



REPUBLIC OF KENYA



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Nyangweso v Board of Management Ahero Girls Sec. School (Civil Miscellaneous Application E134 of 2021) [2023] KEHC 19394 (KLR) (29 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19394 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL MISCELLANEOUS APPLICATION E134 OF 2021**

RE ABURILI, J

JUNE 29, 2023

BETWEEN

JOHN OTIENO NYANGWESO APPLICANT

AND

BOARD OF MANAGEMENT AHERO GIRLS SEC. SCHOOL RESPONDENT

RULING

- a. Stay of execution pending appeal
 - b. Leave to appeal out of time
1. The applicant John Otieno Nyangweso was the plaintiff in Nyando PMCC No 165 of 2018 wherein judgment was delivered on July 27, 2021 dismissing his case with costs against the respondent herein who was the defendant in the said suit.
 2. The applicant intended to file an appeal challenging the judgment in question but was late hence the application dated September 14, 2021 seeking leave of court to file an appeal out of time and secondly, for stay of execution pending appeal.
 3. Before I consider the grounds upon which the application is predicated, I must first establish whether a stay pending appeal would make any legal sense in a negative decree wherein the applicant's suit for special damages for alleged supply of goods to the respondent was dismissed.
 4. The Court of Appeal in *Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme v Millimo, Muthomi & Co Advocates & 2 others* (civil appeal (application) E383 of 2021) [2021] KECA 363 (KLR) stated as follows, concerning applications for stay of negative orders:

“We start by acknowledging the fact that the ruling appealed against was a compounded one dealing with 2 applications, which yielded two different results. The first application,



which was made by the applicant, was dismissed. As submitted by learned counsel for the 1st respondent, the position taken by this court in respect of applications for stay of execution in respect of negative orders is clear. Negative orders cannot be stayed. We reiterate the sentiments of the predecessor of this Court in its decision in *Western College of Arts and Applied Sciences v Oranga & others* (1976-80) 1 KLR, where the court stated in respect of stay of execution as follows:

“But what is there to be executed under the judgment, the subject of the intended appeal”. The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In *Wilson v Church*, the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case, the High Court has not ordered any parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this court, in and application for stay, it is so ordered.”

5. Further, in *Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 others* [2016] eKLR, the Court of Appeal expounded on stay of execution by stating that:

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- “16. In *Kanwal Sarjit Singh Dhiman v Keshavji Juvraj Shah* [2008] eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on December 18, 2006. The order of December 18, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see *Western College of Arts & Applied Sciences v Oranga & others*[1976] KLR 63 at page 66 paragraph C).”

6. For the reasons contained in the above established binding decisions, I find that the prayer for stay of execution does not lie in this case as there is nothing to be stayed where a suit for special damages being the alleged value for the goods supplied to the respondent by the applicant was dismissed.
7. Turning onto the prayer for leave to appeal out of time, the applicant has sworn an affidavit explaining that he is a person living with disabilities and that he is of meagre means hence the delay in filing the appeal within time. Further, that it is his constitutional right to file an appeal challenging the judgment of the trial court and that the intended appeal has overwhelming chances of success.
8. Opposing the application, the respondent through its Secretary to the Board of Management Joyce Omondi Swore an affidavit on November 3, 2021 contending that the application is intended to circumvent justice and to delay taxation of costs; that the intended appeal has no merit and is a waste of judicial time.
9. Both parties counsel filed written submissions to canvass the application which submissions I have considered in reaching my determination in this ruling.
10. Having declined the prayer for stay of execution pending appeal on account that the decree was a negative one and even examining the application, grounds and the affidavit in support of the prayer for stay does not mention any costs, I now proceed to determine the prayer for leave to appeal out of time and the question is whether that prayer is merited.



11. The principles for extension of time to file an appeal out of time were discussed by the Supreme Court in the case of *Nick Salat v Independent Electoral & Boundaries Commission & 7 other* [2014] eKLR thus: extension of time is not a right but an equitable remedy, that it is available to a deserving party, a party seeking extension of time must lay a basis to the satisfaction of the court, the discretion to extend the time is a consideration to be made on a case to case basis, the reason for the delay must be explained to the satisfaction of the court, the court ought to consider if the opposite party will suffer prejudice if the extension is granted, whether the application has been brought without undue delay, and the public interest in matter.
12. The judgment to be impugned was delivered on July 27, 2021 and the application for leave was filed on September 22, 2021, about two months late. The applicant has explained that he is a person living with disabilities and that he is of meagre means hence the delay.
13. Under section 79G of the *Civil Procedure Act*, the appeal ought to have been filed within 30 days of the date of the judgment in the lower court. This court has the discretion to grant leave to the applicant to file the appeal out of time, although like all discretionary orders, the discretion to grant leave to appeal out of time is not an automatic right and can only be exercised where the applicant has placed before the court, sufficient grounds to explain the delay in the filing of the appeal.
14. Two months in my view is not inordinate delay and there is no contrary view that the applicant is a person living with disability as per the annexed certificate of registration of persons living with disability dated November 23, 2016.
15. Although extension of time to file appeal is a matter of exercise of discretion, it goes without saying that the applicant has a constitutional right to appeal. Where a party is aggrieved and wishes to pursue an appeal it would be fair to exercise discretion in their favour and especially where the delay in filing the appeal is not inordinate and the adverse party will not be prejudiced in any way.
16. It is my view that the applicant deserves an given an opportunity to explore all the remedies available to him as a person living with disabilities including an opportunity to pursue the appeal by according him an extension of time within which to file the appeal.
17. I find no injustice of prejudice will be suffered by the respondent if leave to appeal is granted to the applicant. Instead, I find that the applicant will have been ousted out of the judicial process to ventilate his grievance if leave to appeal is denied. Furthermore, granting the leave will avail an opportunity to both parties to argue the appeal and resolve the issue in dispute on merits. I have perused the draft memorandum of appeal and I do not find it to be frivolous.
18. Accordingly, I grant the leave to the applicant to file his appeal within 14 days of today.
19. Each party shall bear their own costs of this application.
20. This file is closed.

Dated, Signed and Delivered at Kisumu this 29th Day of June, 2023

R.E. ABURILI

JUDGE

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