



Be Energy Ltd v Dorine Emily Akinyi Okeno t/a Regold Etipet Enterprises (Miscellaneous Application 180 of 2023) [2023] KEHC 26785 (KLR) (21 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26785 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS APPLICATION 180 OF 2023
MS SHARIFF, J
DECEMBER 21, 2023**

BETWEEN

BE ENERGY LTD APPLICANT

AND

**DORINE EMILY AKINYI OKENO T/A REGOLD ETIPET
ENTERPRISES RESPONDENT**

RULING

1. Before the Court is an application by Be Energy (the Applicant) dated 6th October 2023 in which it is seeking to be granted leave to file an appeal out of time from the judgment in Kisumu CMCC No. E22 OF 2021 and a stay of execution of the costs pending hearing and determination of their intended appeal.
2. The Applicant grounded the application on the fact that; the thirty-day appeal period lapsed on 18/8/2022, typed proceedings were not ready, an earlier appeal via KISUMU HCCA NO 75 OF 2023 had been struck out, the intended appeal had high chances of success and costs were already in a joint interest earning account.
3. The application was equally buttressed by a supporting affidavit sworn by Ali Abdelghany in which he reiterated what was in the grounds in support of the application.
4. In opposition to the application the Respondent filed a Replying Affidavit dated 16/10/2023 sworn by Dorine Emily Akinyi Okeno in which she deponed that the Applicant failed to take prompt action after its appeal was struck out. She further stated that the Applicant was only awakened from slumber when the Respondent sought to withdraw costs held in the joint interest earning account.
5. The Respondent argued that the Applicant's conduct of dragging their feet was calculated at denying them the fruits of the judgment. She concluded by stating that she was capable of paying back in the event the appeal is decided in the Applicant's favour.



Determination

6. This court having considered the Application, Supporting Affidavit and the Replying Affidavit is of the view that the main issues of determination are whether the Applicant is deserving of leave to file an appeal out of time and whether there should be stay of execution of the taxed costs.
7. It is trite law that the court has discretionary powers to grant extension of time to file an appeal. However, in exercising this discretion the court is to be guided by some considerations. In the case of *Imperial Bank Ltd (in receivership) and Another v Alnasir Popat and 18 Others* [2018] eKLR, these considerations were listed as; the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.
8. The chronology of events after the judgment of the magistrate's court on the 18/7/2023 was that; on the 19/7/2022 the Applicants applied for typed proceedings and paid for them on 25/7/2022. They then moved the trial court on 22/11/2022 seeking leave to file an appeal which was allowed on 29/5/2023. Pursuant to this leave the Applicant filed Kisumu Civil Appeal No. E075 OF 2023 which was then struck out on 27/9/2023. The Applicant then filed this Application on 9/10/2023.
9. There is no indication as to when the proceedings were acquired. There is however a letter dated 24/10/2022 in which the Applicant is enquiring as to the status of the typed proceedings. The letters do not have evidence of receipt at the registry. There is equally no certificate of delay from the court explaining the delay. This court finds that the delay period between 18/8/2022 to 25/11/2022 has not been sufficiently explained. Be that as it may it is evident that the Applicant took steps to seek leave albeit at the wrong forum. It even went ahead and filed a substantive appeal which was struck out on the grounds that the magistrate court had no power to grant leave. Indeed, all these point to some initiative by the Applicant to push their case forward. As indicated in the *Imperial bank case (supra)* the conduct of the parties should be a consideration in enlargement of time. Furthermore, the Respondent has not demonstrated any prejudice they may suffer if the Appellant is allowed to appeal.
10. It would also be against the principles of fairness to lock out a party from the seat of justice. Article 48 of the *Constitution* guarantees every person access to justice, in addition, under Article 50(1) of the *Constitution*, every person has the right to have any dispute that can be resolved by the application of law decided in affair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
11. The ultimate goal and purpose of the justice system is to hear and determine disputes fully. It follows that no person who has approached the court seeking an opportunity to ventilate their grievances fully should be locked out.
12. There is equally no evidence that the application is an afterthought or how the same is intended to abuse court process. Further, it is not uncommon for clients to instruct their counsel who procrastinate on filing court processes and only wake up when time for such filing has elapsed. Courts have over time excused parties even in cases where there is inordinate delay, depending on the circumstances of each case and reasons for the delay, courts have accorded parties an opportunity to be heard on appeal.



13. In view of the foregoing this court finds that the prayer seeking enlargement of time to file appeal is merited.
14. The second limb of the application is whether stay of execution of the costs should be granted pending hearing of the appeal. The record shows and it is not in dispute that costs are being held in a joint interest earning account. The Applicant avers that the Respondent's financial status is unknown raising questions as to its ability to pay back if the money is paid to it. The Respondent on the other hand avers that it is in a position to pay back the amount should the appeal be in the Applicant's favour.
15. It is trite law that a mere claim that the respondent cannot refund the costs is not sufficient. There must be reasonable grounds provided by the applicant to show that the respondent cannot refund the costs after which the respondent will be called upon to discharge its evidential burden. In the present case the Respondent has not sworn an affidavit of means to show that it is capable of paying back the costs.
16. This court is therefore of the opinion that it would be prudent if the costs are held in a joint interest earning account pending hearing and determination of the intended appeal.
17. Consequently, I find this application merited and makes the following orders: -
 - i. Leave to file an appeal out of time against the Judgment in Kisumu CMCC No E 22 of 2021 is hereby granted.
 - ii. Stay of execution of the costs in Kisumu CMCC No E 22 of 2021 is hereby granted
 - iii. Costs in Kisumu CMCC No E 22 of 2021 be held in the joint interest earning account pending hearing and determination of the appeal.
 - iv. The Applicant to file a substantive appeal within 14 days of this ruling failure to which the Respondent is at liberty to commence execution.
 1. The respondent is awarded costs of this application assessed at Ksh.6000.
18. Orders accordingly.

DELIVERED, DATED, SIGNED AT KISUMU THIS 21ST DAY OF DECEMBER 2023.

MWANAISHA. S. SHARIFF

JUDGE

