



REPUBLIC OF KENYA



**Waithera v Kalakacha & another (Miscellaneous Civil Application
484 of 2019) [2022] KEHC 10758 (KLR) (Civ) (24 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10758 (KLR)

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

CIVIL

MISCELLANEOUS CIVIL APPLICATION 484 OF 2019

CW MEOLI, J

JUNE 24, 2022

BETWEEN

BETH WAITHERA APPLICANT

AND

FRED AMUTSA KALAKACHA 1ST RESPONDENT

JOSEPH THINJI 2ND RESPONDENT

RULING

1. For determination is the motion dated July 5, 2019 by Beth Waithera (hereafter the Applicant) seeking among inter alia that the court be pleased to grant stay of execution of the decree and judgment delivered on April 23, 2019 in Nairobi Milimani CMCC No. 5220 of 2012 pending hearing and determination of the appeal and leave to file an appeal out of time as against the said judgment. The motion is expressed to be brought under sections 79G & 95 of the *Civil Procedure Act* (CPA) and order 42 rule 6 of the *Civil Procedure Rules* (CPR) inter alia.
2. The grounds on the face of the motion are amplified in the supporting affidavit sworn by the applicant, who deposes that she was aggrieved with the judgment delivered on April 23, 2019 in favour of Fred Amutsa Kalakacha (hereafter the 1st Respondent) and had instructed counsel on record to lodge an appeal; that counsel lodged a notice of appeal as she unsuccessfully sought to obtain copies of the typed judgment and proceedings in time; that the intended appeal is meritorious and has a high chance of success and the instant motion has been brought without undue delay. She further deposed that the 1st Respondent has threatened to execute the decree and she is apprehensive that if stay of execution is not granted, and the appeal succeeds she will not be able to recover the sums paid out to the said Respondent. That no party will be prejudiced in any way by the grant of leave to appeal out of time;



that as the leave sought is in the interest of justice and will facilitate the final and effectual determination of the issues between the parties.

3. The 1st Respondent opposed the motion through a replying affidavit. He deposed that the motion is a sham and a delaying tactic aimed at denying him the enjoyment of the fruits of successful litigation. He attacks the grounds of the motion by asserting that the Applicant's advocate's letter requesting for handwritten proceedings was delivered to the court's registry on the June 7, 2019; that the Applicant has not offered security for the performance of the decree; and that the lower court suit was filed way back in 2012 and if the motion herein is allowed, he will be greatly prejudiced by further delay after waiting for over nine (9) years. He urged the court if inclined to grant the motion to require that half of the decretal sum be paid to him and the balance deposited in an interest earning account as a sign of good faith..
4. By way of a supplementary affidavit dated January 17, 2020 the Applicant swore that that counsel on record applied for certified proceedings and judgment through a letter dated May 7, 2019 by which date the time for lodging the appeal had not lapsed and that the court's failure to provide the proceedings in good time led to delay in filing the appeal; that she had proceeded to apply for handwritten proceedings through the letter dated June 7, 2019. That the 1st respondent has not adduced evidence of his income to rebut the assertion that he will be unable to refund the decretal sum if paid out. In conclusion she contends that since judgment has been entered against her and the 2nd respondent, an order for deposit and remittance of the decretal sum solely by the Applicant would violate her constitutional rights under article 27 of *the Constitution* of Kenya.
5. The motion was canvassed by way of written submissions. Submitting on the prayer for stay of execution, counsel for the Applicant stated that the intended appeal is arguable. Citing the cases of National Industrial Credit Bank and Amal Hauliers Limited v Abdulnasir Abukar Hassan [2017] eKLR, counsel asserted that the apprehension concerning the 1st respondent's inability to refund the decretal sum has not been dislodged and that the intended appeal will be rendered nugatory if stay is not granted. Concerning delay counsel reiterated that the motion was filed without undue delay on July 5, 2019 after judgment was delivered on 23rd April. He reiterated the Applicant's willingness to provide security for the performance of the decree.
6. Counsel cited *Mwangi v Kenya Airways Ltd* [2003] KLR, among other decisions to support the prayer for leave to appeal out of time and submitted that the delay herein was not inordinate and was satisfactorily explained. Counsel further asserted the Applicant's constitutional right of appeal.
7. On his part, the Respondent's counsel viewed the intended appeal as lacking merits pointing out that the annexed purported memorandum of appeal does not seek to challenge the judgment delivered on April 23, 2019. Citing the provisions of section 6 & 9 of the *Oaths and Statutory Declarations Act* counsel contended that the annexures to the applicant's motion including the draft memorandum of appeal are neither marked with serial letter of identification nor sealed with the seal of a commissioner for oaths and are therefore not properly on record. Further, counsel asserted that the applicant is intent on causing delay of a matter that has been pending in court since 2012 and that the delay in filing the appeal is inexcusable. It was further argued that failure to serve the 2nd respondent with the instant motion portends a miscarriage of justice through denial to right to a fair hearing.
8. On the question of stay pending appeal, it was asserted that that he who alleges must prove and that it is not sufficient that the Applicant expresses apprehension concerning the 1st Respondent's financial means. The court was urged to reject the motion with costs.



