



**Nkoumondo v Mwaniki Gachoka & Co Advocates (Miscellaneous Application
113 of 2017) [2022] KEHC 11056 (KLR) (25 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11056 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
MISCELLANEOUS APPLICATION 113 OF 2017**

**JK SERGON, J
JULY 25, 2022**

BETWEEN

ARISTIDE BRILLANT NKOUMONDO APPLICANT

AND

MWANIKI GACHOKA & CO ADVOCATES RESPONDENT

RULING

1. The subject matter of this ruling is the Notice of Motion dated 13th January, 2022 taken out by the applicant/respondent herein, in which it sought for an order for stay of execution of the ruling delivered on 30th December, 2021 and all consequent orders, pending the hearing and determination of the appeal; and a further order for leave to lodge the main appeal out of time against the ruling delivered on 30th December, 2021.
2. The Motion is supported by the grounds set out on its body and the facts stated in the affidavit of Aristide Brillant Nkoumondo, the respondent/applicant.
3. In opposing the said Motion, the respondent filed the replying affidavit of advocate Paul Mwaniki Gachoka, to which Aristide Brillant Nkoumondo, rejoined with his further affidavit sworn on 27th June, 2022.
4. When the Motion came up for interparties hearing before this court, the parties filed and exchanged written submissions.
5. I have considered the grounds laid out on the body of the Motion; the facts deponed in the affidavits supporting and opposing the Motion; and the rival submissions and authorities cited therein.
6. It is evident that the Motion is seeking twin orders, the first being for the enlargement of time to appeal and for leave to appeal out of time against the impugned ruling of 30th April, 2020, which I shall now address.



7. Section 95 of the *Civil Procedure Act* and Order 50, Rule 5 of the *Civil Procedure Rules*, the courts have power to enlarge the time required for the performance of any act under the Rules even where such time has expired.
8. The guiding principles to be satisfied in an application seeking leave of the court to file an appeal out of time/for the extension of time were the laid out in the case of *Thuita Mwangi v Kenya Airways Limited* [2003] eKLR and were reaffirmed in the case of *Growth Africa (K) Limited & another v Charles Muange Milu* [2019] eKLR.
9. Under the first condition touching on length of delay, from my perusal of a copy of the impugned ruling which was annexed to the Motion, it is not in dispute that the said ruling was delivered on 30th December, 2021 which is 14 days prior to the filing of the Motion. In my mind, while there has been no delay in bringing the Motion.
10. As relates to the condition on whether or not an arguable appeal exists, it is the respondents' assertion that the applicant has not attached the draft memorandum of Appeal showing that the appeal is arguable and the same will be rendered nugatory in the event the instant application is dismissed. In reply, the applicant in its further affidavit attached the draft Memorandum and stated that he has a strong appeal with a high chance of success which ought to be ventilated in the Court of Appeal.
11. Upon my perusal of the grounds of appeal raised in the draft memorandum of appeal annexed to the Motion, I find that the appeal is primarily against the decision of the this court to allowing the certificate of taxation dated 7th October 2020 in favour of the respondent for the sum of Kshs.23,046,039/=. The applicant is equally arguing that certificate of costs dated 6th February 2017 was based on a clear arithmetic error and the certificate of taxation dated 14th May 2019 was not based on merit. Taking these factors into account, I am satisfied that the applicant has established arguable points of law and fact in its draft memorandum of appeal.
12. Under the final principle on prejudice, neither the applicant nor the respondent has addressed this issue directly in any of their affidavits or submissions filed on their behalf.
13. Upon my perusal of the record, it is apparent that the ruling was in favour of the respondent herein and against the applicant. It therefore follows that the respondent is lawfully entitled to enjoy the fruits of his judgment. Suffice it to say that it would not be in the interest of justice to lock out the applicant who is aggrieved by the ruling of this court. I therefore find it reasonable for the applicant to be given the opportunity of challenging the ruling on the said judgment in favour of the respondent in the sum of Kshs.23,046,039/= and the dismissal of the respondent's reference dated 30th November 2020.
14. I associate myself with the finding by the court in the case of *Blue Nile E. A. Ltd v Lydia Gode Yusuf & another* [2018] eKLR cited in the applicant's submissions, where the court held thus:

“The right to be heard is a Constitutional right provided for under Article 48 of the Constitution of Kenya, and in all circumstances it will be in the interest of all parties to hear a matter on merit. The only consideration the Court ought to take into account is to balance the rights of both parties. I am therefore inclined to grant the Applicants an opportunity to file their Appeal out of time so that the same can be heard on merit.”
15. The second prayer is for stay of execution of the decree pending appeal, for which the guiding provision is Order 42, Rule 6(2) of the *Civil Procedure Rules* which sets out the conditions to be satisfied for such an order to be granted.



