



Kitisuru Jua Kali Artisans Self Help Group & another v Omire (Suing as the Legal Representative of the Estate of Joseph Ochieng Arodl-Deceased) (Miscellaneous Civil Application E602 of 2022) [2023] KEHC 26757 (KLR) (Civ) (20 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26757 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E602 OF 2022
CW MEOLI, J
DECEMBER 20, 2023

BETWEEN

KITISURU JUA KALI ARTISANS SELF HELP GROUP 1ST APPLICANT
PETER NJUGUNA 2ND APPLICANT

AND

NELLY AWUOR OMIRE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JOSEPH OCHIENG ARODL-DECEASED) RESPONDENT

RULING

1. For determination is the Notice of Motion dated 7th October, 2022 (the Motion) filed by Kitisuru Jua Kali Artisans Self Help Group and Peter Njuguna (hereafter the 1st and 2nd Applicants) seeking leave to file an appeal out of time as against the judgment delivered by the trial court on 3rd January, 2022 in Milimani CMCC No. E6417 of 2020 and a further order to stay execution of the aforesaid judgment, pending the hearing and determination of the appeal. 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).
2. The grounds on the face of the Motion are amplified in the supporting affidavit sworn by advocate Kevin Lusweti, who averred that the following delivery of the judgment, the Applicants' advocates informed them of the outcome thereof. The advocate averred that the delay in lodging an appeal was therefore occasioned by the time taken in obtaining instructions from the Applicants with respect to the appeal, coupled with the delay in receiving certified copies of the judgment and decree. It was also averred that the intended appeal raises arguable grounds on both issues of law and fact.



3. Regarding a stay, it was counsel’s assertion that unless the same is granted, the intended appeal will be rendered nugatory since Nelly Awuor Omire (hereafter the Respondent) whose financial means are unknown, may proceed to execute the decree, thereby creating uncertainty as to her ability to refund the decretal sum if the same is paid and the intended appeal eventually succeeds. It was also counsel’s assertion that the Applicants are ready and willing to provide a bank guarantee as security for the due performance of the decree. On the premise of those averments, the court was urged to allow the Motion.
4. The Respondent opposed the Motion by swearing a replying affidavit on 28th April, 2023. Therein, she deposed that the Motion is purely a delaying tactic intended to frustrate the execution process. The Respondent further deposed that the delay on the part of the Applicants is intentional and inordinate, and that the Applicants have shown indolence in the matter. It was similarly her averment that the Applicants have not met the threshold required for granting a stay of execution and hence the order sought for a stay of execution is unmerited. On those grounds, the Respondent averred that the Motion ought to be dismissed with costs.
5. The Motion was to be canvassed by way of written submissions. However, as at the time of writing this ruling, it was the court’s observation that the Respondent’s submissions had not been availed for the court’s reference despite the existence of court orders directing them to file their submissions. The court will therefore consider the submissions filed on behalf of the Applicants.
6. The Applicants’ counsel anchored his submissions on Section 79G of the [CPA](#) which sets out the timelines for filing an appeal with the High Court to challenge the decision of a subordinate court. The Applicants’ counsel further submitted that the draft memorandum of appeal which was annexed to the Motion contains arguable grounds of appeal with reasonable chances of success, thereby satisfying the requirement that the existence of an arguable appeal ought to be demonstrated as a prerequisite for granting leave to appeal out of time. Reference was made to the decision in *Global Tours & Travels Limited* Nairobi H.C Cause No. 43/2000.
7. Regarding stay, it was counsel’s contention that the conditions set out under Order 42, Rule 6 of the [CPR](#) have been satisfied here. He further echoed the Applicants’ willingness to provide security for the due performance of the decree.
8. The Court has considered the rival affidavit material and submissions on record. The power of the court to enlarge 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.”
9. 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.”

10. 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.

11. 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.



12. On the length of delay, it is not in contention that the subject judgment was delivered on 3rd January, 2022 whereas the instant Motion was brought on or about the 7th of October, 2023. In the court's view, while it is apparent that there has been a prolonged delay of about nine (9) months, the same is not inordinate in the circumstances of the case.
13. Concerning the reasons for the delay, the court considered the explanation given by the Applicants regarding the time taken in settling on a decision to challenge the impugned judgment and in giving instructions to their advocates to file an appeal, by which period the timelines for lodging an appeal had lapsed. The court equally considered the opposing averments by the Respondent which in effect stated that no reasonable explanation has been given by the Applicants for the delay. Upon considering the rival positions taken above and upon studying the material on record, the court finds that while the delay was admittedly extended, it appears plausible that it primarily was occasioned by the time taken in obtaining the certified copies of the decree. The court therefore finds the reasons to be reasonable in the circumstances.
14. As regards the potential merits of the appeal, the court has perused the draft memorandum of appeal which is essentially challenging the trial court's assessment of damages. All that is required is a demonstration that the appeal is worthy of consideration by the court, and not necessarily that it will succeed. In the court's view, the intended appeal passes this test. 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.”
15. 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 vs. IEBC & 2 Others (*supra*); Mbaki & Others vs. Macharia & Another [2005] 2EA 206; and the Tanzanian case of Abbas Sherally & Another vs. 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;...”
16. Moreover, there is nothing on the record to indicate that any prejudice that may be visited upon the Respondent is so grave that it cannot be adequately compensated for by an award in terms of costs.



17. In the circumstances of this case, the court is persuaded to exercise its discretion in favour of the Applicants by granting leave to appeal out of time. The appeal is to be filed in 14 clear days, given the delay in this matter.
18. 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.
19. 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.
20. Earlier, the Court of Appeal in the case of Equity Bank -Vs- 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 Balozzi 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.
21. 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.
22. 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 grant a temporary order to maintain the status quo in respect of the decree in the lower court for 14 clear 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 20TH DAY OF DECEMBER 2023.

C.MEOLI

JUDGE



In the presence of

For the Applicant: N/A

For the Respondent: Mr. Kimeu h/b for Mr. Nyongesa

C/A: Carol

