



**Equity Bank of Kenya Limited v Keno (Miscellaneous Application
E106 of 2023) [2023] KEHC 25860 (KLR) (22 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25860 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS APPLICATION E106 OF 2023
RE ABURILI, J
NOVEMBER 22, 2023**

BETWEEN

EQUITY BANK OF KENYA LIMITED APPLICANT

AND

JOAN AKINYI KENO RESPONDENT

RULING

Introduction

1. This ruling determines the Applicant's Notice of Motion dated 2nd August 2023 seeking the following orders:
 - i. Spent
 - ii. Spent
 - iii. That pending the hearing and determination of the pending appeal the Honourable Court do further issue Stay of Execution of the judgement Kisumu CMCC No. 379 of 2019 Joan Akinyi Keno v Equity Bank of Kenya Limited 7 Anor pending the hearing and determination of the appeal
 - iv. That this Honourable Court be pleased to grant the applicant leave to lodge an appeal out of time against the judgement and resultant decree of the Honourable (SPM) M. Agutu delivered on the 9th May 2023
 - v. That the costs of this application be provided for.
2. The application which was argued orally is premised on the grounds on the face of the application and the supporting affidavit of Steve Biko, sworn on 15th June, 2023. The applicant's case is that he wishes to



appeal against the judgement/decree of Hon. M. Agutu delivered on 9th May, 2023 in Kisumu CMCC No. 379 of 2019, but the permitted time has lapsed.

3. The applicant further avers that the delay in filing the appeal was not intentional but was caused by the lower court that did not forward to the applicant a certified copy of the judgement on time, the applicant having applied for the same on the 11th May 2023.
4. The applicant contends that his intended appeal is an arguable and meritorious one and will therefore be rendered nugatory if stay of execution is not granted as the respondent is threatening and/or intending to execute the judgement before the intended appeal is heard and determined.
5. The applicant further contends that it is willing to abide by any conditions that the court may impose and further that no prejudice shall be occasioned on the respondent if the appeal is allowed out of time.
6. The applicant submitted that it had not been a party to any negotiations and further that their appeal was not only hinged on the decretal sum but on the breach of contract as there was no contract or relations between their client and Rana Auto Selection (K) Ltd.
7. Opposing the application, the respondent swore a replying affidavit on the 24.10.2023. It was the respondent's case that the lower court file involved the respondents, applicants and Rana Auto Selection (K) Ltd and it was not clear why the latter had been left out of the instant proceedings.
8. The respondent averred that Rana Auto Selection (K) Ltd had already settled Kshs. 540,000 and that what remained was the costs and interests and that the parties were negotiating on settlement on the same and as such, the substratum of the suit was already spent.

Analysis & Determination

9. Having considered all the above, the issue for determination is whether the application is merited. The law relating to the filing of appeals out of the stipulated statutory timelines in civil matter section 79G of the [*Civil Procedure Act*](#) which 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.

10. From the above provision, it is clear that a party who has not filed an appeal within time may either file an appeal and seek leave to have the appeal admitted out of the time filed or file an application seeking to be granted leave to file an appeal out of the stipulated timelines.
11. The power to extend time for filing an appeal out of time is discretionary. That discretion must however be exercised judiciously and not capriciously. There are parameters already established for the court to operate within in exercising that discretion. It is worth restating them here as laid out by the Supreme Court in the case of [*Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*](#) [2014] eKLR where the court, for the first time considered and outlined the guiding principles in applications for extension of time in the Court, as follows:

- “i) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;



- ii) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
 - iii) Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 - iv) .Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court
 - ;v) .Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - vi) Whether the application has been brought without undue delay; and
 - vi) Whether in certain cases, like election petitions, public interest should be a consideration for extending time”;
12. Applying some of the above principles, the instant application was filed on the 2nd August 2023 whereas the impugned decision was delivered on the 9th May 2023.
13. The conditions to be met before a decision whether or not to grant leave to appeal out of time or to admit an appeal out of time being an exercise of judicial discretion is granted were earlier on stated by the Court of Appeal in *Thuita Mwangi v Kenya Airways Ltd* [2003]e KLR. The court must consider 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 applicant has submitted that the delay was occasioned by the court who delayed to provide a certified copy of the judgement on time before the lapse of the time within which an appeal should be filed.
15. Other than the initial letter dated 11th May 2023 asking for a certified copy of the judgement, there is no evidence presented before this court that the applicants filed an Appeal and waited for the proceedings since their counsel fully participated in the proceedings until the end and there is nothing that prevented them from accessing the judgment from court by perusing the entire court file as perusal is one such mode of accessing court proceedings and judgment before they are typed and certified.
16. In my view, whether one files the appeal first and seeks extension of time or files the application for extension of time contemporaneously with the Memorandum of appeal amounts to the same thing. The appeal cannot be heard until time is enlarged. These are just semantics which do not affect the core issue of extending time. section 79G permits the extension of time to file an appeal. Once the delay is convincingly explained, then time ought to be enlarged.
17. The respondent submitted that Kshs. 540,000 which is the decretal sum has been settled by Rana Auto Selections Limited and all that is remaining is costs and interest that the parties are negotiating on. In



my view, there would be no arguable appeal where one of the defendants in the trial court has settled the decretal sum in a claim where the defendants are jointly and severally sued.

18. Accordingly, I find that the delay in filing this application was inordinate and not explained to the satisfaction of this court. I decline to extend time upon which the applicants can file their intended appeal.
19. Turning to the issue of stay of execution, an application for stay of invokes the discretionary powers of this court under order 42 rule 6(1) of the Civil Procedure Rules, 2010 that empowers the court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided for under rule 6(2) of order 42 which provides that:
 - “No order for stay of execution shall be made under sub rule (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.”
20. The Court of Appeal in Butt v Rent Restriction Tribunal [1982] KLR 417 guided on how a court should exercise discretion and held that: -
 - “1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 5. The court in exercising its powers under order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
21. Substantial loss is a factual issue which must be raised in the supporting affidavit and further supported by evidence. The applicant has not demonstrated the substantial loss that it will suffer should the court disallow its prayer for stay.



22. In the case of *Machira T/A Machira & Co. Advocates v East Africa Standard* [2002] eKLR Kuloba J. as he then was held that an applicant's ground for substantial loss must be specific and detailed as it is not enough merely stating that substantial loss will result or that if the appeal is successful it will be rendered nugatory.
23. The applicant annexed a copy of the judgement that showed that the respondent was awarded a refund of the Kshs. 540,000 that she had paid to Rana Auto Selection Ltd for a vehicle that was not delivered. The respondent submitted before this court that payment of the said refund had already been effected and the parties were negotiating on the costs and interest awarded. An appeal should not be allowed for cosmetic or academic purposes. It must be for achieving the ends of justice. That is not what is intended in this application.
24. On provision for security for the due performance of decree, order 42 rule 6 of the *Civil Procedure Rules* requires the provision of security as a pre-condition for allowing a request to stay execution. The applicant has not stated that it is willing to provide security and has conveniently evaded that issue yet the application is also brought under order 42 rule 6 of the *Civil Procedure Rules*.
25. I find and hold that the applicant has not satisfied the conditions to warrant grant of stay orders. I thus find that the instant application lacks merit and the same is dismissed on both limbs.
26. Each party to bear their own costs of the application.
27. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 22ND DAY OF NOVEMBER, 2023

R.E. ABURILI

JUDGE

