



**KCB Bank Kenya Limited v Yamin (Miscellaneous Civil Application  
E002 of 2022) [2022] KEHC 10943 (KLR) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10943 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
MISCELLANEOUS CIVIL APPLICATION E002 OF 2022**

**RPV WENDOH, J**

**JUNE 23, 2022**

**BETWEEN**

**KCB BANK KENYA LIMITED ..... APPLICANT**

**AND**

**MOHAMMED YAMIN ..... RESPONDENT**

**RULING**

1. KCB Bank Kenya Limited (the applicant) through the firm of Watako Kirui Advocates, filed the Notice of Motion Application dated 24/1/2022 seeking the following orders: -
  1. Spent.
  2. That the court be pleased to grant an order of stay of execution of the ruling and/or order of the Hon. M. Obiero (SPM) made on 17/12/2021 in Migori CMCC No. E079 of 2021 and/or further proceedings pending the hearing and determination of this application.
  3. That the court be pleased to grant the applicant leave to file the appeal out of time against the whole ruling of an order of stay of execution of the ruling of Hon. M. Obiero (SPM) made on 17/12/2021 in Migori CMCC No. E079 of 2021.
  4. That upon granting prayer 3 above, the court be pleased to grant an order of stay of execution of the ruling and/or order made on 17/12/2021 in Migori CMCC No. E079 of 2021 and/or further proceedings pending the hearing and determination of this appeal.
  5. Costs be provided for.
2. The grounds upon which the application is premised are in the body of the application and the supporting affidavit of the applicant sworn by Keziah Auma an Advocate of the High Court of Kenya dated 24/1/2022. The applicant deponed that the respondent filed a suit and an application seeking injunctive orders against the applicant; that the application was canvassed by way of written



submissions and a ruling was delivered on 17/12/2021; that on the date of the ruling, Counsel holding her brief communicated the application was allowed but did not state the terms thereof; that the respondent served the applicant with a further application on 21/1/2022 seeking to enforce the orders issued on 17/12/2021.

3. The application was opposed. The respondent through the firm of Sam Onyango & Co. Advocates, filed a replying affidavit which has been erroneously titled as a supporting affidavit dated 17/2/2022. The affidavit is sworn by the respondent. He contended that the ruling by the trial Magistrate on 17/12/2021 was delivered on clear and unambiguous terms; that the applicant was represented by Counsel on the date of the ruling and there is nothing which prevented it from filing an appeal forthwith; that the applicant has not demonstrated that it applied for a copy of the ruling and in any case, the same is not a prerequisite for filing an appeal hence the applicant has no excuse for the delay in filing the intended appeal; that he has complied with the court ruling by making the required payments; that the subject motor vehicle has been released to him hence the application for stay is overtaken by events.
4. Further, the respondent stated that he is aware of his obligations to continue servicing the loan and he will continue to do so; that the arrears as set out on the annexed loan account statement are not accurate and grossly exaggerated; that the applicant is not deserving of the orders having previously disobeyed court orders by refusing to release the suit motor vehicle until the police intervened; that the delay is inexcusable and the applicant has not satisfactorily explained the delay.
5. The applicant filed its submissions dated 25/3/2022 on 26/3/2022. The applicant submitted that Section 75G and 95 of the *Civil Procedure Act*, Cap 21, provides for filing of appeals from the subordinate court and for enlargement of time respectively. It was submitted that pursuant to Section 79G of the *Civil Procedure Act*, an appeal can be admitted out of time if it is demonstrated by the applicant that there is sufficient cause for not filing the appeal in time; that in order to appeal, it was incumbent upon the applicant to read the entire ruling of the trial court which was supplied to it on 21/1/2022 approximately 34 days from the date it was rendered; that the instant application was brought 2 days from the date of the receipt of the ruling. To buttress this point, the applicant relied on the Court of Appeal case *BML v VM* (2020) eKLR.
6. On whether an order of stay of execution of the ruling and/or order made on 17/12/2021 can issue, the applicant asked this court to consider Order 42 Rule 6 of the *Civil Procedure Rules*, 2010. The applicant submitted that for grant of stay pending appeal to issue, the court has to be convinced that the applicant has an arguable appeal which risks to be rendered nugatory if stay is not granted; that the appeal is arguable and raises triable issues for reasons that the trial court arrived at the conclusion that no prima facie case had been demonstrated, lost track in its ruling by considering extraneous matters, and it failed to consider the admission of indebtedness; that the applicant had procedurally exercised its statutory power of sale and thus the trial court's decision was erroneous.
7. It was also submitted that the trial court re-invented new terms to the contractual relationship which the parties had bound themselves to; that there are triable issues that are being raised in the intended appeal which should be heard first before the determination of the main suit. If the main suit is allowed to proceed, the appeal will be rendered a mere academic exercise.
8. The respondent had not filed submissions at the time of writing this ruling.

