



Tumaz & Tumaz Enterprises Limited v Cibien Engineering Construction Company Limited (Civil Miscellaneous Application 164 of 2021) [2022] KEHC 10702 (KLR) (27 June 2022) (Ruling)

Neutral citation: [2022] KEHC 10702 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL MISCELLANEOUS APPLICATION 164 OF 2021**

**EKO OGOLA, J
JUNE 27, 2022**

BETWEEN

TUMAZ & TUMAZ ENTERPRISES LIMITED APPLICANT

AND

**CIBIEN ENGINEERING CONSTRUCTION COMPANY
LIMITED RESPONDENT**

RULING

1. Before me for determination is the Notice of Motion application dated 27th October, 2021. The Applicant seeks that;
 1. Spent.
 2. This Honourable Court be pleased to grant the Applicant leave to appeal out of time against the decision delivered on 9th July, 2021 by the Chief Magistrate's Court in Eldoret CMCC No. 13 of 2019.
 3. This Honourable Court be pleased to stay execution of the Decree issued 17th July, 2019 by the Chief Magistrate's Court in Eldoret CMCC No. 13 of 2019, pending the hearing and determination of this application inter-partes.
 4. Upon grant of leave to Appeal out of time, the Memorandum lodged herein to be duly filed.
 5. The Honourable Court be pleased to stay the execution of the Decree issued on 17th July, 2019 pending the hearing and determination of the appeal.
 6. Such other Orders or directions as may appear to this Court just and convenient to grant.



Applicant's Case

2. The application is premised on the grounds on the face of it and is further supported by the affidavit Julius Mwale sworn on 27th October, 2021. He deposed that he is the director of the Applicant Company and that on 16th March, 2021 the Applicant filed an application seek orders of stay of execution and or further execution of the consent judgment that was rendered on 10th July, 2019. In the said application the Applicant also sought for reconciliation of accounts in respect of the monies already paid to the Respondent. The Applicant further averred that on 9th July, 2021 the trial Magistrate delivered a ruling in which she dismissed the said application. The Applicant contends that the said ruling was devoid of any points of consideration.
3. Being aggrieved by the said decision the Applicant intends to appeal out of time against the said decision and it is therefore imperative to preserve the subject matter pending the intended appeal. The Applicant maintains that the delay in the filing of the intended appeal was occasioned by the delivery of the impugned Ruling without notice. That this instant application has been filed without inordinate delay once the Applicant learnt of the delivery of the said ruling.
4. The Applicant contends that it was not aware that the impugned ruling had been delivered until when it was served with the Warrants of Sale of Moveable Property issued on 4th August, 2021 and was subsequently issued with a Proclamation Notice dated 13th August, 2021 a month after the ruling had been delivered in absence of both parties.
5. The Applicant averred the crux of the intended appeal is the consent that was entered into by the parties herein as well as the true accounts of the sums of the monies already paid to the Respondent.
6. The Applicant further averred that it is not in dispute that the parties herein entered into a contract under which the Respondent was supposed to supply 700 tonnes of blast and 50 tonnes of quarry dust for purposes of constructing a high rise building. The Applicant maintains that it was a term of the contract that the Applicant would issue the Respondent with a post-dated cheque to act as security for due performance under the contract. It was further agreed that the Respondent was to raise an invoice upon the successful delivery whereupon the Applicant would instruct the bank to release funds.
7. The Applicant averred that in breach of the contract, the Respondent delivered 261 tonnes of standard ballast mixed with mud, sand and debris and the Applicant stopped the payment. The Applicant further averred that the Respondent thereafter moved to Court claiming Kshs. 2,278,380/= as owing which claiming is not true as it was not supported by any documentation.
8. The Applicant averred that upon institution of the said suit, he instructed his former Advocates to engage the Respondent with the view of having the matter settled out of Court.
9. The Applicant's director averred that he permanently resides in Washington DC in the United States of America, and only became aware of the consent judgment through a third party who had obtained details of the said consent from his former Advocates and that upon learning what had transpired the Applicant appointed the current Advocate on record to act on his behalf.
10. The Applicant averred that it was not privy to any negotiations and therefore the contents of the consent judgment are strange to the Applicant. That to date the consent judgment has not been served on the Applicant.
11. I have noted, however, that most of the facts deposed to in the application affidavit are not relevant to this application for stay, but are issues to be canvassed in the intended appeal.



12. The applicant further averred that the intended appeal raises arguable points which will be rendered nugatory in the event stay of execution is not granted.
13. The Applicant urged court to allow the appeal as prayed.

