



Muthoki Brothers Company Limited v Masanga (Environment and Land Appeal E108 of 2022) [2023] KEELC 18498 (KLR) (11 May 2023) (Ruling)

Neutral citation: [2023] KEELC 18498 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E108 OF 2022
OA ANGOTE, J
MAY 11, 2023**

BETWEEN
MUTHOKI BROTHERS COMPANY LIMITED APPELLANT
AND
PAUL WASIUKI MASANGA RESPONDENT

RULING

Background

1. Before this Court for determination is the Appellant's/Applicant's Notice of Motion dated the 4th November, 2022 seeking the following reliefs;
 - i. That this Honourable Court be pleased to grant leave to the Applicant to file an Appeal out of time against the Judgement delivered by Hon G.M Gitonga on the 11th October, 2022 in CM ELC No 993 of 2020.
 - ii. That this Honourable Court be pleased to grant stay of execution of the Judgement entered and delivered herein against the Applicant on the 11th October, 2022 in ELC Case No 993 of 2020 pending the hearing and determination of this Application and the Intended Appeal.
 - iii. That upon grant of leave, the Notice of Appeal annexed hereto be deemed to have been duly filed.
 - iv. That the costs of this Application be provided for.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Dr Victor Lando, the Appellant's advocate, who deposed that his law firm had conduct of ELC 993 of 2020 at the Magistrates Court; that Judgement therein was delivered on 11th October, 2022 and that



on the aforesaid date, counsel holding his brief sought a 30-day stay of execution as well as a copy of the Judgement which orders were granted.

3. It was deponed by the Appellant advocate that shortly thereafter, on the 12th October 2022, he made a request to the registry via the e-filing system requesting for a copy of the Judgement; that on 14th October, 2022 he sent a representative to the registry to seek the same and that the representative was informed that the Judgement was yet to be typed and they should follow up a week later.
4. According to the Appellant's advocate, on 25th October, 2022, the firm wrote an email to the registry and were informed that the Judgement had still not been typed; that even as at 3rd November, 2022, the correspondence indicated that the Judgement was still not ready and that although the Judgement is not ready to date, they nonetheless filed the Notice of Appeal.
5. In response, the Respondent filed Grounds of Opposition in which it was averred that an appeal to the High Court is in the nature of a Memorandum of Appeal and not a Notice of Appeal which applies to an appeal from the High Court to the Court of Appeal and that subsequently, the prayer to have the Notice of Appeal admitted as an appeal lacks basis in law.
6. It was averred by the Respondent that having been present during the delivery of the Judgement, the Applicant should have been able to set out grounds in a Memorandum of Appeal and that an Appeal to this Court cannot be instituted by way of a Miscellaneous Application and neither can the orders sought be granted. Nonetheless, it was averred, the Applicant has not demonstrated that it will suffer substantial loss nor provided any proposal for furnishing of security.

Submissions

7. The Applicant filed submissions on 6th December, 2022. Counsel submitted that this Court can, pursuant to Section 79G of the *Civil Procedure Act*, grant leave for the filing of an Appeal out of time and that as expressed by the Court in *First American Bank of Kenya Ltd vs Gulab P Shah & 2 Others*, Milimani HCCC 2255 of 2000[2002] 1 EA, the considerations by the court to grant leave to file Appeal out of time include an explanation, if any, for the delay; the merits of the contemplated action; whether the matter is an arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice.
8. The others grounds, it was submitted, includes, whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the Applicant; that in the circumstances, the reason for the delay has been sufficiently explained and that as to arguability, the Respondent's objection to the Motion signals that there are issues to be argued.
9. The Respondent submitted that the Court in *Machira t/a Machira Advocates vs East African Standard*[2002]eKLR, stated that the suspension of the benefits of a successful party can only be done in exceptional circumstances; that the Court in *HGE vs SM*[2020]eKLR, laid out the pre-requisites for the grant of a stay of execution pending Appeal to include the establishment that substantial loss will result unless the application is made, timeous filing of the application and the furnishing of security and that in the present circumstances, the Applicant has not demonstrated any substantial loss.
10. Counsel for the Respondent submitted that as expressed by the Court in *Shell Ltd vs Kibiru and Another* [1986] KLR 410, it is important for the element of substantial loss to be substantiated and that further, the condition on security has yet to be satisfied. Reliance in this respect was placed on the cases of *Gianfranco Manenthi & Another vs Africa Merchant Assurance Co Limited* [2019] eKLR which succinctly set out the rationale for the furnishing of security.



