same is for immediate dismissal. This is because, the extension of time to file the record of Appeal is within the province of the Court of Appeal.
8. In any case, the Applicant has not been bespoken proceedings to date. This means that they are not legible to use a certificate of delay. This means that only an explanation to a single Judge of the Court of Appeal will suffice, in extension of time.
9. I have no jurisdiction to issue the same. I rely on the case of [Gabriel Kigi & 6 others v Kimotho Mwaura & another](#) (1997) eKLR, where the court of Appeal sitting in Nairobi stated as follows: -

“To enable me to decide this, which is now a burning issue, I must refer to the relevant Acts, namely the [Civil Procedure Act](#) and the Act. The [Civil Procedure Act](#) and the rules made thereunder do not prescribe any specific time to file a notice appeal in the superior court. As there is no specific time provided in the [Civil Procedure Act](#) or the rules thereunder as regards filing of a notice of appeal, I must look at the Act. The act also provides no specific time for filing of a notice of appeal in the superior court. The only place where this item is provided for is by or under rule 74 (2) of the [Rules](#). This is to my mind the cruz of the matter before me. It is rule 74(2) of the [Rules](#) which prescribes the time for filing of notice of appeal. It must therefore be reasonable to assume that the time prescribed under rule 74 (2) of the [Rules](#) can properly be extended by reference to rule 4 of the Rules, that is an application grounded on rule 4 of the Rules. At this stage it becomes material to set out Section 7 of the [act](#).

The High Court may extend the time for giving notice of intention to appeal a judgment of the high Court for making an application for leave or a certificate that the case is fit for appeal notwithstanding that the time for giving such notice or making such appeal have already expired.”

10. Rule 4 of the [Court of Appeal Rules](#), provides as follows: -

“The Court may, on such terms as may be just, by order, extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

11. In any case, it is the Court appealed to that has jurisdiction to extend the filing of a record of Appeal. This court cannot as such usurp the power of a single Court of Appeal Judge as regards extension of time to file the record of appeal. The parameters as set within the [Appellate Jurisdiction Act](#).

12. Section 7 of the [Appellate Jurisdiction Act](#) Provides as follows: -

“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”



13. The two foregoing Provisions give this Court power to extend time within which to issue a notice of appeal but does not give power to extend time for filing of the Record of Appeal.
14. On the Issue of stay of execution pending Appeal, there is little to say. The Applicant has not succeeded in getting leave to appeal out of time. This means that the court cannot deal with issue of stay of proceedings. This is more so, in the absence of a Notice to Appeal.
15. Consequently, having dismissed the Part related to leave and extension of time, my hands are tied. I decline to grant the stay of execution pending appeal. In *HGE v SM* [2020] eKLR, justice W Musyoka, stated as follows: -

7. There is really only one issue for determination, and that is whether the order of stay of execution should be granted.
8. Grant of stay of execution pending appeal is provided for under Order 42 Rule 6 of the *Civil Procedure Rules*, the relevant part of which states as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(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.

(3) ...

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.”

16. In *Re Estate of Harish Chandra Hindocha (Deceased)*[2021] eKLR, the court stated as follows: -

“Under the court of appeal rules, stay of proceedings can only be granted if there is a notice of appeal. none was 15. filed in this matter. The substantive provision for accessing the relief sought is Rule 5(2) (b) of the *Court of Appeal Rules*. We, therefore, find it prudent not to interrogate the applicability of the other provisions of law cited alongside the above Rule.



17. Rule 5(2) (b) of the Rules of the Court provides as follows:

“In any civil proceedings where a notice of appeal had been lodged in accordance with rule, order and stay of execution, an injunction, for a stay of any further proceeding on such terms as the court may think just.”

18. The Application on the whole is not merited and as such it is dismissed with costs, in limine

Determination

19. I therefore make the following orders: -

- a. The Application dated November 23, 2022 is dismissed in *limine*.
- b. Costs of Ksh 15,000/= to the Respondent

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 29TH DAY OF MARCH, 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

HON. MR. JUSTICE DENNIS KIZITO MAGARE

JUDGE OF THE HIGH COURT, MOMBASA

In the presence of:

Mr. Tolo for Respondent

No appearance for Application

Court Assistant – Ben Wambua

