



REPUBLIC OF KENYA



**Oraro v Juma (Miscellaneous Civil Application E086 of 2023)
[2023] KEHC 26787 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26787 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
MISCELLANEOUS CIVIL APPLICATION E086 OF 2023
REA OUGO, J
DECEMBER 19, 2023**

BETWEEN

DANCAN HONGO ORARO APPLICANT

AND

ROBERT WANJALA JUMA RESPONDENT

RULING

1. Dancan Hongo Oraro (the applicant) was sued by the respondent in Webuye CMCC No. 86 of 2016. Judgment was entered against him on 18.4.2023. On the 2nd November, he filed a Motion dated the 28th September 2023. The application is brought under sections 1A, 3A, 79 G & 95 of the [Civil Procedure Act](#) and Order 42 Rule 6 (1) and Order 50 Rule 6 of the [Civil Procedure Act](#). He seeks the following orders that;
 - i. Spent
 - ii. The Honourable Court be pleased to enlarge the time within which to file an Appeal and that the Applicant's draft Memorandum of Appeal annexed hereto be deemed as duly filed upon payment of the requisite court fees
 - iii. The Honourable Court be pleased to grant an order of stay of execution of the decree in Webuye CMCC No. 86 of 2016 pending the hearing and determination of the Appeal.
 - iv. Costs of the application be in the cause.
2. The application is supported by the affidavit of Hope Wambugu dated the 28th of September 2023. She is a legal officer employed by Britam Insurance Company which has conduct of the matter on behalf of the applicant. She depones as follows; the applicant failed to file an appeal on time because the judgment was delivered on notice. The said notice was not issued to both parties. The judgment was delivered on the 18th April 2023. On visiting the registry on the 27th June 2023 their advocate learnt



that the judgment was delivered on the 18th April 2023. By then time to file the appeal had ran out. By the time the insurance company decided as to whether to appeal the judgment or not the decision took long due to bureaucracy involved in the company. They desire to appeal and have attached a draft memorandum of appeal. the delay is not inordinate and the intended appeal is meritorious and has a high chance of success.

3. The application was opposed. Robert Wanjala Juma the respondent deponed as follows; the prayers sought are an afterthought as the judgment was delivered on 18.4.2023. The deponent of the affidavit is a stranger to him as at no time did he sue Britam Insurance Company. That the applicant's counsel was served with a bill of costs dated 26.4.2023 yet the said advocate claims that the judgment was delivered without notice to both parties. The applicant's counsel attended the taxation on 11.7.2023 and the court was informed that the parties are negotiating on the bill of costs. The application before the court is defeated by the doctrine of laches because from 18/06/23 to 29/09/23 is a long time and the applicant has not given a satisfactory explanation. The memorandum of appeal carries no substance and the intended appeal has no merit. That if the court is inclined to grant the orders sought the applicant should be ordered to pay his advocates ½ the decretal sum and the balance in court pending the hearing of the appeal. The applicant has failed to demonstrate how he will suffer loss.
4. The applicant filed written submissions. The respondent relied on the replying affidavit. I have considered the rival affidavits the law and the written submissions.
5. Order 42 Rules provides as follows;
 - (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.
6. The order being sought by the applicant is discretionary. The respondent does not seem to dispute that the judgment the applicant seeks to challenge was delivered on notice. It is possible that they were not notified of the judgment. The notice that has been attached is of the taxation application. The time taken in filing the application was reasonable, there was no inordinate day. I will give the applicant the benefit of the doubt and enlarge the time to file the appeal. The applicant shall file and serve a memorandum of appeal within 15 days from 15/1/2024.
7. The next issue is whether the applicant is entitled to an order of stay of execution. The purpose for granting an order of stay was enumerated by the court in *RWW vs. EKW* (2019) eKLR where the court stated:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.9.Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”



8. The respondent has submitted that a stay order can be granted on condition that the applicant deposits half the decretal sum to his advocates and the remaining amount in court. The applicant is willing to offer a security to be held during the period of the appeal. I will grant an order of stay of execution on condition that the applicant deposits half the decretal sum with the advocate of the respondent and the balance in court within 45 days from the date of this ruling. In default of compliance with this latter order the respondent will be at liberty to execute.
9. Final orders;
 - i. The applicant shall file his memorandum of appeal within 15 days from 15/1/2024.
 - ii. A stay of execution of the decree in Webuye CMCC No. 86 of 2016 shall issue on condition that on condition that the applicant deposits half the decretal sum with the advocate of the respondent and the balance in court within 45 days from the date of this ruling. In default of compliance, the respondent will be at liberty to execute.
 - iii. Costs shall abide the outcome of the appeal.

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

R.E. OUGO

JUDGE

In the presence of:

Mr. Atudo -For the Applicant

Respondent - Absent

Wilkister - C/A