I have considered the application, the replying affidavit and the applicant's submissions. The issues arising therefrom are:-

- a. Whether there was unreasonable delay in bringing this application.



- b. Whether leave should be granted to file appeal out of time.
  - c. Whether the applicant has an arguable appeal.
  - d. Whether stay of execution of the ruling and/or order of 17/12/2021 should issue.  
Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules makes provision for stay pending appeal. The four (4) salient ingredients that the applicant should establish for orders of stay of execution to issue are:-
    - i. The applicant will suffer substantial loss.
    - ii. That the application has been filed without unreasonable delay.
    - iii. The applicant is willing to furnish security for due performance of the decree.
    - iv. The applicant has an arguable appeal.
9. The first and second issues will be determined concurrently. Section 79G of the *Civil Procedure Act*, provides that the time for filing an appeal from the Subordinate court to the High Court is 30 days. The same provision gives the High court discretion to enlarge time for a party to file an appeal out time if there are good and sufficient reasons.
10. In determining whether leave to appeal out of time should be granted, I am guided by the binding decision of the Court of Appeal in *Edith Gichungu Koine Vs Stephen Njagi Thoitbi* (2014) eKLR Odek JA rendered himself as thus:
- “Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”
11. On the period of delay, the impugned ruling was delivered on 17/12/2021. The instant application was filed on 24/1/2022. This is a delay of approximately 36 days. The applicant’s reason for the delay was that there was a delay in the issuance of the typed copy of the ruling as it was the only way which they could have drafted their grounds of appeal.
12. Going by the applicant’s explanation, I find the same plausible. There was no other way in which it could have come up with the necessary grounds of appeal if it did not read and appreciate the reasoning of the trial Magistrate.
13. The delay of 36 days from the time when the ruling was delivered is not inordinate. In any event, this was December, just before the Christmas season which has several holidays and work slows down in court to some extent with many staff going on leave. That could be what occasioned the delay in getting a typed copy of the ruling. I also find that there are proper reasons advanced by the applicant to warrant enlargement of time for appeal.
14. Whether the applicant has an arguable appeal: I have considered the ruling being appealed against, the trial Magistrate granted orders in favour of the respondent, for the applicant to release motor vehicle KCF 400T upon payment of a sum total of Kshs. 400,000/= towards settlement of loan arrears and an injunction restraining the applicant from attaching the respondent’s milling machine and any other movable property pending the hearing and determination of the suit. The court was confirming that the respondent is in arrears.



15. On the annexed grounds of appeal, the applicant faulted the trial magistrate for finding that the respondent had paid 70% of the loan owed therefore deserving of an order of temporary injunction. The applicant also faulted the trial magistrate for finding that the arrears amounted to Kshs. 400,000/= while the actual amount is Kshs. 3,231,794.40/= which it sought to recover through exercising its statutory power of sale. I find that these grounds are arguable.
16. On whether stay of execution of the ruling and/or order of 17/12/2021 should issue. The respondent deponed that the orders for stay have been overtaken by events since the subject motor vehicle has been released to him. This fact has not been controverted by the applicant. I find that there is nothing to stay.
17. The respondent has admitted that he is aware of his loan obligations to the applicant. At this point, the court cannot delve into determining the arrears which are owed as it would be going to the merits and demerits of an appeal which is yet to be filed.

In the end, the following orders do issue:-

1. The applicant is hereby granted leave to file their appeal out of time;
2. The appeal be filed within seven (7) days hereof;
3. The applicant to file and serve Records of Appeal within forty five (45) days.
4. Costs to abide the appeal.
5. Mention on before Deputy Registrar to confirm compliance on 4/8/2022.

**DATED, DELIVERED AND SIGNED AT MIGORI THIS 23RD DAY OF JUNE, 2022**

**R. WENDOH**

**JUDGE**

**Ruling delivered in the presence of:-**

Mr. Ndolo holding brief Ms. Oduor for the Applicant.

Mr. Odero holding S. Onyango for the Respondent.

Nyauke Court Assistant.

