



**Lochab Transport Limited & another v Koskei (Civil Appeal
51 of 2020) [2023] KEHC 21638 (KLR) (8 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21638 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 51 OF 2020
RN NYAKUNDI, J
AUGUST 8, 2023**

BETWEEN

LOCHAB TRANSPORT LIMITED 1ST APPELLANT

ROBERT KIPKOECH KIRUI 2ND APPELLANT

AND

EVALINE CHEPKORIR KOSKEI RESPONDENT

RULING

1. What is before this court is an application dated June 13, 2023 seeking the following order;
 1. Spent
 2. That this honourable court be pleased to grant leave to the applicant to file and serve the notice of appeal and substantive appeal against this honourable court's judgment made on May 4, 2021 out of time.
 3. That this honourable court be pleased to stay the execution of its judgment delivered on May 4, 2023 and all consequential orders ensuing therefrom pending the hearing and determination of this application.
 4. That this honourable court be pleased to stay the execution of its judgment delivered on May 4, 2023 and all consequential orders ensuing therefrom pending the hearing and determination of the intended appeal.
 5. That the notice of appeal duly filed on May 26, 2023 be deemed as properly filed.
 6. That the costs of and incidental to this application abide the result of the intended appeal.
2. The application is premised on the grounds set out therein and the contents of the affidavit in support of the same.



Applicant's Case

3. The applicant's case is set out in the supporting affidavit sworn by Evaline Chepkorir Koske. She deposed that judgment was entered in favour of the appellant in this matter on the May 4, 2023 in the absence of her advocates on record. Said advocates were not aware of the judgement as the file had been transferred to Nakuru without notice being issued to them. Further, that her advocates became aware of the judgement on May 15, 2023 *vide* an email by counsel for the appellants.
4. It is the applicant's case that failure to file the notice of appeal within the required time was inadvertent. She urged that there is an arguable appeal with a probability of success and therefore, the release of the security that is deposited in a joint account will render the appeal nugatory. She maintained that the respondent will not suffer any prejudice if the status quo is maintained and prayed the court allow her application.

Respondent's Case

5. The application is opposed *vide* a replying affidavit dated July 7, 2023 sworn by Stephen Kiendi Ndinguli who averred that the application is devoid of merit and is made in bad faith with the view of frustrating the appellants/respondents who have been successful in their appeal. He urged that despite receipt of judgement dated May 4, 2023 on May 15, 2023 as alleged, the applicant counsel had sufficient time up to May 19, 2023 to lodge a notice of appeal. Further, that a copy of the notice of appeal was prepared and ready on the May 15, 2023 and the same was forwarded to the appellants/respondents advocates on the same day instead of being filed in court.
6. It is the respondent's case that the terms of the judgment and the net implication was clear and unambiguous and there is no sufficient reason advanced as to why the notice of appeal which was ready on May 15, 2023 and transmitted to the appellants/respondents counsel on the same day was not filed between Tuesday May 16, 2023 and Friday May 19, 2023 in this information age. Further, that the instant application is a knee jerk reaction to the appellants' application dated June 5, 2023 for release of funds deposited in the joint account pending hearing and determination of appellants/respondents appeal in this matter pursuant to the application dated June 24, 2020, the ruling of August 11, 2020 and consent dated September 2, 2020.
7. The respondents urged that given that it is the appellants who deposited the amount held in joint account pending their appeal which has since been determined in their favour, there is no basis whatsoever for granting the stay orders as sought and the orders issued *ex parte* should be vacated. The respondents averred that there is no judgment capable of being stayed since the respondent/ applicant's late husband had received a substantial amount of what was decreed and whatever little is left will be consumed by costs awarded to the appellants/respondents.
8. The respondents averred that it is the party pursuing an appeal who ought to provide security and not the appellants/respondents in the instant application. They urged the court to dismiss the application as it is an abuse of the court process.

Analysis & Determination

9. Upon considering the pleadings filed and responses thereto, the following issues emerge for determination;
 1. Whether the applicant should be granted leave to file an appeal out of time
 2. Whether stay of execution of the judgement delivered in May 4, 2023 should be granted



Whether The Applicant Should Be Granted Leave To File An Appeal Out Of Time

10. The applicant seeks to appeal a decision that was delivered on May 4, 2023. Further, she contends that her advocates received the judgement via email on May 15, 2023. From the annexures therein, the notice of appeal that she intends to file is dated May 15, 2023. The applicant has not explained why, despite having knowledge of the decision 11 days after the same had been delivered, she elected to send the notice of appeal to the respondents and not to file the same.
11. Section 79G of the *Civil Procedure Act* provides 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.
12. It is my considered view that these applications apply mutatis mutandis to an appeal from a High Court decision. Further, an intended appeal ought to have been filed together with an application for seeking leave to file the appeal out of time. In *Mugo & others v Wanjiru & Anor* [1970] EA 482 the court stated as follows:-