11. According to Counsel, an appeal to the High Court from the Magistrates Court can only be instituted by way of a Memorandum of Appeal and not a Notice of Appeal as in this case. Reliance in this respect was placed on the case of Francis Likhabila vs Barclays Bank of Kenya[2020]eKLR.

Analysis & Determination

12. Having carefully considered the pleadings and rival submissions by the parties, the issues that arise for determination are:
 - i. Whether the Applicant has met the legal threshold for the grant of leave to appeal out of time?
 - ii. Whether the Applicant satisfied the grounds for the grant of a stay of execution pending Appeal?
 - iii. Whether the Applicant has met the legal threshold for the grant of leave to appeal out of time?
13. This Courts' jurisdiction to entertain appeals is found in Sections 13 (1) and 16A (2) of the [Environment and Land Court Act](#), 2015 as well as the [Civil Procedure Act](#).
14. Section 16A(1) provides as follows;

“ All appeals from subordinate courts and local tribunals shall be filed within a period of thirty days from the date of the decree or order appealed against in matters in respect of disputes falling within the jurisdiction set out in section 13(2) of the [Environment and Land Court Act](#), provided that in computing time within which the appeal is to be instituted, there shall be excluded such time that the subordinate court or tribunal may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.”
15. Whereas Section 16A (2) states;

“(2) An appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.”
16. Similarly, Section 79G of the [Civil Procedure Act](#) provides as follows:

“ Every appeal from the 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”
17. A proviso to Section 79(G) aforesaid provides;

“ 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 on time.”
18. Apart from the foregoing, Section 95 of the [Civil Procedure Act](#) and Order 50 Rule 6 of the Civil Procedure Rules grant this court discretion to enlarge time where a limited time has been fixed for doing any act or taking any proceedings.
19. The courts have had occasion to set out the principles guiding the extension of time within which to Appeal. The Supreme Court in the case of County Executive of Kisumu vs County Government of



Kisumu & Others [2017] eKLR relied on its earlier decision in the case of Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others Application No. 16 of 2014 [2014] eKLR where it stated as follows:

“the under-lying principles that a Court should consider in exercise of such discretion:

1. Extension of time is not a right of a 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 on 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 Respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

20. The Court will be guided by the foregoing authorities. To begin with, it is noted that the Respondent seeks to impugn the validity of these proceedings. He asserts that an Appeal to this Court can only be commenced by way of a Memorandum of Appeal and not a Notice of Appeal as has been done in this matter.
21. Indeed, there is no provision in the Civil Procedure Rules requiring the filing of a Notice of Appeal from a subordinate Court to this Court. Order 42 Rule 1 of the Civil Procedure Rules is clear that what is envisaged herein is a Memorandum of Appeal. The Court agrees with the Respondent that there is no “appeal” herein. What does this mean for the prayer for leave to file the Appeal out of time?
22. The Courts have had the opportunity to discuss whether or not the failure to file a Memorandum of Appeal in an application for extension of time is a fatal omission. The Court of Appeal in Abubaker Mohamed Al-Amin vs Firdaus Siwa Somo[2018]eKLR stated as follows;

“25. There appears to be two schools of thought with regard to the said proviso. The first is steadfast that the appeal sought to be admitted under the proviso should first have been filed out of time. This position is reflected in the persuasive decisions of the High Court to mention but a few, Gerald M’limbine vs. Joseph Kangangi [2009] eKLR, GK Associates Limited & another vs. National Bank of Kenya Limited [2017] eKLR and Amri Mchoro Mwamuri vs. Indian Ocean Beach Club [2018] eKLR.

26. The second holds a similar view as the appellant, that is, that the proviso makes room for both admission of appeals already filed out of time and allowing for an appeal to be filed out of time. These decisions include Martha Wambui vs. Irene Wanjiru Mwangi & another [2015] eKLR and Masoud M Y Noorani vs. General Tyre Sales Limited [2014] eKLR.



27. This calls for the interpretation of the said provision in order to discern the intention of the legislature.... Establishing the legislature’s intention entails looking at the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. See *Cusack vs. Harrow London Borough Council* [2013] 4 ALL ER 97.
28. In our view, the essence of the proviso to Section 79G and more specifically, the phrase ‘an appeal may be admitted out of time’ does not exclude an appeal that is yet to be filed. In *Charles Karanja Kiiru vs. Charles Githinji Muigwa* (supra) this Court was dealing with the issue of an appeal that had been filed out of time without leave of the Court. The learned Judge of the High Court was being cudgelled for granting leave and deeming as having been duly filed, an appeal that had in the first instance been filed without leave of the court.
29. This Court held that an appeal can be filed out of time and validated later by way of seeking and obtaining leave of court to admit it out of time. This decision seemed to validate the decision in *Martha Wambui vs. Irene Wanjiru Mwangi & another* (supra) and the other decisions in the second school of thought referred to above. Did the decision invalidate the position taken by the first school of thought? We answer this in the negative and add that this decision sanctioned both positions. We echo with approval the words of Aburili, J. in *Martha Wambui* (supra) where she stated: -

“In my view the use of the term ‘admitted’ connotes both the act of allowing an appeal to be filed out of time and also the act of allowing or permitting an appeal already filed to be admitted out of time...”

