



**Maiyo v Chemweno & another (Miscellaneous Application
E226 of 2023) [2023] KEHC 26841 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26841 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS APPLICATION E226 OF 2023
RN NYAKUNDI, J
DECEMBER 20, 2023**

BETWEEN

LINAH CHELIMO MAIYO APPLICANT

AND

LUKE KIPKEMOI CHEMWENO 1ST RESPONDENT

JACOB KORIR SUGUT 2ND RESPONDENT

RULING

1. By a Notice of Motion dated 3rd October, 2023, the Applicant seeks the following orders:
 - a. That this Honourable court be pleased to grant the applicant leave to appeal out of time against the judgment delivered by Honorable P.N.Areri on 20th July, 2023.
 - b. There be stay of execution of the-judgment in Eldoret Cmcc No E585 of 2023 against the applicant herein and all subsequent orders pending the hearing and determination of this application.
 - c. There be stay of execution of the judgment in Eldoret CMCC No E585 of 2023 pending the hearing and determination of the intended appeal herein.
 - d. That the applicant be granted leave to file his appeal out of time against the judgment in Eldoret CMCC No E585 of 2023.
 - e. Further proceedings in Eldoret CMCC No E585 of 2023 be stayed pending the hearing and determination of the intended appeal herein.
 - f. Costs of this application be provided for.
2. The application is premised on the grounds therein and is further supported by the affidavit sworn by Linah Chelimo Maiyo on 3rd October, 2023.



The Applicant's Case

3. The Applicant deposed that sometimes in the year 2021, she was sued by the Respondents vide Eldoret CMCC No E585 of 2022 over a debt. She further deposed that she instructed M/s Ndiwa Serebe to be on record for her.
4. The Applicant maintains that she was made to understand recently on the 15/9/2023 that judgement had delivered in that cause without her knowledge or that of my former Counsel on record when she received warrants of attachment from Brave Auctioneers. Further that upon service she got in touch with her former Counsel on record who after perusal of the court file on 18/9/23 confirmed that indeed judgement had been rendered. The Applicant added that her former Counsel on record intimated that he was never served with a judgment notice and thus was not aware when judgement was delivered.
5. The Applicant contends that as a result of the foregoing she could not lodge the appeal in good time. The Applicant is apprehensive that should the Respondents proceed with the execution process against her, she shall suffer irreparable damages hence the execution process should be stayed pending the hearing and determination of this application and the intended appeal.
6. According to the Applicant, she has good grounds of appeal with high chances of success as evidenced by the draft of the Memorandum of Appeal. The Applicant added that the bone of contention is how a loan of Kshs 700,000/= advanced by a shylock attracts interest three times the principal amount to Kshs 2,275,000/=.
7. The Applicant further deposed that she has already requested for proceedings in the matter for appeal purposes. The Applicant maintains that Respondents have already started taking steps towards execution by taking out warrants of attachment.
8. The Applicant added that this instant application has been made in good faith and without delay.

The Respondents' Case

9. The application is vehemently opposed by the Respondents vide the Replying Affidavit sworn by Luke Chelimo Maiyo on 14/11/2023.
10. The Respondents deposed that judgment in the above matter was delivered by the honourable Court on 26/7/2023. The Respondents contend that this instant application is inept, incompetent, frivolous, ill-conceived and without merit hence it should be dismissed with costs in the first instance.
11. According to the Respondents the application has been brought in bad faith with the sole intention of denying them the rightful enjoyment of the fruits of the Court's judgment. The Respondents further deposed that judgment in this matter was delivered on 26.7.2023 thus there has been inordinate delay in the filing of the Applicant's Application hence the Applicant is guilty of laches and undeserving of the favours of the Court of equity.
12. The Respondents maintain that the Applicant has not given any valid explanation for delay in seeking stay orders making the delay inordinate. Further the Respondents contend that the entire Applicant's Application is pointing an accusing finger on the firm of Ndiwa Serembe & Company Advocates who were on record for the Respondent and thus same can best be sorted first through other avenues thus to this extent the said Application is an abuse of the Court process.
13. In response to paragraph 4 of the Applicant's affidavit, the Respondents contend that paragraph 4 is neither here nor there since the Counsel was served with the hearing notice but failed to appear.



when the matter came for hearing thus it proceeded and concluded. The Respondents added that the Counsel on record was properly served but failed to attend court.