16. The first condition being that the application must have been brought without unreasonable delay has already been addressed hereinabove.
17. The applicants on their part are apprehensive that if this court does not intervene urgently, there is a real risk and likelihood that execution shall issue and that he does not have money since he already overpaid the advocate and that the respondent will not be able to reimburse the money should the appeal be successful.
18. The applicant relied on the case of *Equity Bank Ltd v Taiga Adams Company Ltd* (2006)eKLR and also *Elena D. Korir v Kenyatta University* (2012) eKLR, Justice Nzioki Wa Makau, held that

“The High Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.

An addition the issue of whether the intended appeal will be rendered nugatory is critical as was held in the case of *Hassan Guyo Wakalo v Straman East Africa Ltd* [2013] eKLR as follows:-

“In addition, the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other”

19. On the other hand, the respondent submitted that they are a reputable company with a strong financial position and assets, and that they have the ability to refund or reimburse the decretal sum if the decision is reversed in the Court of Appeal. That the applicant does not demonstrate or even establish what substantial loss he stands to suffer should the application be denied.
20. The respondent further submitted that the only contention brought by the applicant on this limb is that the respondent holds a title deed belonging to the applicant as lien on account of the disputed costs and that there is a high chance of execution against the said titles should the stay orders not be granted, and that no evidence has been provided to substantiate the allegations as there is nothing to suggest impending execution.
21. On this argument, the respondent relied on the case of *Republic v Lucas M. Maitha Chairman, Betting Control and Licensing Board and 4 Others Ex parte Interactive Gaming and Lotteries Limited* Misc. Civil Application No.370 of 2010 advocates lien is passive and possessory right of enforcing a demand and does not have a character of encumbrance or equitable charge. Therefore, advocates lien does not give an advocate an opportunity to recover his fees from the property as a security but only to hold the same. The respondent cannot therefore execute the property as alleged or at all.
22. The courts have time and time again discussed the question on who has the burden of proof on the issue of refund of the decretal sum. I am both guided and bound by the Court of Appeal’s analysis in



the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR where it held thus:

“Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...”

23. In the absence of anything to indicate or ascertain the respondent’s financial capacity therefore, I am satisfied that the applicant has reasonably demonstrated the manner in which it stands to suffer substantial loss.

24. In respect to the final condition on the provision of security for the due performance of such decree or order, the applicant on the one hand indicates the respondent presently hold the title to Nairobi / Block 94/228 which is situated in Nyari estate and that the title is held as lien in respect of the same disputed fees and has held the title for over 7 years offers sufficient security. They rely on the case of *Kiwatt Ltd & Another v Customs Services Department* citing Halsbury Laws of England 4th Edition Vol 28 at page 227 that

“A general lien entitles a person in possession of the chattels to retain them until all claims or accounts of the person in possession against the owner of the Chattel are satisfied”

25. On the other hand, the respondent submitted that the applicant has not proposed or shown any interest to provide security for the due performance of the certificate of costs and that the applicant is neither a resident nor a Kenyan citizen. The respondent therefore urges the court to safeguard the interests of the respondent as it may be impossible to successfully execute against the applicant.

26. In the end, the Motion dated 13th January, 2022 is found to be meritorious and it is allowed, therefore giving rise to a grant of the following orders:

- i. The applicant is granted leave to file an appeal out of time within 14 days.
- ii. There shall be a stay of execution of the ruling delivered on 30th December, 2021 on the condition that the applicant deposits the entire decretal sum in an interest earning account to be held in the joint names of the parties’ advocates and or firm of advocates within 45 days from today’s date, failing which the order for stay shall automatically lapse and the respondent will be at liberty to execute the decree.
- iii. Costs of the application to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 25TH DAY OF JULY, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Respondent/Applicant

..... for the Applicant/Respondent

