



**Absa Bank Kenya PLC (Formerly Barclays Bank of Kenya Limited) v Nyarecha & 2 others
(Civil Appeal E029 of 2022) [2023] KEHC 27297 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27297 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL APPEAL E029 OF 2022
SN MUTUKU, J
DECEMBER 19, 2023**

BETWEEN

**ABSA BANK KENYA PLC (FORMERLY BARCLAYS BANK OF KENYA
LIMITED) APPELLANT**

AND

MAIKO ATINDA NYARECHA 1ST RESPONDENT

METROPOLITAN NATIONAL SACCO LIMITED 2ND RESPONDENT

MORAN AUCTIONEERS 3RD RESPONDENT

RULING

1. The Applicants filed this Notice of Motion dated 26th April, 2022 under sections 79G, 95 and 1A, 1B and 3A of the [Civil Procedure Act](#), Order 42 Rule 6 and Order 51 of the [Civil Procedure Rules](#) for orders that:
 - a. That this matter be certified as urgent and service dispensed with in the first instance.
 - b. That this Honourable Court be pleased to grant stay of execution of the judgement and decree of the Chief Magistrates Court in Kajiado Civil Suit No 148 of 2018 *Maiko Atinda Nyarecha v Barclays Bank of Kenya Limited & Another* delivered on 27th December, 2021 pending the hearing and determination of the application inter partes.
 - c. That this Honourable Court be and is hereby pleased to grant the Applicant leave to lodge an appeal out of time against the judgement and decree in Kajiado Chief Magistrate Civil Suit No 148 of 2018 delivered on 27th December, 2021.
 - d. That the Memorandum of Appeal filed out of time on 26th April, 2022 be and is hereby deemed as filed with leave of court.



- e. That this Honourable Court be pleased to grant stay of execution of judgment and decree of the Chief Magistrates Court in Kajiado Civil Suit No 148 of 2018 *Maiko Atinda Nyarecha- vs- Barclays Bank of Kenya Limited & Another* delivered on 27th December, 2021 pending the hearing and determination of the appeal.
 - f. That cost of this application be provided for.
2. The grounds in support of the application are found on the face of it and in the supporting affidavit sworn by Samuel Njuguna, Legal Counsel of the Applicant, dated 26th April, 2022. The grounds in support are that judgment was entered on 27th December, 2021 in favour of the 1st Respondent in Kajiado Civil Suit No 148 of 2018 *Maiko Atinda Nyarecha- vs- Barclays Bank of Kenya Limited & Another*; that the said judgment was however delivered without notice to the parties and hence none of the parties was present when the same was delivered; that the Applicant only came to know about the judgment on 21st April, 2022 when the 1st Respondent's agents, Moran Auctioneers, served it with warrants of attachment dated 20th April, 2022.
 3. The Applicant further states that being aggrieved with the said judgment, it has filed a Memorandum of Appeal albeit out of time; that unless leave is granted to file appeal out of time the Applicant's right to appeal will be infringed; that failure to file the appeal within the stipulated time was not occasioned by the indolence of the applicant; that they it has an arguable appeal with high chances of success; that if the prayers sought are not granted the appeal will be rendered nugatory and further that the Applicant will suffer substantial loss if execution is not stayed and leave granted to file appeal out of time. It is stated that the Applicant is willing to deposit security for due performance of the decree and that the Respondents will not suffer any prejudice if the application is allowed.
 4. The application was opposed by the 1st Respondent through the Replying Affidavit dated 30th January, 2023. The Respondent has deposed that the application has been overtaken by events as the Appellant has paid full cost to them and no debt is left pending; that when the judgment was delivered in open court on 28th March, 2021 Covid-19 pandemic rules applied and that the file was always available at the Registry; that their advocate applied for the decree and certificate of costs which was issued to all parties, however the appellant did not respond until the Auctioneers were instructed to proclaim and attach their property.
 5. The 1st Respondent deposed that it has been over two years now and that the provision of section 79G have been breached and overtaken by events to allow the appeal and that the Memorandum of Appeal does not raise grounds for any successful appeal.
 6. The application was canvassed through written submissions as directed by the court on 19th April 2023.

Appellant's/Applicant's Submissions

7. The Appellant filed their submissions dated 8th June, 2023 in which the following two issues have been raised for determination
 - a. Whether the length and reason for delay in filing the Appeal is justifiable
 - b. Whether the intended Appeal is meritorious
8. In respect of the first issue, it is submitted that the Applicant did not have knowledge that judgment was delivered on 27th December, 2021; that the court did not issue notice of the delivery of judgement and that they got to know that judgment had been delivered on 21st April, 2022 when the 1st Respondent's agent issued them with warrants of attachment and sale. It is submitted that the delay in filing the



appeal within time was not occasioned by their indolence; that they filed their Memorandum of Appeal and the application herein without any delay and that 4 months' delay is not unreasonable.

9. The Applicant relied on various cases including *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR where the court stated that:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

10. The Applicant also relied on *Amal Hauliers Ltd v Abdunassir Abukar Hassan* [2017] eKLR where the court found that a delay of 4 months was not inordinate.