14. In response to the contents of Paragraph 5, 6 and 7 of the Applicant's supporting affidavit the Respondents deposed that the Applicant alleges that her former Counsel on record failed to inform her of the progress of Eldoret CMCC No E585 of 2022, which the Respondents maintain is not their fault/doing and thus they should not be penalized nor denied the fruits of their judgment due to someone else fault.
15. According to the Respondents it is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions in the conduct of litigation since parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.
16. The Respondents maintain that the Applicant has not validly explained the delay and was indolent in defending the suit and therefore she doesn't deserve the stay orders she's seeking. In addition, the Respondents deposed that "Equity aids the vigilant and not the indolent".
17. The Respondents contend that the Applicant voluntarily signed the loan agreement and agreed to the terms on her own volition thus she is estopped from going back to her undertaking. Further the Respondents deposed that the applicant is not denying the fact that she entered into the loan agreement which she willingly requested for, agreed on the terms including the interest terms, offered security being the original title to all that parcel of land known as Moi's Bridge/Moi's Bridge Block 14(Teldet)/302 registered in her name and executed the said agreement.
18. The Respondents maintain that it is trite law that a valid judgment of a Court unless overturned by an appellate Court remains a judgment of Court and is enforceable, the issue of jurisdiction notwithstanding.
19. The Respondents further deposed that they are being held at ransom by the Applicant's laxity in having this matter laid to rest. The Respondents contend that Applicant has come to court too late in the day and accordingly, the declaratory relief she seeks must fail.
20. The Respondents maintain that the orders sought by the Applicant are discretionary and no valid basis has been laid by the Applicant's to warrant the Court to exercise its discretion in her favour.
21. According to the Respondents issue of stay of execution cannot arise in the circumstances as there is no intended appeal and the instant Application is a sham and has no valid basis. The Respondents further deposed that the right to appeal ought to be balanced with the right of the decree holder to enjoy the fruits of the judgement.
22. The Respondents maintain that they will suffer great prejudice if the Applicant's Application is allowed. The Respondents further deposed that if the Court is inclined to allow the application then the Applicant should be ordered to pay them half the decretal amount and deposit the other half in a joint interest earning account.
23. The Respondents further contend that the Applicant has not demonstrated substantial loss if any that she will suffer if the orders sought herein are not granted. The Respondents added that litigation must come to an end.