Clearly, as a general rule the filing and service of the notice of appeal ought to be regularised before or at least at the same time as an application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused.”
13. Given that leave to extend time is discretionary, the fact that the notice of appeal was not filed is not fatal to the application for leave. In considering whether to extend time to file an appeal, there are various factors that the court must take into account. In *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR, the Court of Appeal stated that these factors 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 which could be suffered by the if respondent the extension is granted;
 - v. The importance of compliance with time limits to the particular litigation or issue; and
 - vi. The effect if any on the administration of justice or public interest if any is involved.
14. The impugned judgement was delivered on May 4, 2023 and the applicant claims her advocates became aware of it on May 15, 2023. There is reason given as to why even the notice of appeal was not filed immediately but in my view the same is not reasonable. The applicant has chalked down the reason for the delay to inadvertence on the part of her counsel of record which to my mind cannot be held to be sufficient cause for inordinate delay.
15. I would not delve into the merits of the appeal at this juncture as that would be tantamount to projecting the determination of the same by the appellate court. As for the prejudice that would be



occasioned on the respondents, I note that the security was deposited by the respondents in compliance with the orders of the magistrates' court delivered on August 11, 2020 in the Chief Magistrate's Court. The respondents herein also paid a sum of Kshs. 565,570/- to the applicant herein in compliance of said order. The purpose of security was set out in the case of *Arun C Sharma v Ashana Raikundalia T/A Raikundalia & Co Advocates & 2 others* (2014) eKLR where Gikonyo J. held that: -

"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."

16. There is no decree that requires due performance on the present appeal as the court set aside the award of general damages in the trial court and substituted it with an award of Kshs 100,000/-. I must also take into account the fact that the applicant sprang into action upon the filing of the application dated June 5, 2023 wherein the respondents having succeeded in the appeal, sought to have the security released to them. It is upon the filing of said application that the applicant filed the present application. To my mind, this points to a deliberate attempt to delay the respondents from enjoying the fruits of their judgement. The applicant being the one who has lost the appeal, and having been directed to pay costs, is the one to pay security pending the determination of the appeal.
17. In the premises, I decline to grant leave to file the appeal out of time. The application is dismissed in its entirety with costs to the respondents.
18. Besides the above application, on June 5, 2023 another motion was lodged before this court expressed under section 1A 1B 3, 3A and 91 of the *Civil Procedure Act* cap 21 Laws of Kenya order 1 rule 1 & 10 of the *Civil Procedure Rules* and all enabling provisions of the law. It seeks the following orders: That this honourable court be pleased to order that all that money held in joint account in the name of J.M Kimani & Co Advocates and Ogeto & Ogeto Advocates at credit bank account No 0xxxxx4 Nakuru Branch be released to the firm of M/s J.M Kimani & Co Advocates for onward transmission to the depositor. That the costs of the instant application be provided for.
19. The facts upon which application is based are to the extent as I understand them from the body of the motion are as follows:
 - a. That the appellants/applicants herein lodged this appeal from the lower court award on quantum
 - b. That as a condition of stay pending the appeal, the appellants/applicants through their insurance paid part of the money and the balance thereof was deposited in a joint interest earning account in the name of J.M Kimani & Co Advocates and Ogeto & Ogeto Advocates at Credit Bank Nakuru Branch pending appeal.
 - c. That during the pendency of appeal, Paul Kimutai Kosgei passed away and he was substituted by his wife who engaged D.C Ng'eno & Co Advocates in the place of Ogeto & Ogeto Advocates
 - d. After conclusion of the appeal, the decretal amount was substantially reduced and it is only fair that the money be released to the depositor through the firm of M/s J.M Kimani & Co Advocates who has been on record for the appellant/applicant as it has served its purpose



- e. That by the time of delivery of judgement, the firm of M/s Ogero & Ogeto Advocates was still the signatory of the joint account and it had not been replaced by the firm of M/s D.C Ng'eno & Co Advocates which is now on record for the respondent
 - f. That attempts to secure released of the money without resorting to court have been futile
 - g. That the instant application is made in utmost good faith in pursuit of the best interest of justice
20. The question arising is whether the affidavit supporting the application contained material which was sufficient meritorious to have warranted the order sought. In my view the applicant has given good reasons for the proposed orders to be granted by this court: That honourable court be pleased to order that all that money held in joint account in the name of J.M Kimani & Co Advocates and Ogeto & Ogeto Advocate at Credit bank account No 0xxxxxxx4 Nakuru Branch be released to the firm of M/s J.M Kimani & Co Advocates for onward transmission to the depositor.
21. Costs on this application be in the cause.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 8TH DAY OF AUGUST 2023

In the presence of

Mr. Kinyanjui for the Appellant.

.....

R. NYAKUNDI

JUDGE