11. The Applicant urged this court to find in its favour and to disregard the procedural technicalities and cited the Supreme Court of Kenya decision of *Shabbir Ali Jusab v Anaar Osman Gamari & Another* [2013] eKLR where that Court made reference to *Raila Odinga v IEBC and 4 others* Petition (No 5 of 2013) to the effect that:

“..... a court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. The principle of merit, however, in our opinion bears no meaning cast in stone and which suits all situations of dispute resolution. On the contrary, the court as an agency of the process of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best course.”

12. In regard to the second issue it was submitted that it have an arguable appeal which has high chances of success and that unless the orders sought in this application are granted.

13. The Applicant argued that it is aggrieved by the decision of the trial court in holding that the sum of Kshs. 1,304,940/- remitted to KCB went towards offsetting the 1st Respondent’s loan with the 2nd Respondent as well as the decision to restrain the Applicant from attaching the 1st Respondent’s salary, movable and immovable property or any other goods and items owned by the 1st Respondent. The Applicant cited *Athuman Nusura Juma -vs- Afwa Mobammed Ramadhan* [2016] eKLR where the court stated that:

“This Court has been careful to ensure that whether the intended appeal has merit or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly.”

1st Respondents Submissions.

14. The 1st Respondent filed his submissions dated 15th June, 2023. It is his submission that the application to seek leave to appeal out of time has been overtaken by events as per the provisions of 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.”

15. It is submitted that no sufficient grounds have been given for the delay to seek leave to file appeal out of time; that at all material times the file was available at the registry; that the Applicant has since settled their Bill of Costs and that no outstanding bill exists to warrant this Application; that the fact that the Appellant has settled all their cost and that two years have lapsed renders the leave sought an academic exercise; that if the intended leave was to be granted, the burden of prove needed should be beyond reasonable doubt. The 1st Respondent asked this court to dismiss the application.
16. The 2nd Respondent’s submissions are not in the court file.

Analysis and Determination

17. Under Section 79G of the *Civil Procedure Act*, time for filing an appeal from judgment of the subordinate court to the High court is 30 days with the proviso 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. In *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others* [2015] eKLR, the Supreme Court of Kenya held that:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.”

18. Similarly, in *Imperial Bank Ltd (in receivership) and Another v Alnasir Popat and 18 Others* [2018] eKLR, the Court of Appeal stated that:

“Some of the considerations to be borne in mind while considering an application for extension of time include 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. In taking into account the last consideration, it must be born in mind that it is not really the role of the single judge to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal.”

19. In this matter the judgment sought to be appealed against was delivered on 27th December, 2021. The Applicant argues that it was not notified of the judgment date and therefore was not present during the delivery of the same and only came to know about it when they were served with warrants of attachment by the 1st Respondent’s agents. The said warrants are dated 20th April, 2022. I have read the record of the lower court. Parties were not present during the time judgment was delivered. I have noted that this application was filed on 27th April 2022. This is about seven (7) days after the Applicant became aware of the judgment.



20. The 1st Respondent, through his counsel, opposed the application arguing that the application does not raise any sufficient grounds of appeal as the same has been overtaken by events in that the Applicant have settled the matter by paying their bills. Further that the Applicant has waited for 2 years to bring this appeal.
21. I do not agree with the 1st Respondent in arguing that there are 2 years period from the time judgment was delivered and the time this application was filed. From the record of the Court this application is dated 26th April, 2022 and was filed on 27th April, 2022 giving a period of 4 months from the date when Judgment was delivered.
22. The decision to allow or not to allow this application is discretionary. In *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, the Court of Appeal held that:

“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 in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

23. I have considered both arguments by the parties herein. I note that the Applicant is willing to provide security for the due performance of the decree. It is my view that the period of 4 months is not long given the explanation offered by the Plaintiff. The reason for the delay has been explained that the Applicant was not aware that judgment had been delivered until it was served with warrants of attachment which I have confirmed from the record are dated 20th April 2022. This is a plausible explanation, and I am satisfied with it. I find that no party will be prejudiced if this court were to grant the application. The Applicant is willing to provide security for the due performance of the decree.
24. Consequently, it is my finding that the Applicant has satisfied this court that the requirements for grant of stay pending appeal as provided under Order 42 (6) (2) of the *Civil Procedure Rules* which provides that

“(2) No order for stay of execution shall be made under subrule (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”

have been satisfied.

25. The following orders are granted:
- i. That this Honourable Court be and is hereby pleased to grant the Applicant leave to lodge an appeal out of time against the judgement and decree in Kajiado Chief Magistrate Civil Suit No 148 of 2018 delivered on 27th December, 2021.
 - ii. That the Memorandum of Appeal filed out of time on 26th April, 2022 be and is hereby deemed as filed with leave of court upon payment of filing fees.
 - iii. That the record of appeal be filed within 60 days from today’s date.



- iv. That this Honourable Court be and is hereby pleased to grant stay of execution of judgment and decree of the Chief Magistrates Court in Kajiado Civil Suit No 148 of 2018 *Maiko Atinda Nyarecha v Barclays Bank of Kenya Limited & Another* delivered on 27th December, 2021 pending the hearing and determination of the appeal.
- v. That the Applicant shall provide security by depositing the decretal sum in an interest earning account in both names of the current advocates for each party within 30 days from today's date.
- vi. That each party shall bear own costs of this application.

26 Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 19TH DECEMBER 2023.

S. N. MUTUKU

JUDGE