Determination

24. The Court is exercising its discretion is guided by the provisions under the proviso of Section 79 (g) of the *Civil Procedure Act*. In *Karny Zabarya & another v Shalom Levi* CA No 80 of 2018 Koome JA stated:
- “In considering whether to grant leave to a litigant to file his or her appeal out of time, the Court will have regard to factors such as: the reasons for the delay, 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 constituency underpinned right of appeal, the need to protect a party opportunity to fully agitate it’s 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.”
25. Similarity in *Salat v Independent Electoral & Boundaries Commission & 7 others* {2014} KLR (SCK). In the opinion of the Court, the Judge has unfettered discretion to grant leave or refuse it altogether dependent upon the seven elements and guiding principles to ensure the interests of justice is served in the matter.
26. In the instant application, I have undertaken a review of the record and subsequent motion by the Applicant. I would therefore apply the above principles in exercise of discretion to the prayers applied for by the Applicant.
27. In the present case, the Applicant alleges that judgment was delivered without notice to her advocate and thus denying her the opportunity to appeal against the said judgment. The Applicant maintains that she only became aware of the said judgment when she was served with warrants of attachment from Brave Auctioneers. The Respondents on the other hand maintain that the Applicant’s Counsel was duly served with the hearing notice but failed to appear when the matter came up for hearing and thus it proceeded and concluded without the Applicant’s participation.
28. Unfortunately, the proceedings in the trial Court were not tendered before this Honourable Court, however be as it may the only issue to determined by this Court is whether the Applicant had sufficient notice of existence of the Judgment and the outcome of the claim and secondly, whether, in absence of the Judgment or a copy thereof, the applicant could have appreciated the reasoning and final decree to permit him or her to take the next cause of action. From the pleadings before Court it is evident that save for mentioning that the Applicant’s Counsel was in fact served with the herein notice therein. The Respondents did not tender any evidence to prove the said assertion.
29. It follows from the affidavit evidence that the Applicant could not proceed to file an appeal from a Judgment she was not made aware of its existence. The delay in this matter is (2) months and (3) weeks between the trial Court decision and the time an application for an extension of time to apply for permission to appeal against the decree was made. In the circumstances of this case, that cannot be said to be inordinate delay as there is a good reason for not complying with procedural timelines.
30. On the other hand, the draft memorandum of appeal raises substantial grounds to justify good prospects of succeeding on appeal and I find no compelling reasons that the respondent will suffer prejudice or injustice in the interim period of the pendency of the appeal. In the circumstances of this case, I come to the conclusion that the Notice of Motion dated on 3/10/2023 as to grant of leave for an extension of time to file an appeal out of time be is meritorious.



31. In addition to the above aspect, there is the issue whether or not the applicant is entitled to stay of execution pending the hearing and determination of an appeal. Regarding stay of execution Order 42 Rule 6 of the Civil Procedure Rules governs the conditions to be met by a party to the proceedings seeking stay of execution of the Judgment. It provides that the application must be filed without undue delay. At the hearing of the application, it must be demonstrated that the applicant will suffer substantial loss if the order on stay is denied. That the Court considering the application does factor security for due performance of the decree.
32. The approach to be adopted by the Court on an application for stay of execution is outlined in several decisions of the High Court and Court of Appeal including the cases of *Reliance Bank Ltd v Nor Lake Investments Ltd* {2002} 1EA 227, *Githunguri v Jimba Credit Corporation Ltd* {1988} KLR 838, *Damji Pragji Mandavia v Sara Lee Household and Body Care Ltd* CA No 345 of 2004, *National Bank of Kenya Ltd v Jivraj Rai Shi and Brothers Ltd* Civil Application No 153 of 2002.
33. The principles enunciated in the above decisions are as follows for grant of a stay of execution pending appeal thus:
- (1). That there is sufficient cause for the grant of the order for stay of execution of the decree or order.
 - (2). That the application has been made without unreasonable delay.
 - (3). That the substantial loss may result to the applicant unless the order is made.
 - (4). That the successful party is entitled to the enjoyment of the fruits of his or her success.
- While on the other hand, the aggrieved party is entitled to exercise his or her constitutional right of appeal and the intended appeal succeeding should not be rendered nugatory.
34. Applying the above principles, I have perused the record and corresponding notice of motion. In my view the Applicant has discharged the burden on the conditions precedent based on the affidavit evidence to support exercise of discretion in its favour under Order 42 Rule 6 of the Civil Procedure Rules. There is however need for the Applicant to deposit security of the quantum in a joint earning interest account of both Counsels in a reputable financial institution or in the alternative a bank guarantee from any of the financial institutions licenced by the Central Bank of Kenya within 45 days from today's date. In the event this condition threatens realization of the rights on access to justice in Art. 48 of the Constitution each party may be at liberty to apply.
35. The upshot of it being that the applicant be at liberty upon fulfilling the condition on deposit of security or delivery the bank guarantee to the Deputy Registrar of the High Court for due performance of the decree within the stipulated period to file the record of appeal and have it served upon the Respondents within 30 days from the date of compliance with clause No (2) herein above. The costs of the application to abide the intended appeal.

DATED SIGNED AND DELIVERED AT ELDORET THIS 20TH DAY of DECEMBER 2023.

R. NYAKUNDI

JUDGE

