



**Jacaranda Bodaboda Operators & another v Nyasero (Miscellaneous Application E459 of 2022) [2022] KEHC 13030 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13030 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
MISCELLANEOUS APPLICATION E459 OF 2022**

**JK SERGON, J**

**SEPTEMBER 23, 2022**

**BETWEEN**

**JACARANDA BODABODA OPERATORS ..... 1<sup>ST</sup> APPLICANT**

**GEOFFREY KIRADA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**FRANCIS PATRIS NYASERO ..... RESPONDENT**

**RULING**

1. The subject matter of this ruling is the Notice of Motion dated July 20, 2022 taken out by the applicants herein, in which they sought for an order for stay of execution of the decree in Milimani CMCC No.E1304 of 2021, and an order of stay of proceedings in the declaratory suit Milimani E3502 of 2022 instituted by the respondent, 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 May 27, 2022 in Milimani CMCC No.1304 of 2021.
2. The Motion is supported by the grounds presented on its face and the facts stated in the affidavit of the Legal officer at Madison Insurance the applicants' insurer, Moses Barasa.
3. To resist the Motion, the respondent Francis P Nyasero swore a replying affidavit on August 2, 2022.
4. The instant Motion was canvassed through oral arguments whereby the parties' respective advocates chose to rely on the relevant documents filed.
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 reiterating oral submissions.
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 judgment of May 27, 2022, which I shall now address.



7. Section 79G of the *Civil Procedure Act* stipulates that an appeal against the decision of a subordinate court shall be lodged within 30 days from the date of the decree or the order being appealed against. The provision further stipulates that an appeal can be admitted out of time where sufficient cause has been shown.
8. Moreover, under the provisions of 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.
9. In the case of *Thuita Mwangi v Kenya Airways Ltd*[2003] eKLR the Court of Appeal illustrated the conditions to be met in deciding whether to extend the period for filing an appeal out of time and which I shall address hereunder.
10. Under the first condition touching on length of delay, while it is apparent from the record that no copy of the impugned judgment was availed to this court, the parties are in agreement that the impugned judgment was delivered on May 27, 2022 which is close to two (2) months prior to the filing of the Motion. In my mind, while there has clearly been a delay in filing the Motion, I do not find the delay to be inordinate.
11. Concerning the reasons for the delay, the 2<sup>nd</sup> applicant explained that the delay was occasioned by the inadvertent mistake on the part of their insurer who delayed in issuing instructions and misplacement of their file which was traced on July 14, 2022 when this instant application was promptly prepared. The respondent argued that the reason for delay in filing the appeal is untrue, unfathomable and amounts to misleading the court.
12. Upon considering the explanation given by the applicants, I find the same to be reasonable in the circumstances.
13. As relates to the condition on whether or not an arguable appeal exists, it is the respondent's assertion that the appeal is not arguable for it does not disclose any reasonable ground of appeal.
14. Upon my perusal of the grounds of appeal raised in the draft memorandum of appeal annexed to the Motion, I note that the appeal is challenging the finding of the trial court on quantum. I am therefore satisfied that the applicants have demonstrated arguable points of law and fact in their appeal.
15. In addressing the final condition on prejudice, the applicants assert that the respondent does not stand to be prejudiced that cannot be adequately compensated by way of costs.
16. Upon my perusal of the record, it is apparent that the judgment was in favour of the respondent herein and against the applicants. 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 applicants who is aggrieved by the judgment of the trial court on damages. I therefore find it reasonable for the applicants to be given the opportunity of challenging the subordinate court's assessment on damages on appeal.
17. 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.
18. The first condition being that the application must have been brought without unreasonable delay has already been addressed hereinabove.
19. The second condition touches on substantial loss to be suffered by the applicants.



20. The applicants state that the respondent has commenced execution by filing a declaratory suit against their insurer and if stay of execution orders are not granted, the intended appeal will be rendered nugatory. The respondent on the other hand avers that the applicants approached the court with unclean hands as the instant application is only meant to delay realization of fruits of a successful litigation.
21. In the Court of Appeal in the case of *Butt v Rent Restriction Tribunal* [1979] eKLR when it held that in considering an application for a stay of execution, the courts ought to exercise their discretion in a manner that will not render the appeal in question nugatory, if successful.
22. the case of *Masisi Mwita v Damaris Wanjiku Njeri* [2016] eKLR in which the court reasoned that:
- “The corner stone of the jurisdiction of the court under Order 42 of the *Civil Procedure Rules* is that substantial loss would result to the applicant unless a stay of execution is granted... The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal.”
23. 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...”
24. 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.
25. In respect to the final condition on the provision of security for the due performance of such decree or order, the applicants on the one hand indicate their readiness and willingness to issue bank guarantee with respect to the entire decretal sum. On the other hand, the respondent is of the view that should an order for a stay of execution be granted, then the applicants should be ordered to deposit the decretal sum in court as a condition precedent.
26. It is clear that the other issue now pending for determination is whether or not to grant a stay of proceedings in declaratory suit Milimani E3502 of 2022 pending the appeal.
27. The granting of a stay of proceedings is purely a matter of judicial discretion. The principles surrounding the granting of an order for stay of proceedings were aptly discussed by the court in the case of *William Kamunge & 2 others v Muriuki Mbithi* [2016] eKLR:
- “...it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”
28. The first principle being that the application must have been brought without unreasonable delay has already been addressed hereinabove.



29. The second principle concerns itself with whether the applicants have an arguable appeal with reasonable chances of success. I do note that the appeal is challenging the finding of the trial court on quantum. I am therefore satisfied that the applicants have demonstrated arguable points of law and fact in their appeal.
30. In my view, I am satisfied that the applicants have demonstrated that the appeal raises prima facie arguable points of law and fact and that if an order for a stay of proceedings is denied and the suit proceeds for hearing, there is a likelihood that the appeal will be rendered nugatory.
31. The third principle touches on the interest of justice vis-à-vis the subject of prejudice, the applicants state that the respondent does not stand to be prejudiced if the order for a stay of proceedings is granted.
32. Upon the foregoing circumstances hand in hand, I am satisfied that the appellants have reasonably shown that unless there is a stay of proceedings during the pendency of the appeal, there is a likelihood that prejudice and hardship will result to them.
33. Concerning the fourth principle on the expeditious disposal of cases vis-à-vis proper use of judicial time, upon considering the foregoing circumstances, I find that it would only be a practical and proper use of judicial time for the parties to first pursue the appeal before undertaking any further proceedings in the present suit.
34. In the end, the Motion dated July 20, 2022 is found to be meritorious and it is allowed, therefore giving rise to a grant of the following orders:
  - i. The applicants are granted leave of 14 days to file an appeal out of time.
  - ii. There shall be an order for stay of execution of the judgment and decree issued in Milimani CMCC No. E1304 of 2021 pending the hearing and determination of the intended appeal on the condition that the applicants deposit the entire decretal sum in an interest earning account in the joint names of the advocates or firms of advocates within 45 days from the date of this ruling in default of which the stay order shall lapse.
  - iii. There shall be a stay of all further proceedings in Milimani CMCC No. E3502 of 2022 until such time as the intended appeal is heard and determined.
  - iv. Costs of the Motion shall abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 23<sup>RD</sup> DAY OF SEPTEMBER, 2022.**

**J. K. SERGON**

**JUDGE**

**In the presence of:**

.....for the 1<sup>st</sup> Applicant

.....for the 2<sup>nd</sup> Applicant

.....for the 1<sup>st</sup> Respondent

