



**Elacy General Traders Limited v Ndolo (Miscellaneous Application
138 of 2022) [2022] KEHC 673 (KLR) (Civ) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 673 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

MISCELLANEOUS APPLICATION 138 OF 2022

JN MULWA, J

MAY 26, 2022

BETWEEN

ELACY GENERAL TRADERS LIMITED APPELLANT

AND

DANIEL KIMEU NDOLO RESPONDENT

*(judgment of the Honorable Senior Resident Magistrate (SRM) Honorable M.W. Murage
in the matter Milimani Commercial Courts 285 of 2019 delivered 29th September, 2021)*

RULING

1. The Applicant, by an application dated 23rd March, 2022, and premised on Order 22 Rule 22, Order 46 Rules 4 and 6 of the [Civil Procedure Rules](#) seeks orders that;
 - 1) Spent;
 - 2) This honorable court be pleased to grant leave to the Intended Appellant/Applicant to appeal out of time against the judgment of the Honorable Senior Resident Magistrate (SRM) Honorable M.W. Murage in the matter Milimani Commercial Courts 285 of 2019 delivered 29th September, 2021;
 - 3) Spent;
 - 4) Upon this Honorable Court granting leave to the Intended Appellant/Applicant to appeal out of time, that this Honorable court be pleased to grant stay of execution of the Judgment/Decree obtained in Milimani Commercial Courts 285 of 2019 and delivered on 29th September, 2021 pending the hearing and determination of the intended Appellant/Applicant's Appeal



- 5) Spent; and,
 - 6) Costs of the Application abide the outcome of the Appeal
2. It is premised on the grounds on the face of the application and the depositions in the Supporting Affidavit of Martha Mugo sworn on and dated 23rd March, 2022. It is stated that the impugned judgment was delivered on 29th September, 2021 in favour of the Plaintiff for Kshs. 1,502,550 with costs and interest. Further that the Respondent commenced execution proceedings where warrants of attachment dated 16th March, 2022 have been extracted and served upon the Applicant on 17th March, 2022.
 3. It is contended that the Applicant's Advocate after the delivery of judgment proceeded to seek further instructions from their client who instructed them to appeal at the time when the 30 days period had lapsed hence the instant Application. It is stated that the Applicant will suffer detrimentally if execution is allowed as the instant Application and the intended Appeal will be rendered an academic exercise. It is the Applicant's contention that the instant Application has been brought without undue delay.
 4. It is further stated that in the event this court is inclined to grant the Applicant leave to appeal out of time, it is in the interest of justice that stay of execution of the impugned judgment is considered.
 5. The prayer for stay of execution pending Appeal is premised on the grounds that the Applicant has an arguable appeal with high chances of success, and that the decretal sum is substantial, which if paid to the Respondent, may be difficult to refund as the Respondent has not shown his financial standing. The Applicant contends that the Application has been made in good faith and the Respondent will not suffer any prejudice. The Applicant is willing and able to deposit a bank guarantee in favour of the Respondent as may be ordered by the court.
 6. The Application is opposed vide the Replying Affidavit sworn by George Mahugu on 28th March, 2022. It is deposed that the Application is fatally and hopelessly defective, a non-starter, evasive, misconceived, mischievous and an abuse of the court process, and that the orders sought are incapable of being granted, stating that it has been six months since the delivery of the impugned judgment which the Applicant was well aware.
 7. The Respondent contends that on the lapse of stay orders by the trial court, his advocate on record did a letter himself to the Applicant's Advocate dated 15th November, 2021 calling for the settlement cheque which letter is said to have elicited no response following which the Respondent instructed M/S Mbusera Auctioneers to execute the decree which they did and proclaimed the Applicant's chattels on 17th March, 2022, who did not move until the last day of the proclamation notice when they moved this court. It is stated that the delay is inordinate and inexcusable and that no attempt has been made by the Applicant to explain to the satisfaction of this court but only taken for a wild ride hence this court should not abet indolence.
 8. It is contended that the Applicant moved this court only when it was imminent that the wheels of justice were catching up with its indolence hence it is guilty of laches and its Application is marred with unsubstantiated allegations. The Respondent has urged this court to dismiss the instant Application with costs.
 9. The Application was canvassed on 26th April, 2022 by way of oral submissions which I have considered.



10. On enlargement of time, the principles applicable were set out by the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR as follows:

“This being the first case in which this court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a court should consider in exercise of such discretion:

- 1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- 2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- 3) Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
- 4) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
- 5) Whether there will be any prejudice suffered by the Respondents if the extension is granted;
- 6) Whether the application has been brought without undue delay; and
- 7) Whether in certain cases, like election petitions, public interest should be consideration for extending time.”

11. The judgment the subject matter of the application was delivered on 29th September, 2021. The instant application was filed on 23rd March, 2022. It is not explained what stood between the Applicant and the giving of instructions to its advocates in time. The delay has not been explained at all let alone to the satisfaction of this court. The Application has not been brought promptly and I agree with the Respondent that the Applicant was awoken from slumber by execution. The Applicant is apprehensive that it may not be able to recover the decretal sum in the event that the Appeal is successful. The Respondent has not said anything to assuage these fears. As stated by the Court of Appeal in the case of Nrb Civil Application 238 of 2005 (UR 144/2005) *National Industrial Credit Bank Ltd -Vs- Aquinas Francis Wasike & Another*:

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a Respondent or the lack of them. 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 – see for example section 112 of the *Evidence Act*, Chapter 80 Laws of Kenya.”

12. This court is not satisfied that that the Applicant is a deserving party as far as leave to appeal out of time is concerned. However, in the interest of justice and not to unseat the Applicant from the seat of justice, and in exercise of my judicial discretion, I will allow the application, and grant leave to the applicant leave to appeal out of time regardless of the delay.



13. On stay of execution of the judgment pending appeal, I am guided by the provisions of Order 42 rule 6(2) of the [Civil Procedure Rules, 2010](#), which provides as follows:

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.

14. From the forgoing, it is safe to say that for a grant of stay order to issue, an applicant must satisfy the court that;

- a. Substantial loss may result unless the order is made
- b. Substantial loss may result unless the order is made The application has been made without unreasonable delay
- c. Security for costs as the court orders has been given

15. It is equally important at this point to note that the purpose of an order for stay is preservation of the subject matter and that the courts power to grant or deny such orders is discretionary which should be exercised judiciously and ensure a balance between the rights of both parties.

16. The court, in [RWW vs. EKW](#) [2019] eKLR, addressed its mind to the purpose of a stay of execution order pending appeal, in the following words:

“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.”

17. I am satisfied from the oral submissions made that the Applicant has made a case for the grant of stay orders.

18. To balance the competing interest of the parties, the application is allowed on condition that the decretal sum is deposited in a joint interest earning bank account in the names of the advocates for the parties within 30 days from the date hereof.

The Memorandum of Appeal shall be filed within 7 days from the date of this ruling, while the Record of Appeal shall be filed within 60 days.

19. The Applicant shall also pay auctioneers fees, if any, as well as throw away costs to the Respondent, assessed at Kshs. 30,000 within 30 days of this ruling.

Orders accordingly.



DELIVERED DATED AND SIGNED AT NAIROBI THIS 26TH MAY 2022.

J.N MULWA

JUDGE

