



REPUBLIC OF KENYA



KENYA LAW
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**Tsavo Securities Ltd v Wanjohi & another (Civil Appeal 35 of 2017)
[2022] KEHC 11490 (KLR) (Civ) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11490 (KLR)

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

CIVIL

CIVIL APPEAL 35 OF 2017

JN MULWA, J

MAY 26, 2022

BETWEEN

TSAVO SECURITIES LTD APPLICANT

AND

GEOFFREY NGARI WANJOHI 1ST RESPONDENT

ABC CAPITAL LTD 2ND RESPONDENT

(Being an application for stay of proceedings in both NBI Civil Appeal No 35 of 2017 – Geoffrey Ngari Wanjohi v ABC Capital Ltd Securities Ltd and NBI CMCC No 2227 of 2010 – Geoffrey Ngari Wanjohi v ABC Capital Ltd; and for leave to appeal out of time against the judgment of the High Court delivered on the December 20, 2019)

RULING

1. By an application dated November 15, 2021, the 2nd respondent (Tsavo Securities Ltd) sought two main orders;
 - 1) That the honourable court be pleased to grant an order of stay of proceedings in both NBI Civil Appeal No 35 of 2017 – Geoffrey Ngari Wanjohi v ABC Capital Ltd Securities Ltd and NBI CMCC No 2227 of 2010 – Geoffrey Ngari Wanjohi v ABC Capital Ltd, pending hearing and determination of this application.
 - 2) That the court be pleased to grant leave to the applicant to lodge a notice of appeal against the judgment of the High Court delivered on the December 20, 2019 out of time; and that the annexed notice of appeal be deemed as properly lodge.
2. The application is premised on the grounds stated at the face of the application and supporting affidavit sworn by the applicant’s advocate, George Kithi on the November 15, 2021. It is opposed by the



appellant Geoffrey Ngari Wanjohi vide his replying affidavit. The 2nd respondent indicated to the court that it did not wish to oppose the application.

To urge their respective rival positions, both parties filed written submissions. The court has considered the pleadings, and the submissions.

3. The issues that arise for determination in my view, and as captured by both parties are:
 - 1) Whether leave should be granted to the applicant to lodge a notice of appeal against the judgment of this court delivered on the December 20, 2019 out of time.
 - 2) Whether proceedings pending before the High Court and at the subordinate court should be stayed pending the hearing and determination of the intended appeal.
 - 3) Which party ought to bear costs of the application.

Analysis and Determination

4. Leave to file notice of appeal out of time

It is trite that a notice of appeal ought to be filed within 14 days of delivery of judgment. Section 75(1) and (2) of the [Court of Appeal Rules 2010](#) provides:

- a. Any person who desires to appeal to the court shall give notice in writing, which shall be lodged in duplicate with the Registrar of the superior court.
- b. Every such notice shall, subject to rules 84 and 97 be lodged within 14 days of the date of the decision against which it is desired to appeal.

5. The notice of appeal is dated November 15, 2021-annexture GK-4(a) to the affidavit of Geoffrey Kithi, advocate, but not lodged with the Registrar of the superior court. There is also annexed to the affidavit in support of the application a memorandum of appeal, likewise dated November 15, 2021 – annexture – GK-4(b).

6. The reasons advanced for the delay in filing the notice of appeal by the applicant are set out in its replying affidavit and in the submissions dated November 15, 2021; that due to the Covid-19 pandemic, the advocates lost touch with the 2nd respondent and were traced only in November, 2021 when instructions to appeal against the judgment were given, and could not have filed the notice of appeal without instructions from the client.

7. It is further urged that the applicant has an arguable appeal with high chances of success, and would therefore suffer loss if leave sought is not granted, as the delay was not intentional, but an act that the court ought to take judicial notice of, and grant leave for filing of the notice of appeal out of time.

In support of the application, several decisions were cited among them; [Paul Musili Wambua v AG and two others](#) [2015] eKLR, [Nicholas Kiptoo Arap Korir Salt v IEBC & 7 others](#), for the proposition that if the delay is sufficiently explained, the court ought to allow the application.

