



REPUBLIC OF KENYA



KENYA LAW
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**Inuka Afrika v Iguanya (Civil Appeal E011 of 2023)
[2023] KEHC 27003 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27003 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E011 OF 2023
FN MUCHEMI, J
DECEMBER 19, 2023**

BETWEEN

INUKA AFRIKA APPELLANT

AND

JOYCE WAITHIRA IGUANYA RESPONDENT

RULING

Brief facts.

1. The application dated 19th October 2023 seeks for orders for leave to file appeal out of time against the judgment in Thika Small Claim Court, Small Claim No. E636 of 2022 delivered on 31st August 2023. The applicants further seek for orders for stay of execution of the decree issued on 2nd October 2023 pending the hearing and determination of the appeal.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 3rd November 2023.

Applicant's Case

3. The applicant states that judgment in Thika Small Claim case No. E636 of 2022 was delivered on 31st August 2023 without notice to them or their advocates on record. The applicant further states that they came to know of the judgment after making a follow up at the registry and being informed that the judgment was delivered and a decree issued on 2nd October 2023.
4. The applicant is apprehensive that the respondent shall execute her judgment as she has already extracted a decree and is threatening to execute the same.
5. The applicant states that they have instructed their advocates on record to appeal against the whole judgment unfortunately time for lodging and serving the memorandum of Appeal has since lapsed.



The applicant contends that they requested for typed proceedings vide a letter dated 18th October 2023 to enable it prepare the record of appeal for filing in court.

6. The applicant states that the intended appeal has high chances of success and the intended appeal shall be rendered nugatory unless the orders sought are granted. Moreover, the applicant states that the respondent will not be prejudiced in any way if the instant application is allowed.

The Respondent's Case

7. The respondent states that the application is an afterthought and has no merit. The respondent further states that the applicant is not being truthful and has a habit of seeking review after failing to attend court. Further the respondent contends that the applicant has withheld and failed to disclose that the trial court gave its notice for judgment after the applicant closed its case. The respondent further states that on the judgment date the applicant failed to attend court despite being aware that judgment would be delivered on the said date.
8. The respondent argues that the appeal is void ab initio and incurably faulty as the applicant filed its memorandum of appeal before seeking leave to file the appeal out of time. As such the respondent prays that the application and appeal be dismissed with costs.

The Applicant's Submissions

9. The applicant relies on the case of *Stanley Kangethe Kinyanjui vs Tony Ketter & Others (2013)* eKLR and submits that the appeal is arguable and meritorious with a high chance of success.
10. The applicant submits that the reason for the delay in filing the appeal is that the judgment in the lower court was delivered without notice and they came to learn of the judgment after making a follow up with the registry. The applicant further submits that the delay is about 19 days and they have made every effort to ensure that the instant application is brought properly before the court.
11. The applicant contends that it will suffer great loss if the orders sought are not allowed as it is a micro credit institution aimed at empowering micro and small businesses and it is therefore apprehensive that its business operations will be crippled if the respondent will execute her decree. To support its contentions, the applicant relies on the case of *Oraro Rachier Company Advocates vs Co-operative Bank of Kenya Ltd [2000]* eKLR. Furthermore, the applicant contends that the respondent's financial means are unknown and therefore she will be unlikely to refund the decretal sum in the event the appeal succeeds. The applicant therefore argues that it will suffer irreparable damage in the event the respondent proceeds with execution.
12. The applicant relies on the cases of *Redland Enterprises Limited vs Premier Savings & Finance Limited Civil Misc. Application (MSA) No. 10 of 2002* and *Kamlesh Mansukhalal Damki Patel vs ODPP & 3 Others (2015)* eKLR and urges the court to balance the right of appeal by the applicants against denying the respondent the right to enjoy the fruits of a successful litigation.
13. On the issue of security, the applicant submits that it is ready and willing to abide by the conditions imposed on it by the court. Furthermore, the applicant contends that it deposited half the decretal sum being Kshs. 439,537/- as security in court.

The Respondent's Submissions

14. The respondent relies on Section 79G of the *Civil Procedure Act* and submits that the memorandum of appeal dated 19th October 2023 was filed without leave of the court and is therefore void. The respondent contends that the applicant ought to have filed a miscellaneous application seeking to lodge



its appeal out of time and upon the application being successful, file the memorandum of appeal. The respondent argues that the applicant placed the cart before the house by first filing its Memorandum of Appeal first before filing this application seeking enlargement of time. Thus the appeal is void ab initio and is incurably defective. To support her argument, the respondent relies on the cases of *Republic vs Kensington Income Tax Commissioners ex parte Princess Edmond de Poliganac* (1917) 1 KB 486; *Andrew Kiplagat Chemaringo vs Paul Kipkorir Kibet [2018]* eKLR and *Kyuma vs Kyema Civil Appeal No. 16 of [1988]* eKLR and further submits that the violation of Section 79G of the [Civil Procedure Act](#) is not a procedural technicality especially for the applicant who is ably represented.

15. The respondent submits that the instant application has been filed as an afterthought as the applicant has not advanced any plausible reasons to merit the grant of orders sought to enlarge time to file the appeal.

