



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CIVIL APPLICATION NO. E568 OF 2021

AFRICAN POPULATION & HEALTH RESEARCH CENTRE.....APPELLANT/APPLICANT

-VERSUS-

JAPHETH KWIRINGIRA.....RESPONDENT

AS CONSOLIDATED WITH

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RULING

1. The appellant/applicant in both instances has taken out two (2) applications. The first application is the Notice of Motion dated 24th September, 2021 filed in Misc. Civil Application No. E469 of 2021 and supported by the grounds set out on its body and the facts stated in the affidavit of Phyllis Mungai. Here, the applicant sought for an order for leave to appeal out of time against the judgment and decree delivered on 27th July, 2021 in Milimani CMCC No. 609 of 2019.
2. The first application stands opposed by way of the replying affidavit sworn by advocate Atuhairwe Agrace on 15th October, 2021 to which Phyllis Mungai rejoined with a supplementary affidavit sworn on 5th November, 2021 on behalf of the applicant.
3. The second application is dated 19th November, 2021 and is supported by the grounds laid out on its face and the facts stated in the affidavit of Phyllis Mungai. Here, the applicant sought for an order for a stay of execution of the aforementioned judgment pending the hearing and determination of the intended appeal.
4. In retort to the second application, the respondent put in Ground of Opposition dated 20th December, 2021 and raised a total of seven (7) grounds essentially arguing that the second application is an abuse of the court process and that the applicant has not satisfied the conditions for granting an order for a stay of execution.
5. The two (2) applications were to be canvassed through written submissions. However, going by the record, it is apparent that at the time of writing this ruling, only the submissions by the applicant had been availed for this court's reference.
6. I have considered the grounds laid out on the body of the respective applications; the facts deponed in the supporting and replying affidavits; the Grounds of Opposition and the written submissions on record plus the authorities cited.

7. I will first tackle the first application seeking the order seeking for enlargement of time to appeal and for leave to appeal out of time against the impugned judgment and decree.
8. The proviso of Section 79G of the Civil Procedure Act stipulates that an appeal against the decision of a subordinate court shall be lodged within 30 days from the date of the decree or the order being appealed against. The provision further stipulates that an appeal can be admitted out of time where sufficient cause has been shown.
9. Furthermore, under the provisions of Section 95 of the Civil Procedure Act and Order 50, Rule 6 of the Civil Procedure Rules, the courts have power to enlarge the time required for the performance of any act under the Rules even where such time has expired.
10. The Court of Appeal in the case of **Thuita Mwangi v Kenya Airways Ltd [2003] eKLR** illustrated the conditions to be met in deciding whether to extend the period for filing an appeal out of time and which I shall address hereunder.
11. Under the first condition touching on length of delay, the applicant annexed a copy of the impugned judgment to the first application, indicating that it was delivered on 27th July, 2021 which is close to two (2) months prior to the filing of the Motion. In my mind, while there has clearly been a delay in filing the Motion, I do not find the delay to be inordinate.
12. Concerning the reasons for the delay, the applicant explained that the delay was occasioned by the difficulty experienced by its erstwhile advocate in obtaining the certified typed copies of the proceedings and judgment. The applicant also attributed part of the delay to laxity on the part of its former advocate.
13. In reply, Atuhairwe Agrace states on behalf of the respondent that the applicant has not given any reasonable explanation for the delay.
14. Upon considering the explanation given by the applicant for the delay, I find the same to be reasonable in the circumstances.
15. The condition on whether or not an arguable appeal exists was not specifically addressed by any of the parties.
16. Be that as it may, upon my perusal of the grounds of appeal raised in the draft memorandum of appeal annexed to the first application, I note that the appeal is challenging the finding of the trial court on both liability and quantum arising out of an alleged breach of contract. I am therefore satisfied that the applicant has demonstrated arguable points of law and fact in their appeal.
17. In addressing the final condition on prejudice, the applicant asserts that the respondent does not stand to be prejudiced if the order sought is granted.
18. Upon my perusal of the record, it is apparent that the judgment was in favour of the respondent herein and against the applicant. It therefore follows that the respondent is lawfully entitled to enjoy the fruits of his judgment. Suffice it to say that it would not be in the interest of justice to lock out the applicant who is aggrieved by the judgment of the trial court. I therefore find it reasonable for the applicant to be given the opportunity of challenging the impugned judgment on appeal.
19. The second prayer which was sought in the second application is for stay of execution of the decree pending appeal, for which the guiding provision is Order 42, Rule 6(2) of the Civil Procedure Rules which sets out the conditions to be satisfied for such an order to be granted.
20. The first condition being that the application must have been brought without unreasonable delay has already been addressed hereinabove.
21. The second condition touches on substantial loss to be suffered by an applicant.
22. The applicant on its part is apprehensive that if the decretal amount is paid to the respondent, the likelihood of recovering the amount from the respondent should the appeal succeed is slim, considering the fact that the respondent does not reside within the jurisdiction of this court and he has no known assets and/or income.
23. The respondent by way of his Grounds of Opposition simply argues that the applicant has not satisfied the conditions for granting the order sought in this instance, especially since its application seeking a similar order for a stay of execution before the lower court was dismissed.
24. To answer the sentiments raised by the respondent, I am of the view that the dismissal of an application seeking an order for a stay of execution does not preclude a party from filing a similar application before a court of higher status.
25. The question on who has the burden of proof on the issue of refund of the decretal sum was discussed by the Court of Appeal in the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR** cited in the submissions by the applicant, when it held that:

“Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...”

26. The above position was echoed in the recent case of **Superior Homes (Kenya) Limited v Musango Kithome [2018] eKLR** equally

cited in the submissions by the applicant, where the court held that:

“What amounts to reasonable grounds for believing that the respondent will not be able to refund the decretal sum is a matter of fact which depends on the facts of a particular case. In this case it is contended that the respondent in his evidence before the trial court stated that he was unemployed. That if true, would in my considered view amount to a reasonable ground for believing that the respondent is unlikely to refund the decretal sum if the appeal succeeds. It is, however, upon the applicant to lay a basis for this belief. However, it is noteworthy that in this case, the respondent has in his affidavit in fact stated that he was a man of means but did not go ahead to prove or rather rebut the allegation that he was unemployed. It follows therefore that he has in his own affidavit admitted that he is of meagre means and this creates uncertainty on the Appellant’s part as to whether he will refund the monies if the appeal succeeds.”

27. In the absence of anything to ascertain the respondent’s financial capacity to refund the decretal sum which I might add is a substantial amount, I am satisfied that the applicant has reasonably demonstrated that it stands to suffer substantial loss if the order for a stay of execution is not granted.

28. Under the final condition which is the provision of security for the due performance of the decree or order, the applicant state that it is ready and willing to comply with the conditions which will be set by this court. The respondent did not address this issue.

29. In making an order for the provision of security, it is noteworthy that this court must balance the interest of the parties.

30. In the end therefore, the Motions dated 24th September, 2021 and 19th November, 2021 are found to be meritorious and hence they are allowed as prayed, thus giving rise to the following orders:

- i. Leave is granted to the applicant to file an appeal out of time within 14 days from today’s date.**
- ii. There shall be an order for stay of execution of the judgment and decree issued on 27th July, 2021 pending the hearing and determination of the intended appeal on the condition that the applicant deposits the entire decretal sum in an interest earning account in the joint names of the advocates or firms of advocates within 45 days from the date of this ruling in default of which the stay order shall lapse.**
- iii. Costs of the Motion shall abide the outcome of the appeal.**
- iv. The orders issued herein shall apply to H. C. Misc. Civil Application no. E469 of 2021 accordingly.**

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 25TH DAY OF MARCH, 2022.

.....
J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant/Applicant

.....for the Respondent

IN MISC. CIVIL APPLICATION NO. E568 OF 2021

.....for the Appellant/Applicant

.....for the Respondent

IN MISC. CIVIL APPLICATION NO. E469 OF 2021