9. The Court has considered the rival affidavit material and submissions made in respect of the motion. Before delving into the substance of the motion the court will address the objection raised by the 1st respondent regarding the annexures attached to the supporting affidavit deposited by Applicant. Referring to section 6 & 9 of the [Oaths and Statutory Declarations Act](#) the 1st Respondent’s counsel argued that the annexures to the applicant’s motion are not compliant and therefore not properly on record. A perusal of the said annexures reveals that they are properly marked and contain the seal of a commissioner for oaths. In the court opinion’s it is likely that the copy of the motion served upon the 1st Respondent’s counsel, contained unmarked and unsealed annexures. However, having confirmed that the annexures before the court are compliant, the court determines that the service of unsealed and unmarked annexures on the 1st respondent’s counsel has not been demonstrated to have occasioned any prejudice to the 1st respondent and nothing turns on that objection.
10. Moving on to the prayer seeking stay of execution pending the intended appeal, it is evident on a plain reading of order 42 rule 6(1) of the CPR that an order to stay execution pending appeal presupposes the existence of an appeal. The filing of an appeal is a condition precedent to the exercise of this court’s appellate jurisdiction under order 42 rule 6 (1) of the [Civil Procedure Rules](#). Although the provision does not expressly say so, this can be inferred from the rule. Further, an analogy can be drawn from order 42 rule 6 (4) of the [Civil Procedure Rules](#) which states that an appeal is deemed filed in the Court of Appeal when the notice of appeal has been given. Equally, order 42 rule 6 (6) of the [Civil Procedure Rules](#) states:
- “Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.” (Emphasis added).
11. It would seem therefore that the invocation of the jurisdiction of this court under order 42 rule 6 (1) or 6 (6) of the [Civil Procedure Rules](#) must be preceded by the filing of an appeal, or compliance with the procedure for filing an appeal, in this case a memorandum of appeal (See order 42 rule 1 of the [Civil Procedure Rules](#)). Until the memorandum of appeal is filed, the court may be acting in vacuo by considering the applicants prayer for stay of execution pending a non-existent appeal. The Court of Appeal in [Abubaker Mohamed Al-Amin v Firdaus Siwa Somo](#) [2018] eKLR while citing with approval the decision of the High Court in [Rosalindi Wanjiku Macharia vs. James Kiingati Kimani \(Suing as the Legal Representative of the Estate of Martin Muiruri \(Deceased\)\)](#) [2017] eKLR concurred and adopted the foregoing reasoning.
12. Earlier, the Court of Appeal in the case of [Equity Bank -Vs- Westlink MBO Limited](#) [2013] eKLR while commenting on rule 5 (2) (b) of the [Court of Appeal Rules](#), whose wording was then substantially similar to order 42 rule 6 (1) of the [Civil Procedure Rules](#), and on order 42 rule 6 (6) of [Civil Procedure Rules](#), left no room for doubt that an application for stay of execution pending appeal could only be entertained before it after the filing of an appeal or a Notice of Intended Appeal. (See also [Balozi Housing Co-operative Society Limited -Vs- Captain Francis E. K. Hinga](#) [2012] eKLR). Order 42 Rule 1;
- “(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
- (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.”



