**Nairobi City Water & Sewerage Co Ltd v Ahmed (Miscellaneous Civil Application E078 of 2023) [2023] KEHC 24152 (KLR) (Civ) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24152 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**MISCELLANEOUS CIVIL APPLICATION E078 OF 2023**

**CW MEOLI, J**

**OCTOBER 26, 2023**

**BETWEEN**

**NAIROBI CITY WATER & SEWERAGE CO LTD ..... APPLICANT**

**AND**

**ZEIN SAID ABDUL AHMED ..... RESPONDENT**

**RULING**

1. For determination is the motion dated February 16, 2023 by Nairobi Water & Sewerage Co. Ltd (hereafter the applicant) seeking inter alia that this court be pleased to grant the applicant leave to lodge an appeal out of time against the judgment in Nairobi Milimani CMCC No. 565 of 2019; and that there be a stay of execution of the decree emanating from the said judgment pending the hearing and determination of the intended appeal. The motion is expressed to be brought undersection 1A, 1B & 79G of the *Civil Procedure Act* (CPA), Order 42 Rule 6, Order 50 Rule 6, Order 51 Rule 1 of the *Civil Procedure Rules* (CPR) and is premised on the grounds thereon. As amplified in the supporting and supplementary affidavits sworn by Viola Odhiambo, who is described as a Legal Officer with the Applicant.

2. The gist of her depositions is that on February 17, 2022 the lower court delivered judgment in favour of Zein Said Abdul Ahmed (hereafter the Respondent) in Nairobi Milimani CMCC No. 565 of 2019 for the sum of Kshs. 800,000/- with costs and interest, and the Applicant, being aggrieved by the said judgment instructed its advocates on record then to file an appeal against the said judgment. That onFebruary 13, 2023the applicant was served with a proclamation notice by auctioneers threatening to execute after the lapse of seven (7) days while the applicant believed that its previous counsel on record had filed an appeal as instructed. She asserts that failure to file the appeal in time was caused by the previous counsel, prompting instruction of new counsel who filed the instant motion.

3. That there is apprehension that execution will proceed, rendering the applicant's arguable intended appeal nugatory, if stay of execution pending the determination of the intended appeal is denied. In conclusion, she expresses the applicant's willingness to comply with any conditions that the court may impose, and asserts that there no party will suffer prejudice if the motion, brought in good faith and without unreasonable delay, is allowed.

4. The respondent opposes the motion through a lengthy replying affidavit deposed by Khalil Abdalla Said, pursuant to his appointment as attorney of the Respondent under a power of attorney. He views the motion as an abuse of the court process citing the lengthy delay, which he says is unexplained. He further asserts that the applicant was entitled, to inter alia appoint another counsel to come on record in view of the previous advocates' inaction. He asserts that the applicant was only jolted to action by the service of warrants of attachment.

5. He goes on to depose that the intended appeal lacks merit and the Respondent would be prejudiced if the court were to allow the motion as that it would effectively allow the applicant to demand, re-bill or disconnect the respondent's water supply despite the decision of the trial court being in his favour. He further deposed that the applicant ought to demonstrate substantial loss in the event the orders sought are declined. That execution in itself does not amount to substantial loss as the Respondent is entitled to the fruits of successful litigation.

6. In rejoinder by way of a supplementary affidavit, Viola Odhiambo reiterated her earlier explanations regarding delay in filing the intended appeal. Further stating that the Applicant had always been in constant communication with its previous counsel and that the instant motion has been made in good faith. She insists that the appeal has an overwhelming chance of success and any prejudice occasioned to the respondent can be compensated by way of costs. That prejudice is more likely to be visited on the applicant if the motion is not allowed because it will be disabled from recovering payment for services rendered to the respondent. Therefore, it is just, fair and in the interest of justice that the motion be allowed.

7. The motion was canvassed by way of written submissions. Counsel for theapplicant condensed his submissions into two (2) issues for the court's consideration. Addressing the prayer seeking stay of execution pending the intended appeal, counsel cited the provisions of Order 42 Rule 6 of the (*CPR*) and the decision in *Butt v Rent Restriction Tribunal* [1982] KLR 417 as captured in *Charles N. Ngugi v ASL Credit Limited* [2022] eKLR. To assert that the prayer invokes judicial discretion, and that the Applicant may suffer substantial loss if the same is not granted here expressing the Applicant's willingness to comply with any conditions the court may attach to the grant of the prayer.

