



REPUBLIC OF KENYA



KENYA LAW
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**Ali v Musimbi & another (Miscellaneous Civil Application
90 of 2022) [2023] KEHC 21657 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21657 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS CIVIL APPLICATION 90 OF 2022**

SM GITHINJI, J

JULY 28, 2023

BETWEEN

FIROZ MOHAMED ALI APPELLANT

AND

ABDISALAN RASHI MUHAMMED 1ST RESPONDENT

FREDRICK MUNGUTI MUSIMBI 2ND RESPONDENT

RULING

CORAM: Hon. Justice S. M. Githinji

Ms Marungi Advocate for the Applicant

Ms Osino Advocate for the Respondent

1. The applicant files a notice of motion dated November 3, 2022 seeking the following orders;
 - a. Spent
 - b. That this honourable court be pleased to grant leave to the applicant/ Intended Appellant to appeal out of time against the judgment of the honourable Principal Magistrate in Mariakani Principal Magistrate Court Civil Suit No. 239 of 2019 and judgment delivered on September 6, 2022.
 - c. That this honourable court be pleased to stay execution of the judgment and decree in Mariakani Principal Magistrate Court Civil Suit No. 239 of 2019 and judgment delivered on September 6, 2022 pending the hearing and determination of this application and the intended appeal therein.
 - d. That as a condition for stay pending execution, the hearing and determination of this appeal/ intended appeal (as the case may be), the applicant/appellant be and is hereby ordered to



provide/issue security for the entire decretal sum/amount in the form of a bank guarantee to be issued by Family Bank Limited.

- e. That the costs of this application abide by the outcome of the intended appeal.
2. The application is premised on the grounds set out on the face of it and the supporting affidavit of Nnanungi Mariat and Firoz Mohamed Ali deposed separately, which in a sum both affidavits state that judgment was entered on September 6, 2022 against the applicant/intended appellant jointly and severally in the sum of Kshs. 182,190 in damages and liability apportioned at 100% plus costs and interests.

It was stated that aggrieved by the said judgment, the applicant intends to file an appeal and the time within which to file an appeal lapsed. Further, stay of execution lapsed and the respondent threatened execution vide a letter dated 13/10/2022. It is averred that the delay was occasioned by; obtaining a copy of the judgment late and the court accessing the Memo of Appeal late which was sent via court email. Additionally, it was deposed that the appeal has high chances of success and appellant stands to suffer prejudice and substantial loss should the instant application be denied.

The respondent filed a replying affidavit sworn by Fredrick Munguti Musumbi the 1st respondent who deposed that the application lacks merit and the applicant has frustrated the efforts to recover any decretal sum. Further, that judgment was delivered to all parties via email and that an email was sent by the respondent's advocate for notice of entry of judgment.

Analysis and Determination

3. The application was canvassed by way of written submissions. I have considered the rival affidavits, the submissions by the parties as well as the authorities relied on. The issues for determination are; whether stay of execution should be granted and leave to appeal out of time.

The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides:

“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.”
4. Further to the above, stay may only be granted for sufficient cause. The court in deciding whether or not to grant the stay, given the overriding objective stipulated in sections 1A and 1B of the [Civil Procedure Act](#), is no longer strictly limited to the foregoing provisions. The courts are obliged to give effect to the overriding objective in their exercise of powers under the [Civil Procedure Act](#) or in the interpretation of any of its provisions.

Section 1A (2) of the [Civil Procedure Act](#) provides that; -

“the court shall, in the exercise of its powers under this act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1b some of the aims of the said objectives are; “the just determination of the proceedings; the efficient disposal of the business of the court; the efficient use of the available judicial



and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.”

5. Therefore, an applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely; -
 - a. that substantial loss may result to the applicant unless the order is made,
 - b. that the application has been made without unreasonable delay, and
 - c. that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See *Antoine Ndiaye v African Virtual University* [2015] eKLR.

6. As to what substantial loss is, it was observed in *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR/, that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

7. In the instant case, the applicants aver that they stand to suffer substantial loss of over Kshs. 503,050 as well as costs and interest if stay of execution is not granted. They further aver that the respondent has not demonstrated that he is able to refund the sum if paid and the appeal succeeds. The appellants have also pleaded that they are able to comply with any order as to security of costs as they have secured a bank guarantee from Family Bank.

The court, in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal 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. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the appellant with those of the respondent.”

8. In this case, the respondent states that he is a casual labourer earning Kshs. 1,000 per day in a bid to illustrate his ability to repay the decretal sum in case the appeal succeeds. Accordingly, I am not persuaded that substantial loss has been proved.

As to security for costs, the appellant has made provision for a Bank Guarantee. However, it is trite that a court is not bound by the type of security offered by an applicant. It can make appropriate orders



which serve the interest of justice taking into account the fact that money depreciates unless it is kept in an interest earning account for the period of the appeal.

On the issue of leave to appeal out of time, section 79G of the Civil Procedure Act provides:

“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.”

9. In the case County Executive of Kisumu v County Government of Kisumu & others (2017) eKLR while relying to its decision in the case of Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others Application No. 16 of 2014 (2014) eKLR the Hon. Judges of the Supreme Court reiterated the considerations to be made in such a case to be as follows:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. In certain cases, like election petitions, public interest should be a consideration for extending time.”

10. The trial court delivered its judgment on September 6, 2022 and the same was delivered to the parties electronically. The instant application was filed on November 3, 2022 almost two months from the date the judgment was delivered. There is no sufficient cause advanced as to why the delay occurred. In the premise, I am inclined to decline the prayer for leave to appeal out of time.

In the end, the application dated November 3, 2022 fails in its entirety for want of merit and the same is hereby dismissed. The applicant to bear the cost of the application.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 28TH DAY OF JULY, 2023.

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S.M. GITHINJI

JUDGE

In the Presence of; -

Miss Osino for the Respondent



Ms Nasanga for the Applicant

