



**Guardian Coach Limited v Mwita (Miscellaneous Civil Case
E014 of 2023) [2023] KEHC 26209 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 26209 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
MISCELLANEOUS CIVIL CASE E014 OF 2023
DO OGEMBO, J
NOVEMBER 30, 2023**

BETWEEN

GUARDIAN COACH LIMITED APPLICANT

AND

ROBERT MARWA MWITA RESPONDENT

RULING

1. The appellant/applicant filed a Memorandum of appeal against the judgment decree of Hon. S.W. Mathenge, SRM, dated and delivered on 17-5-2023 in Bondo PMCC No 46 of 2019. The Memorandum of appeal is dated 29-6-2023. Simultaneously, the applicant filed a Notice of Motion application dated 29-6-2023. The application, brought under Order 42 Rule 6, Order 51 Rule 1, Order 22 Rule 22 and Section 5(b) of the *Insurance (Motor Vehicle Third party Risks Act)*, Cap 405, basically prays for: -
 1. That this Honourable court be pleased to grant stay of execution of the judgment and/or decree delivered on 17-5-2023 of Kshs 130,000/ together with costs and interests and taxation in Bondo PMCC No 46 of 2019 pending the hearing and determination of the intended appeal.
 2. That the Honourable court be pleased to grant leave to the applicant to file an appeal out of time from the Judgment and decree of the Honourable trial court delivered on 17-5-2023 for Kshs 130,000/= together with costs and interests in Bondo PMCC No 46 of 2019.
2. The applicant also prays for costs of this application. This application was canvassed by way of written submissions.



3. The submissions of the applicant were that failure to file appeal in time was not as a result of indolence but rather due to the reason that the client instructed the Advocates to appeal after lapse of the statutory period. That the delay is not inordinate and has been explained (*Mwaura Muthumbi v Josephine Wanjiru Ngugi & another* [2018]eKLR).
4. Secondly, it was argued that the said intended appeal, premised on 3 grounds, are highly arguable and meritorious as seen in the annexed draft Memorandum of appeal.
5. And relying on Order 42 Rule 6(2) of the *Civil Procedure Rules*, it was argued that the applicant stands to suffer substantial loss should stay not issue as there is no guarantee that Respondent would be in a position to refund the judgment sum should the appeal succeed (*G.N. Mueraa P/A (sic Mt. View Maternity & Nursing Home v Miriam Maalim Bisbar & another* [2018]eKLR).
6. The applicant further submitted that should execution proceed, the appeal would be rendered nugatory and the applicant would suffer irreparable loss. And that there has been no inordinate delay in filing this application.
7. The applicant went further to express readiness to comply with any conditions that this court may impose including provision of security. The case of *Justin Mutunga David v China Road and Bridge Corp (k) Ltd* [2019]eKLR was relied on.
8. The Respondent opposes this application. The Respondent has submitted that Order 42 Rule 6(1) and (2) and indeed authorities coming out of the courts (*Visram Ravji Halai v Thornton & Turpin*, [1990]KLR, the applicant has to satisfy 3 conditions, establishment of a sufficient cause, satisfaction of substantial loss and furnishing of security. And that there is no inordinate delay.
9. That it has not been proved the substantial loss since the financial position of the Respondent is not known (*Jamii Bora Bank Ltd v Samuel Wambugu Ndirangu*, Civil Appeal E30/2021 and *Shell Ltd v Kibiru & another* [1986]KLR 410).
10. It was also submitted that there has been inordinate delay. That the court granted stay for 30 days and this application filed on 29-6-2023 was well beyond the time and the reason given for the delay is not excusable.
11. Further, that under Order 42 Rule 6, the applicant is required to offer security for the due performance of the decree and the court is entitled to take into account the fact that no security has been offered (*Mwaura Karuga T/A Limit Enterprises v KBC Ltd & 4 others* [2015]eKLR , and *Gianfranco Manenthi & another v Amaco* [2019]eKLR).
12. That the right of appeal must be balanced against the right of the Plaintiff to enjoy the fruits of his judgment (*Mohammed Salim T/A Choice Butchery v Nasserpuria Memon, Jamat* [2013]eKLR).
13. On the issue of leave, it was submitted that same is an equitable remedy reserved for deserving applicant. And that the applicant has failed to demonstrate a good and sufficient cause for not filing the appeal on time. It was submitted that the applicant has failed to meet the threshold for seeking leave to file appeal out of time no stay of execution of pending appeal. The court was urged to dismiss this application.



14. I have considered this application of the applicant. The first issue that this application raises is whether leave to file appeal out of time should issue. Section 79G of the Civil Procedure Act, at its provision states;

“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.”

15. The applicant herein has submitted that failure to file the appeal on time was due to the fact that the appellant gave instructions to the advocate late when time had passed. It is noted that the Judgment intended to be appealed against was delivered on 7-5-2023. This application was itself filed on 12-7-2023. To me this is not inordinate delay. In my view this period of delay totalling about 2 months is excusable.

16. Then there is the issue of whether stay of execution pending the determination of the appeal should issue Order 42 Rule 6(2) of the Civil Procedure Rules require of the applicant to prove the substantial loss it stands to suffer should order of stay not issue. The applicant has submitted on the fact that the ability of the Respondent to repay the decretal amount should the appeal eventually succeed is not guaranteed. The Respondent denies this. None of the parties has shown any evidence to sufficiently show the actual financial status of the Respondent. But at paragraph 11 of the Affidavit in support of the application, the applicant offers to deposit a bank guarantee. The submissions of the applicant are otherwise that the applicant is ready to comply with any conditions the court may set as security. I find this proposal reasonable as it would accommodate the interests of both the applicant and Respondent.

17. In the circumstances, I allow the application of the applicant dated 21-6-2023. I accordingly order as follows: -

- i. Leave be and is hereby granted to the applicant to file appeal out of time as prayed in Prayer 4 of the application. The intended appeal to be filed within 30 days from today's date.
- ii. That an order of stay of execution of the Judgment/or decree delivered on 17-5-2023 pending the determination of the appeal filed herein.
- iii. That as a condition to order (ii) above, the applicant to deposit the whole decretal amount herein in a joint interest earning account in the names of the 2 advocates for the parties within 30 days from today's date. In default, the order of stay herein issued at (ii) above, to automatically lapse and be discharged and the Respondent to be at liberty to execute the Judgement/decree.
- iv. Costs of this application to the Respondent.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 30TH DAY OF NOVEMBER, 2023

D.O. OGEMBO

JUDGE

Court:

Ruling read in Open court in the presence of Ms. Turgutt for Applicant. Respondent advocate is absent.

D.O. OGEMBO

JUDGE