8. Counsel invoked the provisions of Order 50 Rule 6 of the (*CPR*) and section 79G of the (*CPA*) in submitting that the court has discretion to grant enlargement of time. Counsel relied on the decision in *MFI Documents Solutions Ltd v Paretto Printing Works Limited* [2021] eKLR to argue that the Applicant has satisfactorily explained the delay. Pointing out that the respondent will not suffer any prejudice that would not be sufficiently compensated by way of damages, which in the circumstances of the case must be a reference to costs. Counsel called to aid the decisions in *CFC Stanbic Limited v John Maina Githaiga & another* [2013] eKLR as cited in *Geoffrey Oguna & another v Mohamed Yusuf Osman & 2 others* [2022] eKLR to bolster the explanation that the previous advocate failed to act on the applicant's instructions to appeal. That mistake of previous counsel ought not be visited on the applicant. The court was urged to allow the motion as prayed.

9. On the part of the Respondent, despite the court's express directions on limiting submissions to three (3) pages, counsel did not abide by the said directions. The respondent's submissions were confined to two (2) cogent issues. As concerns the factors and principles to be considered in respect of the question

of leave, counsel anchored his submissions on the provisions of section 79G of the (*CP*A), the decisions in *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR, *Wachira Karani v Bildad Wachira* [2016] eKLR and *Edith Gichungu Koine v Stephen Njagi Thoithi* [2014] eKLR.

10. On the period of delay, counsel restated the contents of the respondent's affidavit material and relied on the decisions in *Rupa Savings & Credit Co-operative Society v Violet Shidogo* [2022] eKLR, *Rajesh Rughani v Fifty Investments Limited & another* [2016] eKLR, *Pius Mulwa Masai (Suing as legal representative of the Estate of Masai Kabolelya) v Nzembe Musili & 5 others* [2021] eKLR and *Nicholas Salat v Independent Electoral & Boundaries Commission & 7 others* [2014] eKLR as cited in *Silas Kanyolu Mwatha v Josephine Kavive James* [2021] eKLR . Submitting that equity does not aid the indolent, and that the Applicant had sufficient time to lodge an appeal describing the year long delay as inexcusable. Moreover, asserting that the applicant's plea based on mistake of previous counsel is unacceptable and intended on frustrating the Respondent as the successful litigant.

11. The intended appeal was dismissed by the Respondent's counsel as lacking in merit and a waste of judicial time, and likely to be a source of hardship to the respondent. Counsel reiterated the Respondent's apprehension that theapplicant may sustain demands against the respondent through re-billing and disconnection of his water supply despite the fact that the respondent has a judgment that is yet to be settled by the applicant.

12. Addressing stay of execution, counsel buttressed his submissions on the provisions of Order 42 Rule 6 of the (*CPR*), by citing inter alia the decisions in *Samvir Trustee Limited v Guardian Bank Limited* Nairobi (Milimani) HCCC 795 of 1997, *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR and Portreitz Maternity v James. He submitted that the onus of proving substantial loss rests upon the Applicant and must be discharged accordingly as execution being a lawful process is not tantamount to substantial loss. Counsel reiterated that the applicant having failed to discharge its burden the stay orders already granted ought to be vacated. In conclusion, the court was urged to dismiss the motion with costs.

13. The Court has considered the rival affidavit material and submissions in respect of the motion. Alongside the prayer for leave to appeal out of time, the Applicant has sought stay of execution pending hearing and determination of the intended 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*.

14. 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 vs. 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.

15. 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 -vs- 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.

16. If the Applicant 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" insection 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.

17. In the circumstances, the prayer seeking a stay of execution of the judgment in Nairobi Milimani CMCC No. 565 of 2019 pending hearing and determination of the intended appeal has no legal anchor and cannot be entertained. Nevertheless, the court will address the issue of the already deposited security, later in this ruling.

18. Turning now to the prayer seeking leave to appeal out of time, the power of the court to enlarge time for filing an appeal out of time is expressly donated by section 79G, as well as generally, bysection 95 of the *Civil Procedure Act*. 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."

