



Musembi & another v Chembe & another (Miscellaneous Civil Application E559 of 2022) [2023] KEHC 24151 (KLR) (Civ) (26 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24151 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E559 OF 2022**

CW MEOLI, J

OCTOBER 26, 2023

BETWEEN

**BONIFACE MOLOO MUSEMBI 1ST APPLICANT
NICHODEMUS MULI MUSEMBI 2ND APPLICANT**

AND

**ROSE CHEMBE 1ST RESPONDENT
GITUMA GEORGE 2ND RESPONDENT**

RULING

1. For determination is the Notice of Motion dated 12th September, 2022 (hereafter the Motion) brought by Boniface Moloo Musembi and Nichodemus Muli Musembi (hereafter the 1st and 2nd Applicants) seeking leave to file an appeal out of time against the judgment delivered on 11th March, 2022 in favour of Rose Chembe (hereafter the 1st Respondent) in Milimani CMCC No. 3214 of 2019 (hereafter the primary suit); an order to stay execution of the said judgment, pending the hearing and determination of the appeal; and leave to deposit security by way of a bank guarantee.
2. The Motion is expressed to be brought under Sections 3A, 79G & 95 of the *Civil Procedure Act* (CPA) and Order 22, Rule 22; Order 42, Rule 6; Order 50, Rule 6 and Order 51, Rules 1 and 3 of the *Civil Procedure Rules* (CPR).
3. The grounds on the face of the Motion are amplified in the supporting affidavit sworn by Kelvin Nguere, the Deputy Claims Manager at Directline Assurance Company Limited (the Applicants' insurer), who averred that the trial court had after trial indicated that the judgment would be delivered on notice but was eventually delivered on 11th March, 2022 without prior notice to the parties herein. The deponent



averred that the judgment was rendered in favor of the 1st Respondent, while the trial court apportioned liability equally between the Applicants and Gituma George (hereafter the 2nd Respondent).

4. That the Applicants only came to learn of the delivery of judgment upon the 1st Respondent instituting Milimani CMCC No. 3349 of 2022 (the declaratory suit) against the insurer in a bid to enforce the judgment in the primary suit solely against the Applicants despite the apportionment of liability. The deponent asserted that the 1st Respondent's financial means and hence ability to refund the decretal amount is unknown. Therefore, if the decretal sum were paid out, the appeal if successful would be rendered nugatory. He expressed the Applicants' insurer's willingness to furnish security by way of a bank guarantee from a reputable bank.
5. The 1st Respondent opposed the Motion through a replying affidavit wherein she deposed that the Motion is a delaying tactic intended to frustrate the declaratory suit. The 1st Respondent further deposed that the explanation given for the delay in bringing the Motion is not valid as the Applicants were at all material times aware of delivery of the judgment in the primary suit. Asserting that substantial loss had been demonstrated, the 1st Respondent urged the court to dismiss the Motion with costs.
6. The Motion was canvassed by way of written submissions. Regarding the prayer for leave to appeal out of time, the Applicants' counsel anchored his submissions on the decisions in *Edith Gichugu Koine v Stephen Njagi Thoithi* [2014] eKLR and *Julius Kamau Kithaka v Waruguru Kithaka Nyaga & 2 others* [2013] eKLR on the guiding principles. On the period and reasons for the delay, counsel for the Applicants contended that the Motion was brought expeditiously and that any delay could be attributed inter alia to the time taken in obtaining a copy of the judgment due to the limited access to the court registry owing to the Covid-19 pandemic.
7. He submitted that no likelihood of prejudice has been demonstrated by the 1st Respondent if the order for leave to appeal out of time is granted, placing reliance on the case of *Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another* [2018] eKLR. Counsel further submitted that the Applicants have an arguable appeal with reasonable chances of success.
8. Submitting on the prayer seeking stay of execution, counsel reiterated depositions on the risk of substantial loss. Finally, citing *Selestical Limited v Global Rock Development* [2015] eKLR and *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR he reiterated the Applicants' willingness to furnish a bank guarantee, as security for the due performance of the decree. On those grounds, the court was urged to allow the Motion.
9. On the part of the 1st Respondent, her counsel by way of brief submissions echoed the averments made in her replying affidavit and urged the court to dismiss the Motion for being frivolous and constituting an abuse of the court process, citing the decision in *Kivanga Estates Limited v National Bank of Kenya Limited* [2017] eKLR.
10. From the record, it is apparent that the 2nd Respondent did not participate in the hearing of the Motion or file any documents in that respect.
11. The Court has considered the rival affidavit material and submissions made in respect of the Motion. The first prayer seeks leave to appeal out of time. The power of the court to enlarge the time for filing an appeal out of time is expressly donated by Section 79G of the *CPA*, as well as Section 95 of the same Act. Section 79G 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. The principles governing leave to appeal out of time are settled. A successful applicant must demonstrate “good and sufficient cause” for not filing the appeal in time. In *Thuita Mwangi v Kenya Airways* [2003] eKLR, the Court of Appeal while considering Rule 4 of the *Court of Appeal Rules* which was in *pari materia* with Section 79G of the *Civil Procedure Act*, reiterated its decision in *Mutiso v Mwangi* [1997] KLR 630 as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

13. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court’s discretion in his favor. On the question of the exercise of judicial discretion, the Supreme Court observed in the case of *Telkom Kenya Limited v John Ochanda And 996 Others* [2015] eKLR that:

“In instances where there is delay in filing the notice of appeal, this Court has inherent jurisdiction to admit such appeal, provided sufficient explanation is proffered for the cause of delay. The design and objective of the Supreme Court Rules is to ensure accessibility, fairness and efficiency in relation to this Court. Parties should comply with the procedure, rather than look to the Court’s discretion in curing the pleadings before it. This Court’s position is that the circumstances of each case are to be evaluated, as a basis for arriving at a decision to intervene, in instances where full compliance with procedure has not taken place....”

See also *Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 Others* [2019] eKLR.

14. The Supreme Court in the case of *Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The Court stated *inter alia* that:

“The underlying principles a court should consider in exercise of such discretion include;

1. Extension of time is not a right of any 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 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 Respondent if the extension is granted;
6. Whether the application has been brought without undue delay.
7.”

See also *County Executive of Kisumu v County Government of Kisumu & 8 Others* [2017] eKLR.

15. Although none of the parties tendered a copy of the impugned judgment for the court’s reference, it is not in dispute that the said judgment was delivered on 11th March, 2022 whereas the instant Motion was brought sometime on or about the 12th of September, 2022. In the court’s view, while there has been a prolonged delay of about six (6) months, the same is not deemed inordinate in the circumstances.
16. Concerning the reasons for the delay, the deponent of the affidavit supporting the Motion essentially asserted that delay in filing both the appeal and Motion was occasioned by the want of notice regarding the date of delivery of the judgment, and difficulty in accessing the typed copy of the judgment. The 1st Respondent dismissed these assertions stating that the Applicants had notice of delivery of the impugned judgment.
17. Upon perusing material on record, the court noted that none of the parties, especially the 1st Respondent, provided evidence of notice or circumstances surrounding the delivery of the judgment. Nevertheless, it appears plausible that such notice may indeed not been issued and, in addition, the delay in obtaining the typed copy of the judgment and proceedings may have contributed to the delay in filing the appeal in good time and in bringing the Motion.
18. The court, having perused the draft memorandum of appeal does not think it is one without merit. All that is required is a demonstration that the appeal is worthy of consideration by the court, and not necessarily that it will succeed. Besides, based on the language employed in *Mutiso v Mwangi (supra)* the requirement touching on the viability of the intended appeal, is neither mandatory nor stringently applied in an application of this nature. The Court of Appeal in *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited* (2020) eKLR stated that such appeal:

“... may not succeed as in law an arguable appeal need not succeed so long as it raises a bona fide issue for determination by the Court.”