Issues for determination

16. The two main issues for determination herein are:-
 - a. Whether the court should exercise its discretion to grant the applicants leave to file their appeal out of time;
 - b. Whether the applicants have met the prerequisite for grant of stay of execution pending appeal;

The Law

Whether the court should exercise its discretion to grant the applicant leave to file its appeal out of time;

17. Section 79G of the [Civil Procedure Act](#) states:-

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 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.

18. It is clear from the wording of section 79G of the [Civil Procedure Act](#), that before the court considers extension of time, the applicant must satisfy the court that that they have good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of [Diplack Kenya Limited vs William Muthama Kitonyi \[2018\]](#) eKLR an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.
19. The Supreme Court in the case of [Nicholas Kiptoo Korir arap Salat vs 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:-

“The underlying principles a court should consider in exercise of such discretion should include:-

- a. 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;



- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
- f. Whether the application has been brought without undue delay."

20. Similarly in the case of *Paul Musili Wambua vs Attorney General & 2 Others [2015]*eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-

“.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

21. The applicant attributes the delay in filing the appeal in time to the fact that judgment was delivered without notice. I have perused the court record and noted that judgment was delivered on 31st August 2023 in the absence of both parties. However on 14th August 2023 the trial court set the judgment date to 31st August 2023 in the presence of the respondent only. There is no certificate of service by the respondent to show that she served the appellant. It is therefore my considered view that the applicant was not aware of the judgment date. Thus their reason for delay is justified.

22. I have further perused the court record and noted that judgment was delivered on 31st August 2023 and the applicant filed its memorandum of appeal on 19th October 2023. The applicant filed the instant application on the same date which is about 18 days out of the statutory time for filing its appeal. It is my considered view that a delay of 18 days is not inordinate. Therefore the applicant has shown good cause to warrant it filing its appeal out of time.

Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

23. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) *Civil Procedure Rules*. Order 42 Rule 6 of the *Civil Procedure Rules* stipulates:-

- " 1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court



to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.

2. 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 1st 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."

24. Thus under Order 42 Rule 6(2) of the *Civil Procedure Rules*, an applicant should satisfy the court that:

1. Substantial loss may result to him/her unless the order is made;
2. That the application has been made without unreasonable delay; and
3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

25. Substantial loss was clearly explained in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto [2012]* eKLR:-

" No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

26. The applicant contends that it stands to suffer irreparably if the respondent levy execution against them. The respondent argues that the applicant has not demonstrated the substantial loss it stands to suffer. On perusal of the applicant's affidavit, I have noted that the applicant has not demonstrated how it stands to suffer substantial loss if the orders sought are not granted. The applicant merely states that it is exposed to execution of the decree unless a stay is granted and further that the intended appeal shall be rendered nugatory if stay is not granted. Only in its submissions does the applicant state that he stands to suffer irreparable damage as the respondent will not be financially able to repay back the decretal sum.

27. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show how execution shall irreparably affect it or will alter the status quo to its detriment therefore rendering the appeal nugatory. The applicant brought up the issue of the respondent being unable financially to pay back the decretal sum in its submissions. The applicant ought to have raised that contention in its affidavit to give the respondent a chance to respond and produce evidence of her financial abilities. This court considers the fact that the applicant was not



aware of the delivery of the judgement having not been notified. The respondent who was in court ought to have served the applicant with the date. For this reason, I find that the applicant if hurried up with execution proceedings will suffer substantial loss.

Has the application has been made without unreasonable delay.

28. Judgment was delivered on 31st August 2023 and the applicant has brought the present application on 19th October 2023. It has taken the applicant 18 days between the date of judgment delivered in the trial court and the time when it filed the instant application. Thus as discussed above the delay of 18 days is not inordinate.

Security of costs.

29. The purpose of security was explained in the case of *Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014]* eKLR the court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.

30. Evidently, the issue of security is discretionary and it is upon the court to determine the same. I have perused the court record and noted that the court on 23/10/2023 directed the applicant deposit half the decretal sum in court in 10 days from the said date. The applicant has already deposited the said sum of KShs. 439,537/-. The amount deposited is in my view adequate as security and demonstrates good will on part of the applicant.
31. Additionally, the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Samvir Trustee Limited vs Guardian Bank Limited [2007]* eKLR the court stated:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”

32. The court in granting stay has to carry out a balancing act between the rights of the two parties. The question then begs as to whether there is just cause for depriving the respondent her right of enjoying her judgment. I have perused the grounds of appeal and without going into the merits of the appeal noted that they do not raise any arguable points of law. Therefore it is my considered view that the applicant has not met the threshold of granting stay of execution pending appeal.



Conclusion

33. I hereby find that the application dated 19th October 2023 has merit and I hereby make the following orders:-

- a) That leave to file appeal out of time is hereby granted to the applicant.
- b) That the memorandum of appeal filed on 19th October 2023 is hereby deemed as properly filed.
- c) That orders for stay pending appeal are hereby granted.
- d) That the amount of KShs.439,537 earlier deposited as security by the applicant will be retained in the court account pending determination of the appeal.
- e) That each party meets their own costs of this application.

34. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 19TH DAY OF DECEMBER 2023

F. MUCHEMI

JUDGE

