



**Board of Management Muslim Girls Secondary School v Njomo & 2 others (Miscellaneous Application E321 of 2022) [2022] KEHC 13415 (KLR) (Civ) (20 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13415 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
MISCELLANEOUS APPLICATION E321 OF 2022  
JN MULWA, J  
SEPTEMBER 20, 2022**

**BETWEEN**

**BOARD OF MANAGEMENT MUSLIM GIRLS SECONDARY  
SCHOOL ..... APPLICANT**

**AND**

**DENIS KASKON NJOMO ..... 1<sup>ST</sup> RESPONDENT  
KENYA COMMERCIAL BANK ..... 2<sup>ND</sup> RESPONDENT  
SIMON KIPKEMBOI TOO ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The applicant was the defendant in the Small Claims Court case No E613 of 2021. Judgment was delivered against it on the March 2, 2022. Being aggrieved by the said judgment, this application dated June 2, 2022 was filed seeking orders of stay of execution of the decree and for leave to file an appeal out of time. It is premised on the provisions of order 50 rule 6, 42 rule 6(1) and 51 rule 1 of the [Civil Procedure Rules](#).

The supporting affidavit was sworn by one, Jane Opati who describes herself as the principal of the school, Muslim Girls Secondary School and secretary of the Board of Management of the applicant.

2. The gist of the application is that the Attorney General took over the conduct of the case on behalf of the applicant but when judgment was eventually delivered, the office of the Attorney General did not inform the applicant, but only learnt about the judgment during a board meeting when the statutory period for filing an appeal had already lapsed, and being aggrieved by the judgment filed the application hereto, and annexed a draft memorandum of appeal; there having been a delay of slightly over three months.



3. In opposing the application, the respondents filed a replying affidavit raising several objections; among them that the applicant raises issues that were not canvassed during the hearing of the suit at the trial court, being that the suit was time barred; that the applicant participated in the trial and never raised such an issue, and that in any event, the respondents had been granted leave to file the suit out of time by the court by an order dated July 30, 2021. It is therefore argued that in the circumstances, the application is bad in law and misconceived.
4. The terms of the impugned judgment has not been disclosed to the court by either of the parties. The parties were directed to file their submissions within 14 days from July 6, 2022. As at August 30, 2022, none of the parties had filed, so the court proceeded to prepare the ruling without the benefit of the submissions.
5. On the June 7, 2022, an interim order of stay of execution was granted by the court in terms of prayer No 2. I have considered the affidavits in support and in objection to the application. The decision whether or not to grant an order of stay of execution, and extension of time to file an appeal out of time is at the court discretion that has however to be exercised judiciously.

The prayer for stay of execution is dependent on whether the prayer for leave to file appeal out of time will be granted; as such, an order cannot be granted in vacuum.

#### **Extension of time**

6. 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, and further that an appeal may be admitted out of time if the applicant satisfies the court that he has good and sufficient cause for not filing the appeal in time.

In the instant application, there is a delay period of three months. The reasons for the delay have been explained; being lack of information as to when the judgment was delivered. The respondents by their replying affidavit have not stated that they oppose the application due to the delay, but on a legal issue that the intended appeal exhibited by the draft memorandum of appeal raised a matter that was not canvassed or pleaded at the trial court.

7. The principles governing the grant of leave to file appeal out of time are well settled. An applicant to be successful must demonstrate good and sufficient cause for not filing the appeal within time. The court of appeal in *Mutiso v Mwangi* [1997] KLR 630 rendered itself thus:-

“it is now settled that the decision whether to extend time for appealing is essentially discretionary. It is also well settled that generally the matters which this court takes into account in deciding whether or not to grant an extension of time are; firstly, the length of the 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 if the application is granted”

8. The Supreme Court of Kenya reiterated the above position in the case of *Nicholas Kiptoo Korir v IEBC & 7 others* [2014] e KLR and emphasized that a party who seeks extension of time has the burden of laying a basis to the satisfaction of the court; and whether the delay has been explained to the satisfaction of the court and whether the application has been brought without unreasonable delay.

See also *Scania East Africa Ltd & 2 others v Patrick Mutisya Koko* [2022] e KLR.

There being no objection on account of the three months delay, and being minded that there is no measure as to what constitutes delay, and being each case ought to be considered on its own peculiar



circumstances, I am satisfied that the applicant has laid a basis for the grant of leave to appeal out of time. I have also considered the grounds of appeal stated in the draft memorandum of appeal. I am satisfied that the intended appeal has high chances of success as demonstrated by the applicant.

To that extent then, the applicant is allowed to file the intended appeal out of time, upon terms as shall be stated here below.

### **Stay Of Execution**

9. The parameters for the grant of an order for stay of execution are provided under order 42 rule 6 (2) of the *Civil Procedure Rules*, thus, 6(2) (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.

From the very scanty material facts placed before the court, it seems that the decree is a money decree, for an undisclosed amount payable by the applicant to the respondents. The applicant in its supporting affidavit has not disclosed the amount of the decree passed against it, nor that the respondents would be unable to pay back the decretal sum if paid to them, and the intended appeal turns out successful; nor has it demonstrated what substantial loss it would suffer if stay orders are denied.

10. Substantial loss in such an application is the cornerstone in various forms; and the applicant is under an obligation to demonstrate such loss to the court's satisfaction. Further the court ought to consider and address its mind to the question of whether to refuse stay would render the appeal nugatory. I have stated that the decree seems to be a money decree, for an unspecified amount. In the case *National Industrial Credit Bank Ltd V Aquinos Francis Wasike & another* [2006] e KLR, the court held that it is upon the applicant to prove substantial loss either through difficulty in satisfying the decree or loss occasioned by the inability by the adverse party to refund, if the appeal succeeds. I am afraid that the applicant by its failure to disclose relevant material facts to the court has failed substantively to demonstrate any substantial loss if may incur so as to render the appeal nugatory. See also *Kenya Shell Ltd v Kibiru & another* [1986] KLR 410.

11. In the above case, the honourable judges rendered that:

“...An intended appeal does not operate as a stay... If there is no evidence of substantial loss, it would be a rare case when an appeal would be rendered nugatory by some other event... therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money...” (emphasis mine)

12. The applicant having failed to satisfy the court that execution or enforcement of the decree would render the intended appeal nugatory, then, an order of stay of execution cannot be granted. Parallel to the above, a successful litigant should not be deprived of its fruits of a judgment in its favour without just cause.

For the foregoing, I find and hold that the applicant's application succeeds partially.

### **Consequently:-**

- a. The applicant is granted leave to file appeal out of time. The memorandum of appeal shall be filed and served within 10 days of this ruling.
- b. The court declines to grant an order of stay of execution of the trial court's judgment delivered on the March 2, 2022 pending hearing and determination of the intended appeal.
- c. As the application succeeds partially, each party shall bear own costs on the application.



**DATED, DELIVERED AND SIGNED THIS 20<sup>TH</sup> DAY OF SEPTEMBER, 2022**

**J. N. MULWA**

**JUDGE**

