



REPUBLIC OF KENYA



KENYA LAW
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**Tawakal Airbus Limited v Abdulrahman (Miscellaneous Application
8 of 2022) [2023] KEHC 17881 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 17881 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
MISCELLANEOUS APPLICATION 8 OF 2022**

SM GITHINJI, J

APRIL 27, 2023

BETWEEN

TAWAKAL AIRBUS LIMITED APPLICANT

AND

BAKARI MOHAMED ABDULRAHMAN RESPONDENT

RULING

1. This Ruling determines the Applicant's Notice of Motion dated September 26, 2022 brought under the provisions of Sections 3A, 79G and 95 of the [Civil Procedure Act](#) and Order 2 Rule 22, Order 4 Rule 6, Order 50 Rule 6 and Order 51 Rules 1 and 3 of the [Civil Procedure Rules](#).
2. The Applicant seeks the following orders:
 1. Spent.
 2. That this Honourable Court be pleased to extend time and grant leave to the applicants to lodge a memorandum of appeal out of time against the judgment by Honourable E Kadima Magistrate in Suit No 05 of 2020 and related matters.
 3. That the annexed memorandum of appeal be deemed to be duly filed on time.
 4. Spent.
 5. That the Honourable Court be pleased to stay execution of the judgment in Garsen Magistrates Court Civil Suit No 05 of 2020 and related matters pending the hearing and determination of the intended appeal.
 6. Spent.
 7. That this Honourable Court be pleased to issue any other orders that it may deem fit, just and expedient in the interests of justice.



8. That the costs of this application be in the cause.
3. The Application is supported by the affidavit of one Nyabero Bokoo Brasiny, advocate for the Applicant.
4. The applicant's case is that aggrieved by the decision of the lower court delivered on June 2, 2022 in Garsen Magistrates Court Civil Suit No 05 of 2020 consolidated with Garsen CMCC 6, 56,53,48 and 55 all of 2020, they intend to file an appeal out of time challenging the judgment.
5. According to the Applicant, judgment was to be delivered on January 13, 2022 but was adjourned to January 27, 2022 and later on to March 10, 2022 when the trial court indicated that the same was to be delivered on notice. That counsel never received such notice until when he was served with a demand letter indicating that judgment had been delivered in their absence.
6. The Applicant avers that the judgment subject matter herein being substantial, should the execution proceed, they stand to suffer irreparable loss and prejudice. It is their case that their appeal raises arguable issues with high chances of success and that failure to stay the execution proceedings herein, the appeal stands to be rendered nugatory.
7. The Applicant avers that they are ready and willing to provide a bank guarantee from DTB Bank as security for stay of execution pending the determination of the appeal.
8. Opposing the application, the Respondent through his advocate Geoffrey Kilonzo, and vide a replying affidavit dated October 5, 2022 and filed on the October 6, 2022 contends that Suit No 05 of 2020 was not consolidated with any other matters as averred by the Applicant. That the suit was listed for mention on December 2, 2021 before the trial court to confirm filing of submissions when the Applicant was granted more time to do so. Failure to comply with the directions, the trial court proceeded to deliver judgment.
9. The Respondent avers that there were no submissions filed before the trial court for the Applicant to now allege that the trial court disregarded its submissions. That the submissions filed and struck off in the other mentioned cases were filed 5 months after the expected time for filing, contrary to the court's directions.
10. The parties agreed to canvass the Application by way of written submissions and while the Respondent filed his submissions, the Applicant indicated that he needed more time to do so. As at the time of writing this Ruling and despite the Court having granted the Applicant an extension, I note that they did not file their written submissions.
11. I have considered the Application, grounds thereof, supporting affidavit and annexures. I have also considered the Replying affidavit and submissions together with case law cited by counsel. I find that the following issues arise for determination: -
 1. Whether leave to file appeal out of time should be granted.
 2. Whether the Applicant has demonstrated that the orders of stay of execution pending appeal are merited.
12. Section 79G of the *Civil Procedure Act* deals with the time for filing appeals from subordinate courts and states: -

' 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.'

13. In *Paul Musili Wambua -v- Attorney General & 2 others [2015] eKLR*, the Court of Appeal in considering an application for extension of time and leave to file Notice of Appeal out of time stated the following;

' it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.'

14. Judgment was delivered on June 2, 2022 and the delay in filing the application was for about four months which is inordinate. The Applicant claims that judgment was delivered in their absence since they were not informed of the judgment date which was to be given on notice. The Applicant's counsel has also given an explanation that the instructions to appeal were given after the lapse of the 30 days since he only received a copy of the judgment on September 22, 2022.
15. These averments are not substantiated. There is no record of proceedings to ascertain that indeed judgment was to be delivered on notice. Moreover, the averment by the Applicant that neither them nor their advocate was served with the notice for the delivery of judgment after the same was adjourned, is controverted by the Respondent.
16. The delay in filing the appeal is not in my considered view justified to warrant this court exercise its discretion. Having said that, I find no basis to consider the second issue, that is, whether the Applicant has demonstrated that the orders of stay of execution pending appeal are merited.
17. The upshot is that the Notice of Motion dated September 26, 2022 is unmerited and is hereby dismissed with costs.

RULING FOR GARSEN READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 27TH DAY OF APRIL, 2023.

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S.M. GITHINJI

JUDGE

In the Presence of; -

- 1. Miss Nyambuto holding brief for Mr Kilonzo for the Respondent**
- 2. Mr Nyabero for the Applicant (absent)**