19. In Vishva’s case, the Court emphasized the right of appeal in the following terms:

“Turning to the request to allow the applicant to exercise his now undoubted constitutionally underpinned right of appeal, the position is.... crystalized in the case of *Richard Ncharpi Leiyagu v IEBC & 2 Others (supra)*; *Mbaki & Others v Macharia & Another* [2005] 2EA 206; and the Tanzanian case of *Abbas Sherally & Another v Abdul Fazaiboy*, Civil Application No. 33 of 2003; for the holding *inter alia* that:

- (i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;
- (ii) the right to be heard is a valued right; and



- (iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice;”
20. Concerning likely prejudice to 1st Respondent, there is no indication that an award of costs would not be adequate compensation. In the circumstances of this case, the court is persuaded to exercise its discretion in favour of the Applicants and to grant leave to appeal out of time. The appeal shall be filed within 14 days.
21. Turning now to the second prayer seeking stay of execution pending the appeal, it is evident on a plain reading of Order 42 Rule 6(1) of the [CPR](#), that an order to stay execution pending hearing and determination of an appeal presupposes the existence of an appeal. The filing of an appeal is a condition precedent to the exercise of this court’s appellate jurisdiction under Order 42 Rule 6 (1) of the [Civil Procedure Rules](#).
22. Hence the invocation of the jurisdiction of this court under Order 42 Rule 6 (1) or 6 (6) of the [Civil Procedure Rules](#) must be preceded by the filing of an appeal, or compliance with the procedure for filing an appeal, in this case a memorandum of appeal (See Order 42 Rule 1 of the [Civil Procedure Rules](#)). Thus, where a party specifically seeks stay of execution pending hearing and determination of an appeal not yet filed, the court may be acting in vacuo by considering the Applicant’s prayer for stay of execution pending a non-existent appeal. The Court of Appeal in [Abubaker Mohamed Al-Amin v Firdaus Siwa Somo](#) [2018] eKLR while citing with approval the decision of the High Court in [Rosalindi Wanjiku Macharia v James Kiingati Kimani \(Suing as the Legal Representative of the Estate of Martin Muiruri \(Deceased\)\)](#) [2017] eKLR approved the reasoning that stay of execution pending appeal must be predicated on an existing appeal.
23. Earlier, the Court of Appeal in the case of [Equity Bank v Westlink MBO Limited](#) [2013] eKLR while commenting on Rule 5 (2) (b) of the [Court of Appeal Rules](#), whose wording is substantially similar to Order 42 Rule 6 (1) of the [Civil Procedure Rules](#), and on Order 42 Rule 6 (6) of [Civil Procedure Rules](#), left no room for doubt that an application for stay of execution pending appeal could only be entertained before it after the filing of an appeal or a Notice of Intended Appeal. (See also [Balozi Housing Co-operative Society Limited v Captain Francis E. K. Hinga](#) [2012] eKLR). Order 42 Rule 1 of the [CPR](#) provides that an appeal to the High Court shall be in the form of a memorandum of appeal. In this case, an appeal is yet to be filed and therefore, there is no basis upon which this court could exercise its appellate jurisdiction under the said provision in a miscellaneous matter.
24. If the Applicants desired to seek an order to stay execution alongside the prayer for the late admission of their appeal, they ought to have first filed the memorandum of appeal in a proper appeal and the relevant application. In my considered view, the words that “an appeal may be admitted out of time” in Section 79G, appears to admit both retrospective and prospective applications. So that leave under the Section may be sought before or after a memorandum of appeal is filed. However, it may be more prudent for a party who also seeks stay of execution in the same motion for leave to appeal out of time to have filed the memorandum of appeal in advance.
25. In the circumstances, the prayer for stay of execution pending the intended appeal has no legal anchor and cannot be considered. The court while declining the said prayer will, subject to prior compliance or compliance by COB on 2.11.2023 by the Applicants, with the order for deposit of half the decretal sum made by this court on 11.05.2023, issue a temporary order to maintain the *status quo* in respect



of the decree in the lower court for 14 days. This, to enable the Applicants make the application for stay of execution upon filing their appeal. The costs of the motion are awarded to the Respondent in any event.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 26TH DAY OF OCTOBER 2023.

C.MEOLI

JUDGE

In the presence of

For the Applicants: N/A

For the Respondent: N/A

C/A: Carol

