



REPUBLIC OF KENYA



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**Kensilver Express Limited v Mugambi (Miscellaneous Application E004 of 2023)
[2023] KEHC 19425 (KLR) (Commercial and Tax) (30 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19425 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX**

MISCELLANEOUS APPLICATION E004 OF 2023

FG MUGAMBI, J

JUNE 30, 2023

BETWEEN

KENSILVER EXPRESS LIMITED APPLICANT

AND

AGNES KANARIO MUGAMBI RESPONDENT

RULING

Brief Facts

1. Before the court is the application dated December 22, 2022 brought under section 3, 3A and 75(1)G and 95 of the *Civil Procedure Act*, Order 42 rule 1, Order 42 rule 6, Order 43 rule 1 and Order 50 rule 6, Order 51 rules 1,3 and 4 of the *Civil Procedure Rules* and all enabling provisions of the law.
2. The orders sought in the application are as follows;
 - i. Spent
 - ii. Spent
 - iii. Spent
 - iv. Spent
 - v. There be a stay of execution of the judgment of the Honourable court delivered on November 29, 2022 pending the hearing and determination of the intended appeal
 - vi. The applicant be granted extension of time within which to file an appeal as set out in the annexed Memorandum of Appeal
 - vii. Any other relief that the Honourable Court deems fit and appropriate to grant.



3. The application is premised on the grounds on the face of it, the supporting affidavit sworn by Rovina Koske and the submissions dated June 6, 2023. The application emanates from a judgement of the lower court in Nairobi CMCC 1398 of 2018. The judgment of November 29, 2022 ordered the applicant to pay general damages of Kshs 3,240,000/= to the respondent. The applicant and its insurers, APA Insurance Company, allege to have found out about the judgment when the applicant was served with warrants of attachment.
4. The applicant avers that its advocates did not inform it of the judgment and upon perusing the judgment, the applicant was dissatisfied with the decision and is desirous of an appeal against the same.
5. The respondent opposed the application by filing a replying affidavit sworn by Agness Kanario Mugambi dated January 16, 2023 and submissions dated June 6, 2023. It was the respondent's case that the applicant was well aware of the judgment. The applicant had been served with the pleadings and failed to enter appearance and eventually reached out to the respondent's advocates with an offer for settlement.
6. On the submission by Counsel for the applicant that it had not been apprised of the judgment by its counsel, it was the respondent's case that the applicant had a responsibility to follow up the matter with its advocates. The respondent submitted that in any case, the applicant had until January 16, 2023 to file their appeal and therefore had no reason to seek for an extension of time.
7. The respondent observed that the applicant ought to have filed an appeal first before seeking leave for extension of time. Counsel termed the application as an abuse of court process as the applicant was within time and need not have filed the present application.

Analysis

8. I have carefully considered the pleadings and rival submissions made by the opposing parties and the authorities submitted before the court. There are two key prayers the courts consideration; one for extension of time to file an appeal and the other for stay of execution pending appeal.
9. Section 79G of *Civil Procedure Act* gives the timelines for filing an appeal at the High Court. It provides in part that;

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. Essentially, the applicant had 30 days from November 29, 2022, to file the appeal to the High Court. The appeal should therefore have been filed on or before December 28, 2022. This time fell during the High Court Christmas vacation which was excluded for purposes of computation of time, according to Order 50 rule 4 which provides for computation of time during the Christmas recess.
11. It stipulates 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 pleadings or the doing of any other act: Provided that this rule shall not apply to any application in respect of a temporary injunction.”

12. Similar observations were made by the Court of Appeal in *Gabriel Osimbo v Chrispinus Mandare* [2020] eKLR where Mohammed JA held as follows –

“The time for filing appeals from the subordinate court to the High Court is governed by section 79G of the Civil Procedure Act ...

I find that the appeal to the High Court was filed in time as the Christmas vacation period is excluded for purposes of computation of time stipulated for filing of documents. See also, *Keziah Stella Pyman & 2 others v Paul Mwololo Mutevu & 8 others* [2013] eKLR.”

13. I would therefore concur with these decisions and with the respondent that having filed the present application on 22nd December, the applicant did not need extension of time and ought to have filed its appeal as it was well within time to do so. Since the same has obviously been lying in wait, I am inclined to grant such leave even though this was not necessary had the applicant applied the law.

14. The second issue is whether the applicant has made out a case for stay of execution. The requirements for a party to successfully obtain the orders are provided for under Order 42, rule 6(2) which provides that:-

“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 appellant 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 appellant.”

15. The Court of Appeal in the case of *Butt v Rent Restriction Tribunal* {1982} KLR 417 gave guidance on how a Court should exercise discretion in an application for stay and held that:

- “ 1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the Judge’s discretion.
3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
4. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. The Court in exercising its powers under Order XLI rule 4 (2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its



own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

16. This Court is also well aware of the purpose of stay of execution as espoused in judicial decisions including *RWW vs EKW* [2019] eKLR. It is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. I further proceed on the need to weigh the right of appeal against the success of a litigant who should not be deprived of the fruits of his/her judgment.
17. The applicant avers that it stands to suffer substantial loss. As to what amounts to substantial loss, the Court of Appeal in *Mukuma vs Abuoga* (1988) KLR 645 opined that substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory. In the present case, I note that while there is on record an affidavit of service relating to service of summons to enter appearance and a plaint on the applicant, there is no evidence of receipt by the applicant, even though the statutory notice appears to have been received by the applicant.
18. Since the receipt of the statutory notice cannot replace the summons to enter appearance and plaint, and while the applicant may have had counsel on record who may not have diligently acted for their client, I am of the view that the justice of the case requires that the applicant is heard on appeal. I am therefore convinced that there would be substantial loss on the applicant if the execution takes place as the intended proclamation lists the applicant’s ten PSV vehicles and other office equipment that constitutes its tools of trade.
19. As to whether the application for stay of execution has been brought without undue delay, the Court has already stated that there was no delay in filing the application.
20. Finally, on the question of security, the applicant has made a proposal to give a bank guarantee in the sum of Kshs 3,000,000/= as security for the due performance of the decree. The order for security is discretionary and I am conscious of the need to ensure that a successful party has access to the fruits of their judgment should the appeal not be successful. I am also aware of the need to ensure that such security does not lock out an appellant from an appeal that presents arguable grounds.

Determination and orders

21. For these reasons I find merit in the application and allow it on the following terms;
 - i. That the appellants shall pay half of the decretal amount in a joint interest earning account to be mutually agreed upon in the names of the advocates for the respective parties within 30 days from the date of this ruling;
 - ii. That in default, the orders for stay pending appeal will be deemed to have lapsed and the respondents will be at liberty to execute.
 - iii. That in the meantime, the applicant shall file and serve the Record of Appeal within 30 days from the date of these orders.
 - iv. Costs shall be in the cause

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 30th DAY OF JUNE 2023.

F. MUGAMBI

JUDGE