13. There is no provision for the filing of a notice of intended appeal in the High Court from a decision of the subordinate court. Order 42 rule 1 of the CPR provides that an appeal to the High Court shall be in the form of a memorandum of appeal. In this case, an appeal is yet to be filed and there is therefore no basis upon which this court could exercise its appellate jurisdiction under the said provision in a miscellaneous matter. If the Applicant desired to seek an order to stay execution alongside the prayer for the late admission of their appeal, they ought to have first filed the memorandum of appeal in a proper appeal and the relevant application. In my considered view, the words that “an appeal may be admitted out of time” in section 79G, appears to admit both retrospective and prospective applications. So that leave under the section may be sought before or after a memorandum of appeal is filed. However, it may be more prudent for a party who also seeks stay of execution in the same motion for leave to appeal out of time to have filed the memorandum of appeal in advance.
14. In the circumstances, the prayer seeking a stay of execution of the judgment and decree in Nairobi Milimani CMCC No. 5220 of 2012 pending hearing and determination of the intended appeal has no legal anchor and is consequently disallowed.
15. Regarding the prayer seeking leave to appeal out of time, the power of the court to enlarge time for filing an appeal out of time is expressly donated by section 79G, as well as generally, by section 95 of the [Civil Procedure Act](#). The deponent of the affidavits in support of the motion asserts that delay in filing the appeal and motion was occasioned by the fact that there was some delay in accessing the typed copy of the judgment and proceedings. The 1st respondent opposed the above assertions by submitting that the letter requesting for handwritten proceedings was delivered at the court’s registry on the 7th June 2019 and the Applicant failed to offer any reason why there was a delay in doing so.
16. 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.”
17. The principles governing leave to appeal out of time are settled. The successful applicant must demonstrate “good and sufficient cause” for not filing the appeal in time. In [Thuita Mwangi v Kenya Airways](#) [2003] e KLR, the Court of Appeal while considering rule 4 of the Court of Appeal Rules which was in pari materia with section 79G of the [Civil Procedure Act](#), reiterated its decision in [Mutiso v Mwangi](#) [1997] KLR 630 as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”
18. 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 his 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....”

See also *Patrick Wanyonyi Khaemba V Teachers Service Commission & 2 Others* [2019] eKLR.

19. The Supreme Court in the case of *Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that:

“(T)he underlying principles a court should consider in exercise of such discretion include;

1. Extension of time is not a right of any 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 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 Respondent if the extension is granted;
6. Whether the application has been brought without undue delay.
7.”

See also *County Executive of Kisumu v County Government of Kisumu & 8 Others* [2017] eKLR.

20. Admittedly, the judgment of the lower court was delivered on April 23, 2019 and a request for proceedings made about 37 days later. It is not possible to tell when the applicant’s counsel eventually obtained a copy of the judgment and proceedings. The explanation given by the Applicant’s counsel that she filed a notice of appeal within the statutory timeline but not the memorandum of appeal appears curious given that the procedure for filing appeals in this court is by way of a memorandum of appeal, which the counsel could have filed at the same time. Nevertheless, the present motion was presented to this court on 5th July 2019 and the delay is not inordinate. It would be onerous to shut out a party from his undoubted right of appeal on account of the failures and or mistakes of his counsel that do not appear deliberate, especially where as in this matter, the Respondent will not suffer prejudice that cannot be compensated through costs.



21. The court has perused the memorandum of appeal and does not think it is one without merit. All that is required is a demonstration that the appeal is worthy of consideration by the court, and not necessarily that it will succeed. Further, based on the language employed in *Mutiso v Mwangi* (supra) the requirement touching on the viability of the intended appeal, is neither mandatory nor stringently applied in an application of this nature. The Court of Appeal in *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited* (2020) eKLR stated that such appeal:

“... may not succeed as in law an arguable appeal need not succeed so long as it raises a bona fide issue for determination by the Court.”

22. In *Vishva*'s case, the court emphasized the right of appeal in the following terms:

“Turning to the request to allow the applicant to exercise his now undoubted constitutionally underpinned right of appeal, the position is... crystallized in the case of *Richard Ncharpi Leiyagu vs. IEBC & 2 Others* (supra); *Mbaki & Others vs. Macharia & Another* [2005] 2EA 206; and the Tanzanian case of *Abbas Sherally & Another vs. Abdul Fazaiboy*, Civil Application No. 33 of 2003; for the holding inter alia that:

- (i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;
- (ii) the right to be heard is a valued right; and
- (iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice;...”

23. In the circumstances of this case, the court is persuaded that in order to facilitate the Applicants undoubted right of appeal, the prayer for leave to appeal out of time ought to be granted. Consequently, the court will grant leave to the Applicant to file an appeal within 14 days. In the meantime, there will be an order to maintain the status quo for the same period. The costs of the motion are awarded to the 1st Respondent in any event.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 24TH DAY OF JUNE 2022.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Ms. Moraa

For the 1st Respondent: Mr. Odhiambo

C/A: Carol

