



**Hamiza v Diwani (Miscellaneous Civil Appeal E038 of 2023)
[2023] KEHC 275 50 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 27550 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CIVIL APPEAL E038 OF 2023**

F WANGARI, J

JULY 28, 2023

BETWEEN

AL-AMIN MASUD HAMIZA APPLICANT

AND

HARRISON GARAMA DIWANI RESPONDENT

RULING

1. The Applicant/Appellant vide an application dated 8th February, 2023 sought for the following orders in brief;
 - a. That the Applicant be granted leave to appeal out of time against the judgement by Hon. E.M. Muchoki SRM in Mombasa Civil Case No. E376 of 2020 delivered on 21/11/2022.
 - b. That there be stay of execution of the above judgment pending the hearing and determination of this application, and the appeal.
 - c. That as a condition for stay of execution pending the hearing and the determination of the appeal, there be a security for the entire decretal amount in the form of a Bank Guarantee to be issued by Family Bank Limited.
 - d. That the costs to be in cause.
2. The application was opposed via replying affidavit dated 16/2/2023 stating that the Applicant cannot succeed on the appeal on liability as he did not adduce evidence in the trail court, and further, there is no reason given as to why there was a delay in filing of the appeal.
3. Directions were taken that the application be disposed of by way of written submissions. The Applicant complied by filing his submissions dated 8th March, 2023. There are no submissions on record for the Respondent and I shall deem that they were never filed.



Analysis and Determination

4. I have considered the application, the Applicant's submissions, authorities cited as well as the law and in my view, the following are the issues for determination: -
 - a. Whether the application is meritorious;
 - b. What is the order as to costs?
5. On the first issue, the application basically seeks for leave to file an appeal out of time. Section 79G of the *Civil Procedure Act* is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. It provides as follows: -

“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.”
6. From the provision above, it is noteworthy that the phrase used is “an appeal may be admitted out of time”. This therefore means that an appeal may indeed be admitted out of time. However, the intended appeal ought to have already been filed before or together with an application seeking leave to for filing an appeal out of time. I have perused the file and indeed the Applicant has attached a draft memorandum of appeal.
7. The decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion just like any other exercise of discretion by the court. Some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time were suggested by the Court of Appeal in *Thuira Mwangi v Kenya Airways Ltd* [2003] eKLR. They include the following: -
 - i. The period of delay;
 - ii. The reason for the delay;
 - iii. The arguability of the appeal;
 - iv. The degree of prejudice that will be suffered by the Respondent if the extension is granted;
 - v. The importance of compliance with time limits to the particular litigation or issue;
 - vi. The effect if any on the administration of justice or public interest if any involved.
8. On the period of delay, I note that the judgement which the Applicant seeks to appeal was delivered on 21/11/2022. This application was filed about 2 months out of time. This in my view is not an inordinate delay. On the reason for the delay, the Applicant submits that the delay was occasioned by the delay in obtaining the copy of judgment, and by the time they received instructions from their client to appeal, the time to appeal had already lapsed. I am satisfied that the reason for delay has been sufficiently explained.
9. On arguability of the appeal, I note that in law, an arguable appeal/intended appeal is one that need not succeed but one that warrants the court's interrogation on the one hand and the courts invitation to the opposite party to respond thereto. I have perused the draft memorandum of appeal and indeed



the grounds therein are arguable and I am thus satisfied that the appeal lodged is one that meets the test of arguability.

10. On the degree of prejudice, the Respondent has not shown the prejudice to be suffered at this juncture. Be that as it may, any prejudice to be suffered can be alleviated through award of costs. The upshot of the foregoing is that I am inclined to allow the application. I am satisfied that the Applicant has successfully navigated the barricades for grant of the orders sought. I thus exercise my discretion in favour of the Applicant.
11. Lastly, the Applicants are required to furnish security to the Court as security for the performance of the judgment debt should the appeal fail. The purpose of security was clearly enunciated in *Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 others* [2014] eKLR, where the court stated: -

“...The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose...”

12. In their supporting affidavit, the Applicants stated that they were willing to provide security in form of a Bank Guarantee for the entire decretal sum. This was countered by the Respondent who stated that since the appeal on liability cannot succeed, the Applicant should be ordered to pay at least 2/3 of the decretal sum, then the balance be deposited in a joint interest earning account.
13. I find it as a sign of good faith on their part. Nevertheless, in accordance to Order 42 rule 6(2) (b) of the *CPR*, it is the court that orders the kind of security the Applicant should give as may ultimately be binding on the Applicant. This modeling of the law is to ensure the discretion of the court is not fettered. I shall thus make orders accordingly on the issue of security.
14. On the issue of stay of execution, the principles for grant the same pending appeal are settled. Stay of Execution pending appeal is governed by Order 42, Rule 6 of the *Civil Procedure Rules*, 2010 which provides 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) Notwithstanding anything contained in subrule (2), the court all have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
15. At this stage, the court should not delve into the merits of the appeal and should only concern itself with the material presented before it on whether to grant stay or not. The power of a court to grant stay of execution is discretionary and just like any other discretionary power, the same must be exercised judiciously and not capriciously or whimsically.
16. It must be recalled that the purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of each of the parties to the dispute. In *RRW v EKW* [2019] eKLR, the Court of Appeal addressed itself on this issue as hereunder: -
- “...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. 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...”
17. The Applicant states that I the event the appeal is successful, the decretal sum may not be recovered from the Respondents as his means of income is unknown, thus leading to substantial and irreparable loss. While it is unfortunate that the Respondents will have to wait a little bit longer to enjoy the fruits of the judgement, the Applicant has adequately demonstrated that he is likely to suffer loss were the Applicant’s interests in the subject matter be ignored and I so hold.
18. On the issue of costs, the same follows the event. This is what section 27 of the *Civil Procedure Act* decrees. However, this court has discretion to either award or not award any costs. Though the Applicant is successful, it would be onerous to require the Respondent to bear the costs of the application and I thus exercise my discretion to direct that the costs shall be in the cause.
19. Flowing from the foregoing, I proceed to make the following orders: -
- a. The application dated 8/2/2023 is merited and is thereby allowed on the following conditions;
 - i. The draft Memorandum of Appeal is deemed to have been properly filed.
 - ii. That the Applicant do deposit the decretal amount of Kshs. 2,976,642 in a joint interest earning account within the next 30 days.
 - iii. The Record of Appeal be filed within the next 45 days.



- b. In default of (a) above, the application stands dismissed and execution of the lower court judgment to follow.
- c. The costs to be in the cause.

Orders accordingly

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 28TH DAY OF JULY, 2023.

F. WANGARI

JUDGE

In the presence of:-

M/s Githinji Advocate for the Appellant

Njoroge Advocate for the Respondent

Abdullahi, Court Assistant

