



**Zoa Taka Limited & another v Kyalo (Civil Appeal E031 of 2022)  
[2022] KEHC 11487 (KLR) (Civ) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11487 (KLR)

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

**CIVIL**

**CIVIL APPEAL E031 OF 2022**

**JN MULWA, J**

**MAY 26, 2022**

**BETWEEN**

**ZOA TAKA LIMITED ..... 1<sup>ST</sup> APPELLANT**

**JAMES GITAU KURIA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DENNIS KYALO ..... RESPONDENT**

*(Being an appeal from the Judgment delivered on 17th March, 2021 by  
Hon. A. N. Makau (Ms), in Nairobi CMCC Civil Suit No. 11532 of 2018)*

**RULING**

1. Judgment in the trial court - Nairobi CMCC No. 11532 of 2018 was delivered on the 17/3/2021. The Applicants were dissatisfied with the quantum of damages as assessed by the trial court in the sum of Kshs. 853,550.00 upon which they applied for a copy of the Judgment during which period the order of stay of execution granted by the trial court lapsed.
2. They then processed to file an appeal dated 26/1/2022 on the 27/1/2022, albeit out of time, and without leave of court, simultaneously with this application dated 27/1/2022.
3. The Applicant seeks for orders of stay of execution against the judgment, an order to admit the Appeal filed on the 26/1/2022 out of time, and to deem the same as duly and properly filed, pending hearing and determination of the intended appeal.
4. The Respondent, despite having been served with the application has not filed any response thereto. The proceedings before the court show that on the 17/3/2022, the Respondent was duly represented in court. And a hearing date for the application was taken in court. Despite that, the Respondent failed to file any Replying Affidavit or Grounds of Opposition, thus the application stands unopposed.



5. By the affidavit in support of the application shown by one Yvonne Mora on the 27/1/2022, who states that she is the Administrative Assistant of the 1<sup>st</sup> Applicant, it is deponed that the said judgment was delivered in the absence of its advocates, as the initial judgment dated 12/3/2021, the court was not sitting, without indication as to when it would be delivered.
6. It is deponed that it was only in December 2021, that they were advised by the Advocates that the judgment was delivered on the 17/3/2021. That being dissatisfied with the quantum of damages as being excessive in the circumstances, filed the application.
7. It is further deponed that if the decree is executed, the Respondent may not be able to refund the same should the appeal be successful.
8. Mr. Manyara Advocate for the Applicants urged the application before this court on the 26/4/2022. I have considered the dispositions averred to in the Supporting Affidavit.
9. Under Order 42 Rule 6(2) of the [Civil Procedure Rules](#), the Applicant has to satisfy the court that:
  - (2) No order of stay of execution shall be made under sub-rule (1) unless;
    - a) That the court is satisfied that substantial loss may result to the Applicant unless the order is made and 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.
10. The said conditions were stated in numerous decisions among them, by the Court of Appeal in [Halal & another vs Thornton & Timpin](#) [1963] e KLR, [1990] e KLR. To that extent then, an order of stay is not automatic, but at the Court's discretion, which should be exercised judiciously, within the confines of the law. The court must apply its mind to the circumstances of each case and the law – ELC Appeal No. 8 of 2021 [Peter Nakupang Lowar vs Nautu Lowar](#) [2022] e KLR.
11. The purpose for stay of execution pending appeal is to preserve the subject matter in dispute so that the Appellant's rights of appeal are safeguarded should the appeal be successful, is not rendered nugatory – [RWW VS EKW](#) [2019] e KLR.
12. The interests of both parties must be safeguarded to ensure that none of them suffers prejudice that may not be compensated by an award of demands.
13. The court is satisfied that the failure to file the appeal within the time stipulated under the [Civil Procedure Rules](#) was beyond the Applicant's control. A party ought not be punished for matters that are beyond their control, and therefore not attributed to their indolence or deliberate, to subvert the cause of justice – Section 79G [Civil Procedure Act](#).
14. It is also instructive to note that the Respondent, by its failure to oppose the application, agrees to the orders sought by the Applicants and that if granted will not produce its interests, nor cause harm to itself.
15. For the above reasons, the court is satisfied that the application is merited, and that the Applicant meets the threshold stated under Order 42, Rule 6 of the [Civil Procedure Rules](#).



16. On the matter of filing appeal out of time, the court expressed itself in the case of *Mohammed Salim T/A Choice Butchery vs Nasserpuria Memon Jamat* [2013] e KLR that:

”The right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruit of judgment delivered in his favour. There must be a just cause for depriving the plaintiff that right...”
17. The Appellant has expressed itself that it is willing to abide by orders that the court may deem fit in order to protect the Respondent’s interests. That goes with protection of the Appellant’s interest on recovery of the decretal sum should it be paid out to the Respondent, and the appeal succeeds. It is a delicate balancing act.
18. The Judgment sum as captured in the Supporting Affidavit in support of the application is Kshs. 853,550.00 plus costs and interest.
19. I have perused the intended draft Memorandum of Appeal. In dispute is the variance in two medical reports by two different doctors, and the quantum of damages in respect of the Respondents injuries, one stating that Respondent sustained soft tissue injuries while the other speaks of fractures. There is no dispute as to liability.
20. It would be unfair and unjust to lock the Respondent away from enjoyment of part of the judgment sum as parties fight the appeal, which, from a perusal of the draft Memorandum of Appeal has an arguable appeal which may succeed.
21. Section 79(G) proviso provides that an appeal may be admitted out of time if the Appellant satisfies the court that he has a ground and arguable appeal and has sufficient cause for not filing the appeal within time.
22. I am satisfied that the explanation for the delay by the Applicant is sufficient cause – see *Richard Muthusi vs Patrick Gituma Ngoma & another* [2017] e KLR.
23. Consequently, I make the following orders:
  - a) That the Appellant is granted leave to file appeal out of time; the Memorandum of Appeal within 7 days; and 60 days to file the Record of Appeal; and serve from the date of this ruling.
  - b) Stay of execution is granted on condition that the Appellant pays 50% of the judgment sum to the Respondent within 45 days of this ruling.
  - c) The balance (50%) of the judgment sum to be deposited in Court within 45 days of this ruling.
  - d) In default, the application will stand dismissed.
  - e) Costs of the application shall abide outcome of the appeal.

**DELIVERED DATED AND SIGNED AT NAIROBI THIS 26<sup>TH</sup> DAY OF MAY, 2022**

**J. N. MULWA**

**JUDGE**

