



**Maika & another v Oluta (Miscellaneous Application E042 of 2021)
[2022] KEHC 11288 (KLR) (Civ) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11288 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL
MISCELLANEOUS APPLICATION E042 OF 2021**

JN MULWA, J

MAY 26, 2022

BETWEEN

SAMUEL MIRUKA MAIKA 1ST APPLICANT

TOM OMAE 2ND APPLICANT

AND

MARK BARASA OLUTA RESPONDENT

RULING

1. The Applicants, by their Application dated 4/10/2021 sought orders of stay of execution of the Judgment and decree in Milimani Chief Magistrates Civil Suit No. 3562 of 2019 delivered on the 8/1/2021 pending determination of this application and intended appeal, and leave to extend time to lodge a Memorandum of Appeal out of time.
2. The application is supported by an affidavit sworn by one Samuel Miruka Maika and grounds stated at its face.
3. The application is opposed vide a Replying Affidavit sworn by the Respondent Mark Barasa Oluta on the 18/2/2022, citing unreasonable delay in filing the application and intention to deny him fruits of his Judgment, in the sum of Kshs. 200,000/= general damages and Kshs. 4,920/= special damages plus costs and interest.
4. For the applicants, it is averred that should the Respondent execute the decree, they will suffer substantial loss as the Respondent may not be able to refund the decretal sum if the intended appeal succeeds. It is further stated that no prejudice will be suffered by the Respondent if an order of stay is granted. The applicants are ready to provide a bank guarantee for the entire decretal sum as security for the due performance of the decree.



5. Parties have filed written submissions that I have considered.

Issues for determination

1. Whether leave to file appeal out of time ought to be granted to the applicant
2. Whether an order of stay of execution pending appeal should be granted.

Leave to appeal out of time

6. The delay of about eight months is not sufficiently explained by the applicant save to state that the application was brought without unreasonable delays. Whether to extend time is an exercise of courts discretion. Factors for consideration by the court as laid down by the courts are among others; the period of day, the reason for the delay, the arguability of the appeal, degree of prejudice which could be suffered by the Respondent if extension is granted - See Supreme Court of Kenya Decision in [*Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*](#) [2014] eKLR where the court rendered:

“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.”

The delay has not been explained at all, let alone to the satisfaction of the Court.

7. I agree with the Respondent that the applicant has not attempted to explain what stood between the applicant and its advocates for a period of eight months. A plausible and satisfactory explanation for delay is the key that unlocks the Court’s discretion in favour of the applicant. See also, [*Red Cross Society vs Mbondo Katheke Mwanja*](#) [2019] eKLR.
8. The right of appeal, as stated in [*Mohammed Salim T/A Choice Butchery vs. Nasserpuria memou Jamat*](#) [2013] eKLR, must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruit of judgment delivered in his favour, and therefore, there must be a just cause for depriving the plaintiff that right.



9. The Applicant has expressed itself of its willingness to abide by orders and conditions that the court it may deem fit in order to protect the Respondent's interests.
10. Section 79G of the *Civil Procedure Act* proviso, provides that an appeal may be admitted out of time if the appellant satisfies the court that he has an arguable appeal and sufficient cause for the delay.
11. Upon consideration of all averments and arguments by the applicant, the court is not satisfied that the Applicant is a deserving party for an order of extension of time to file appeal out of time. However, in the interest of justice and not to shut out the door for the applicant to the seat of justice, and in exercise of my Judicial discretion, I will allow the applicant to file appeal out of time regardless the unexplained delay, upon terms appearing here below, noting that the law does not state any minimum or maximum period of delay, provided that there is plausible and satisfactory explanation, as that is the key that unlocks the court's discretion –Mohammed J. in *George Kagima Kariuki & 2 others vs George M. Gichimu & 2 others* [2014] eKLR.

On stay pending appeal

12. An applicant must satisfy the court that provisions of Order 42 Rule (6) of the *Civil Procedure Rules* are satisfied, that
 - a. Substantial loss may result unless the order is made
 - b. That security for the due performance of the decree and costs has been given.

Of equal importance is the purpose of stay, being preservation of the subject matter pending hearing and determination of the appeal.

13. In *RWW vs EKW* [2019] eKLR, the court addressed itself to the purpose of a stay order thus:

“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.

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.”

Ultimately, the interests of both parties must be balanced. See also *M/s Partreitz Maternity vs James Karanja Kabia*, Civil Appeal No. 63 of 1997.

14. Substantial loss is the cornerstone in an application for stay of execution pending appeal. The decretal sum in this matter is stated as Kshs. 200,000/= general damages and Kshs. 4,920/= special damages. The applicant submits that the Respondent may not be able to refund if paid, should the appeal be successful, and would thus render the appeal nugatory.
15. In the case of *Industrial Credit Bank Ltd vs Aquinas Francis Wasike & another*, the court rendered that:

“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.”

16. For the above reasons, and in answering the two issues for determination, I find that the applicants application is merited, not on the material facts as presented to the court, but upon consideration of the balancing interests of both parties, the rights of litigants to pursue their cases, and for the respondent not to be blocked from enjoyment of his judgment fruits in circumstances where the applicants have no excusable or plausible reasons for their delays, I make the following orders:
- a. The applicants are granted leave to file appeal out of time. The Record of Appeal to be filed and served within 60 days of this ruling.
 - b. The Applicants are granted stay of execution orders pending hearing and determination of the appeal, on condition that they shall pay to the Respondent 50% of the Judgment sum within 30 days of this ruling. The balance (50%) shall be deposited in an interest earning account in joint names of the parties advocates within 45 days of this ruling.
 - c. Costs of this application shall abide the outcome of the appeal.

Orders accordingly.

DELIVERED DATED AND SIGNED THIS 26TH DAY OF MAY, 2022

J. N. MULWA

JUDGE