8. In opposing the application, the respondent/appellant filed his submissions dated April 13, 2022. It is submitted that Covid-19 was declared a national pandemic in March, 2020 whereas judgment was delivered in November, 2019, and therefore there was sufficient time for the applicant to obtain instructions in good time before the Covid-19 onset and further that the applicant being a company, a distinct legal entity, could have used digital online methods to convey instructions to its advocates.

9. Reliance was placed on several decisions to advance the principles laid down on applications for leave to file appeal out of time, among them, length of delay, possible prejudice to each party should orders not



be granted, conduct of the parties and need to balance the interests of both parties including duty of a litigant to constantly check on its advocates the process of its case, among them; *County Government of Mombasa v Kooba Kenya Limited* [2019] eKLR, *Multiple Haulier v Enoch Bilindi Musuudi & 2 others* [2021] eKLR, *Savings and Loan Limited v Susan Wanjiru Muritu* Nairobi (Milimani) HCCC No 397 of 2002.

10. By the above, it is submitted that the applicant was not diligent enough, and absconded its duty to ensure prosecution of the case post judgment. The advocates too are blamed for their failure to inform the applicant in good time of the court's judgment, and therefore, it is submitted that the delay was unreasonable and not sufficiently explained.
11. I have carefully considered the rival arguments and the decisions cited by both parties.
12. The right of a litigant to be heard was succinctly stated by the Court of Appeal in *Vishva Stone Suppliers company Limited v RSV Stone [2006] Limited* [2020] eKLR, and particularly in the matter of leave to file appeal out of time.

Rule 4 of the *Court of Appeal Rules* provides:

"4. The court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court of a superior court, for the doing of any act authorized or required by the Rules, whether before or after the doing of the act, and a reference in their Rules to any such time shall be construed as a reference to that time as extended."

13. The court further went to state that;
 - i. The mandate under rule 4 is discretionary, unfettered and does not require establishment of "sufficient reasons". Neither are the factors for exercise of the courts unfettered discretion under the said rules limited to the period of the delay, the reason for the delay (possibly), the chances of the appeal succeeding and the degree of prejudice to the respondent if the application is granted; the effect of the delay on public administration and the importance of compliance with time limits; the resources of the parties and also whether the matter raises issues of public importance.
 - ii. Orders under rule 4 of the *Court of Appeal Rules* should not be granted liberally but also on terms that are just unless the applicant is guilty of unexplained and inordinate delay in seeking the courts indulgence or that the court is otherwise satisfied beyond para adventure, that the intended appeal is not an arguable one."
14. In the above legal provisions, the court speaks of the conduct of the parties, the balancing of each parties' interests, plausible explanation of the inordinate delay, attachment of the draft memorandum of appeal, and most importantly, the right to a hearing not only being constitutionally entrenched but also that it is the cornerstone of the rule of law.
15. In *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR and *University of Eldoret and another v Hosea Sietenei and 3 others* [2020] eKLR, the Supreme Court of Kenya rendered itself thus:
 - i. 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.
 - ii. A party who seeks for an extension of time has the burden of laying a basis to the satisfaction of the court.



- iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.
 - iv. Whether there is reasonable reason for the delay, the delay should be explained to the satisfaction of the court.
 - v. Whether there will be any prejudice suffered by the respondent if the extension is granted.
 - vi. Whether the application has been brought without undue delay;
16. Further, the Supreme Court in *Raila Odinga & 5 others v IEBC & 3 others* [2015] eKLR, *Patricia Cherotich Sewe v IEBC & 4 others* [2015] eKLR held that;
- i. Rules of procedure are handmaidens of justice.
 - ii. A court of law should not allow the prescriptions of procedure and form to triumph the primary object of dispensing substantive justice to the parties depending on the appreciation of the relevant circumstances and requirements of a particular case.
 - iii. The exercise of the jurisdiction under article 159 of the *Constitution* is unfettered especially where procedural technicalities pose an impediment to the administration of justice.
17. In view of the above principles laid down by both the Supreme Court and the Court of Appeal, which I have considered, and considering the circumstances of the delay as explained by the applicant, and the unfettered discretion of the court to administer substantive justice to all litigants, and taking into account the procedural technicalities in the rules of procedure on the timelines stated thereto, and taking note that rules are not cast on stone, and the prevailing circumstances to each case, and particularly the onset of Covid-19 Pandemic, this court finds that the delay in filing the notice of appeal could be attributed to factors beyond the applicant and its advocates.
18. The court takes judicial notice of the effects of the Covid-19 pandemic, and the scaling down of the court processes, and comes to the finding that notwithstanding the delay of close to two years, the applicant ought not be locked out of its right to be heard on appeal by failing to grant leave for the filing of the notice of appeal out of time.
- The respondent has not demonstrated any prejudice or loss that he may suffer if the orders are granted. the applicant has laid a basis for the grant of the orders sought.
19. Consequently, prayer No 2 of the application is granted. The notice of appeal shall be filed and served within 14 days of this order, subject to conditions appearing at the tail end of this ruling.

Stay Of Proceedings Before the High Court and at the Subordinate Court

20. The court in its judgment dated December 20, 2019 at paragraph 47 (1) directed that the matter be remitted back to the lower court for trial. The claim before the lower court was and is purely a monetary claim in the sum of Kshs 140,927.35/= and thus falls squarely under the jurisdiction of the subordinate court. This court is, by the present application, urged to stay the proceedings in the lower court as well as in this court to await hearing and determination of the intended appeal.
21. In the case *Re Global Tours & Travel Ltd* HCWC No 43 of 2000 Ringera, J (as he then was) stated the principles that underpin stay of proceedings, thus;

“...whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of Judicial discretion to be exercised in the interest of justice... in



deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order...”

22. The court notes that upon delivery of the judgment on December 20, 2019, the appellant has since taxed its bill of costs wherein he was awarded Kshs 135,745.00. As submitted by the applicant, there is a high probability that the appellant will execute the decree on costs against the applicant. No application for stay of execution has been filed to my knowledge.

While urging the court to stay the proceedings, the applicant is willing to deposit whatever monetary security into court for the due performance of the decree in an interest earning account, as the court may determine.

23. The Respondent however submits that the application is an afterthought and further states that it will forestall the hearing of the suit before the subordinate court, thus causing further delay in its finalization, contrary to provisions of article 50 of the *Constitution*. See also the case *Exekiel Mule Musembi v H Young & Company (EA) Limited* [2019] eKLR.

In the circumstances of this application, the intended appeal and the matter generally, would it be in the interest of justice to stay proceedings in the subordinate court where the respondent is ready to have the matter fixed for hearing, and before the High Court where costs have already been taxed?

24. Upon consideration, I am persuaded that, for ends of justice to be met, and balancing the interests of both the applicant and the respondent, that justice will not be served by staying the proceedings in the subordinate court. The hearing of the suit before the subordinate court ought to proceed to finality. No prejudice will be caused to the applicant if the said suit is heard and concluded as directed and ordered by the judge in the December 19, 2019 judgment.

25. on the proceedings before this court (High Court), I am convinced that an order to stay of proceedings will not serve any justifiable purpose. In my understanding, the only proceedings before this court are execution proceedings of the decree for costs of the appeal taxed at Kshs 135,745.00. The court has not been informed of any reference having been filed in respect to the taxed costs.

I therefore come to the conclusion that it will not be in the interest of justice, fair and expeditious disposal of the subject matter as mandated under article 50 of Constitution, to stay proceedings in either the subordinate court or in this court. The prayer for stay of proceedings is therefore dismissed as devoid of merit.

26. The upshot is therefore that, the applicant is granted leave to file a notice of appeal out of time, within 7 days of this ruling, and upon condition that the taxed costs to the 1st respondent in the sum of Kshs 135,745/= be paid within 14 days of this ruling. In default, the orders hereto shall automatically lapse.

The costs of the application shall be borne by the applicant at 50% - scale fees as the applicant's application succeeds partially.

Orders accordingly.

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

JN MULWA

JUDGE.