19. The principles governing leave to appeal out of time are settled. The successful applicant must demonstrate "good and sufficient cause" for not filing the appeal in time. In *Thuita Mwangi v Kenya Airways* [2003] e KLR, 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."

20. 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. 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:

> "(T)he 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.

21. There is no dispute that the impugned decision of the lower court was delivered on February 17, 2022. The Applicant's explanation on delay in filing the appeal is premised on the sole fact that upon delivery of the impugned judgment the applicant's erstwhile counsel despite instructions failed to lodge the appeal within the required time prompting the applicant to change of counsel upon the realization. Therespondent asserted that the applicant has not placed any material showing efforts to follow up on the position of the appeal and take appropriate action in regard to the erstwhile counsel's alleged failures.

22. Evidently, the Applicant's affidavits in support the motion contains assertions but no evidence to demonstrate the fact that indeed previous counsel was promptly instructed to appeal the impugned decision of trial court. Further, the Applicant did not exhibit any follow up letter to corroborate the accusations against the previous advocate, lending credence to therespondent's argument in that regard. Whatever the case, as of February 17, 2022the Applicant was aware of the delivery of the impugned judgment but it is not clear when new counsel was instructed. The consent executed by the outgoing and incoming advocate (applicant's annexure "VO1" is undated.

23. It is settled that the period of delay as well as explanation thereof are key considerations in an application of this nature. A party seeking extension of time must not be seen to presume on the Court's discretion. While a court ought not to entertain an indolent or dilatory litigant, it will not ordinarily visit the mistake of counsel on the innocent litigant. Here, the period of delay is a year and is highly inordinate in the circumstance. The explanation proffered by the Applicant though plausible appears rather convenient.

24. Apaloo, J.A. (as he then was) famously stated in *Phillip Kiptoo Chemwolo and & anor. v Augustine Kubede* [1986] eKLR:-

> "I think a distinguished equity judge has said:

"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merit."

I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of parties and not for the purpose of imposing discipline...."

12. In its later decision the Court of Appeal in *Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others,* [2015] eKLR no doubt adverting to the overriding objective in section 1A and 1B of the *Civil Procedure Act* made the following remarks:

"From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side..."

25. In the court's view, the explanation given by the applicant though not well demonstrated could well be plausible. The courtbears in mind that the Applicant is a public body which, like other bureaucratic organizations may not always function at optimum agility and efficiency. Equally, the alleged failure of the Applicant's erstwhile counsel could well be a possibility. It would be a travesty of justice for the court to drive the Applicant from the seat of justice for what appears to be a possible omissions and/or laxity by previous counsel. Any prejudice likely to be visited upon the Respondent would be adequately compensated through costs if the motion is allowed. In addition, the court can attach conditions for the expedition of the appeal once filed, to curb unnecessary delay.

26. Concerning the merits of the intended appeal, the court having perused the grounds in the draft memorandum of appeal, is satisfied that they raise issues worthy of consideration on appeal; that is to say the intended appeal appears arguable. That said, based on the language employed in *Mutiso* (*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* (*supra*) stated that "an arguable appeal need not (be one that will) succeed so long as it raises a bona fide issue for determination by the court."

27. In *Vishva's case* (supra), 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* (*supr*a); *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..."

28. In the circumstances of this case, the court is persuaded that to facilitate the Applicant's undisputed right of appeal, leave ought to be granted to the Applicant. The applicant shall file the appeal within 14 days. In addition, the Applicant shall upon filing the appeal prosecute it fully within 15 (Fifteen) months, failing which the Respondent shall be at liberty to move the court appropriately.

29. As earlier observed, an order to stay execution is not tenable in this instance, but the court notes that the Applicant has complied with the order issued on February 20, 2023 by depositing security pending determination of the instant motion. In the interest of justice, the court will grant a temporary order to maintain the status quo now obtaining in respect of the decree in the lower court, for a period of 14 days, to enable the applicant file an appropriate stay motion in the appeal to be filed pursuant to the leave granted herein. 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 Applicant: N/A

For the Respondent: Ms. Wanjau h/b for Mr. Hassan

C/A: Carol