30. We hold the view that the above expression by Aburili, J. portrays the correct interpretation of the proviso to Section 79G of the *Civil Procedure Act*. Having arrived at that finding, it goes without saying that the learned Judge fell into error when she dismissed the prayer to file the appeal out of time on grounds that leave could not be granted before the appeal itself had been lodged.”

23. In the case of *Geoffrey Maina Njuguna vs Waweru Ndirangu* [2022] eKLR, the Court opined that;

“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.”

24. The Court agrees that Section 79G applies for both prospective and retrospective applications. Having settled the foregoing, has the Applicant sufficiently demonstrated why he should be allowed to file an Appeal out of time? It is not disputed that the Judgement, the subject of the Appeal, was delivered on 11th October, 2022. The current application was filed on 4th November, 2022. It is apparent that at the time of filing, the 30-day period had not yet lapsed. There was in essence no delay and no reason to seek extension of time.
25. However, the time has lapsed in the course of these proceedings. The Applicant has clearly demonstrated why he has yet to file the Appeal, the failure by the registry to avail the typed copy of the Judgement. For those reasons, the Court finds this to be a proper case to exercise its discretion and allow the Applicant time to file the intended Appeal out of time.



26. The law governing the grant of stay of execution pending appeal is Order 42 Rule 6 of the Civil Procedure Rules, the relevant part of which states as follows:

- “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- (2) No order for stay of execution shall be made under sub rule (1) unless—
- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

27. In the case of *Halai & Another vs Thornton & Turpin (1963) Ltd* [1990] eKLR the Court of Appeal held inter-alia:-

“The Superior 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 a stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”

28. It is evident from the above provisions and cited authority that the grant of orders of stay of execution are subject to the court’s discretion, the court being guided in this regard by the provisions of Order 42 rule 6 of the Civil procedure rules. The question of how the court should exercise this discretion was discussed by the Court of Appeal in *Butt vs Rent Restriction Tribunal* [1982] KLR 417 who stated thus;

- “1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.



4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
29. Before the Court can consider whether to grant stay of execution pending Appeal, there must of course be before it an Appeal. As discussed earlier, there is no Appeal before this Court, the Notice of Appeal herein being a document unknown in these proceedings. The Court of Appeal in *Abubaker Mohamed Al-Amin vs Firdaus Siwa Somo* (supra) 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:
- “... the learned Judge was correct in holding that in the absence of the appeal there was nothing upon which the stay orders sought under Order 42 of the Civil Procedure Rules could be anchored. Towards that end, we concur and adopt the observations made by Meoli, J. in *Rosalindi Wanjiku Macharia vs. James Kiingati Kimani* (Suing as the Legal Representative of the Estate of Martin Muiruri (Deceased)) [2017] eKLR where she stated;
- “In my view, even if the prayer to appeal out of time had been granted, and the said prayer for stay pleaded in the Motion, it would still have failed for the reason that the existence of an appeal is a condition precedent to the exercise of this court’s discretion under Order 42 Rule 6 (1) of the Civil Procedure Rules. ...
- It would seem 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 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 would be acting in vacuo by granting a stay of execution pending appeal.”
30. Similarly, the Court in *Waithera vs Kalakacha & Another* (Miscellaneous Civil Application 484 of 2019) [2022] KEHC 10758 (KLR) (Civ) (24 June 2022) (Ruling) stated thus;
- “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.”
31. As aforesaid, an Appeal is yet to be filed herein and there is therefore no basis upon which this Court can exercise its Appellate jurisdiction under the said provision, moreso in a miscellaneous matter.
32. In the end, the Application partly succeeds in the following manner;
- i. The Applicant be and is hereby granted leave to file an Appeal within 30 days of the date hereof.



ii. The costs of the application shall be in the Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 11TH DAY OF MAY, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Wandurwa holding brief for Mr. Lando for Applicant

No appearance for Respondent

Court Assistant - Tracy