Respondent's Case

14. The application was opposed by the Respondent vide the replying affidavit sworn on 2nd March, 2022 by Sydney Adembesa Mudiri. The Respondent deposed that the application is misadvised, misconceived, bad in law, baseless, frivolous, scandalous, and an outright abuse of the due process of court and does not entitle the Applicant to the reliefs sought.
15. The Respondent averred that the Applicant does not have an automatic right of appeal against the decision and or order of the learned Magistrate issued on 9th July, 2021 as it was not an order that was appellable as of right under Order 43 of the Civil Procedure Rules 2010.
16. The Respondent averred that the draft memorandum of appeal does not disclose an arguable appeal with any probability of success.
17. The Respondent averred that on 10th July 2021, a valid consent judgment was entered by the trial court in Eldoret CMCC No. 13 of 2019 between the Applicant and Respondent. That the Applicant agreed to pay monies owed in the sum of Kshs. 2,278,380/= as follows: Kshs 450,000/= to be paid before the end of July 2019, Kshs. 450,000/= to be paid before the end of September 2019 and the balance due to be paid before the end of November 2019.
18. The Respondent further averred that on 16th July 2019, the Applicant and Respondent further agreed that the Applicant would pay Kshs. 91,138/= being interest thereof and Kshs. 198,069/= being costs of the suit by the end of November 2019 thereby making the total amount owed to the Respondent to be Kshs. 2,567,587/=.
19. The Respondent averred that following the said consent judgment, the Applicant has so far only paid the Respondent Kshs. 428,000/=.
20. According to the Respondent, this instant application is only calculated at delaying the lawful execution process in *ELDOR ET CMCC No. 13 of 2019* and preventing the Respondent from realizing and enjoying its fruits of the judgment.
21. The Respondent deposed that the Applicant has come to court with unclean hands and does not merit the equitable orders sought. The Respondent contends that the last date of payment as per the said consent was November 2019, and 26 months later the Applicant is yet to settle the said amount.
22. As I have noted in the case of the applicant, the respondent herein is also duly concerned with the merits of the intended appeal, then with circumstances under which stay may be granted, or circumstances under which leave to appeal may be granted.
23. Clearly, both the applicant and the respondent are addressing irrelevant issues at this stage.
24. The respondent has nonetheless urged the Court to dismiss the application.

Submission

25. The application was canvassed by way of written submissions.



Determination

26. I have considered the application, the supporting and replying affidavits and the submissions filed as well as the authorities relied upon. The only two issues for determination are;

- i. Whether the court should exercise its discretion to grant the applicant leave to file its appeal out of time'
- ii. Whether an order of stay of execution pending appeal should issue.

27. Section 79G of the *Civil Procedure Act* provides that:

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

28. The decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion and just like any other exercise of discretion Courts must do so on basis of evidence and on sound legal principles.

29. Under section 79G of the *Civil Procedure Act*, a party may be granted leave to file an appeal out of time if he satisfies the court that he has good reason for not filing the appeal within the time provided by law. In the case of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR, the Court of Appeal reiterated the conditions to be considered in deciding whether or not to grant extension of time to file an appeal. These are the length of the delay, the reason for the delay, possibly, the chances of success of the appeal if the application is granted, and finally, the degree of prejudice to the respondent if the application is granted.

30. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court's discretion in their favor. On the question of the exercise of judicial discretion, the Supreme Court observed in the case of *Telkom Kenya Limited v John Ochanda And 996 Others* [2015] eKLR that:

“In instances where there is delay in filing the notice of appeal, this Court has inherent jurisdiction to admit such appeal, provided sufficient explanation is proffered for the cause of delay. The design and objective of the Supreme Court Rules is to ensure accessibility, fairness and efficiency in relation to this Court. Parties should comply with the procedure, rather than look to the Court's discretion in curing the pleadings before it. This Court's position is that the circumstances of each case are to be evaluated, as a basis for arriving at a decision to intervene, in instances where full compliance with procedure has not taken place...

It is this Court's position of principle that prescriptions of procedure and form should not trump the primary object of dispensing substantive justice to the parties. However, the Court will consider the relevant circumstances surrounding a particular case and will conscientiously ascertain the best course. It is to be borne in mind that rules of procedure are



not irrelevant but are the handmaidens of justice that facilitate the right of access to justice in the terms of Article 48 of the Constitution....”

31. In the present case, the decision that the Applicant seeks to appeal against was delivered on 9th July 2021. The application for leave to file the appeal out of time was filed on 27th October, 2021. The Applicant alleged that it learnt of the delivery of the ruling of 9th July, 2021 when it was served with the Warrants of Sale of Moveable Property issued on 4th August, 2021 and the Proclamation Notice dated 13th August, 2021 more than one month after the said ruling was issued in absence of both parties.
32. A party seeking leave to appeal out of time should not presume on the Court’s discretion, regardless of the period of delay. The period of delay and explanation therefore are twin considerations in an application of this nature. In the absence of an explanation, the Court would find it difficult to exercise its discretion in the Applicant’s favour.
33. The delay in the present case is for about 3 months. The Applicant has attributed the delay in the filing of the intended appeal to it not being aware that the ruling in trial court had been rendered. It is noteworthy to state that parties have the duty to follow up on the progress of their cases. That notwithstanding the Applicant herein has submitted that it only became aware of the ruling after it had been served with the Warrants of Sale of Moveable property issued on 4th August, 2021 and the Proclamation Notice dated 13th August, 2021. The Applicant however has not rendered any explanation as to why it took more than two months to file this instant application after learning that the ruling in the trial Court had been rendered.
34. It is incumbent upon the Applicant to fully explain the circumstances leading to the inordinate delay in filing the intended appeal. It is not enough to allege that it was not aware that the ruling had been rendered. Such an indolent party cannot expect the court to exercise its discretion in his favour. In the result, the court is satisfied that the Applicant has not demonstrated “good and sufficient cause” for not filing the appeal in time to justify the prayer for extension of time to appeal.
35. Should the Applicants be granted stay pending appeal? The Applicant argued that the intended appeal raises arguable points of law and will be rendered nugatory in the event orders of stay are not granted.
36. It is evident on a plain reading of Order 42 Rule 6(1) of the *Civil Procedure Rules* that an order to stay execution pending appeal presupposes the existence of an appeal. Since the leave to file appeal out of time has been denied, it follows that there is no appeal, and therefore a stay will serve no purpose.
37. In view of the foregoing, I find and hold that the Applicant’s application dated 27th October, 2021 is not meritorious and I accordingly dismiss it with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 27TH OF JUNE 2022

E. K. OGOLA

JUDGE

