



**Bashir (Suing as the legal representative of the Estate of her deceased Sons)  
v Jamil Coach Company Limited & another (Miscellaneous Application  
E080 of 2020) [2022] KEHC 17046 (KLR) (28 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 17046 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MISCELLANEOUS APPLICATION E080 OF 2020  
MN MWANGI, J  
OCTOBER 28, 2022**

**BETWEEN**

**MARIAM MOHAMED BASHIR (SUING AS THE LEGAL REPRESENTATIVE  
OF THE ESTATE OF HER DECEASED SONS) ..... APPLICANT**

**AND**

**JAMIL COACH COMPANY LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**LAWRENCE KALUME KATANA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The applicants filed the Notice of Motion dated December 5, 2020 brought under the provisions of Sections 3A, 79G and 95 of the [Civil Procedure Act](#) (Cap 21), Order 2 Rule 22, Order 4 Rule 6, Order 50 Rule 6 and Order 51 Rules 1 and 3 of the [Civil Procedure Rules, 2010](#) and all other enabling provisions of the law. The applicants seek the following orders -
  - i. Spent;
  - ii. That this Honourable Court be pleased to extend time and grant leave to the applicants to lodge a Memorandum of Appeal out of time against the judgment by Honourable Lesootia Saitabau, Principal Magistrate in suit No 1492 of 2015 on August 24, 2020 in the absence of the parties (sic);
  - iii. Spent;
  - iv. That the Honourable Court be pleased to stay execution of the judgment in Mombasa Magistrate's Court Civil Suit No 1492 of 2015 pending the hearing and determination of the intended appeal;
  - v. Spent;



- vi. That this Honourable Court be pleased to issue any other orders that it may deem fit, just and expedient in the interest of justice; and
  - vii. That the costs of this application be in the cause.
2. The application is supported by an affidavit sworn on December 5, 2020 by Pauline Waruhiu, the Legal Counsel of Directline Assurance Company Limited, the insurers of Motor Vehicle Registration No xxxx. In opposition thereto, the respondent filed grounds of opposition dated December 8, 2020.
  3. The application herein was canvassed by way of written submissions. The applicants' submissions were filed on February 8, 2021 by the law firm of Kimondo, Gachoka & Company Advocates, whereas the respondent's submissions were filed on March 22, 2021 by the law firm of Aboubakar, Mwanakitina & Company Advocates.
  4. Mr Nyabero, learned Counsel for the applicants stated that the judgment sought to be appealed against is the judgment/decree delivered on August 24, 2020. He further stated that the said judgment was delivered in the absence of the parties due to the scaling down of physical operations of the Trial Court due to the Covid-19 Pandemic, whereof the Trial Court directed parties to leave their email addresses with the Court for the judgment to be sent to them upon delivery. He stated that the applicant's Advocate did not leave his email address with the Court on July 4, 2020 as required.
  5. He indicated that it was not until November 12, 2020 that the applicants' Advocate on record inquired at the Civil Court Registry and he was informed that the judgment had since been delivered and he was given a copy of the said judgment. Mr Nyabero relied on the decisions in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others [2014] eKLR*, *Kenya Tea Growers Association & another v Kenya Planters & Agricultural Workers Union [2012] eKLR* and *Martha Wangari Karua v IEBC Nyeri Civil Appeal No 1 of 2017* and submitted that the appellant has an arguable appeal that raises triable issues, the period that has lapsed between the delivery of the judgment and when the applicants' Advocate sought to find out whether the said judgment had been delivered was not inordinately long, and that no prejudice would be occasioned on the respondent that cannot be compensated by costs, in the event the application herein is allowed.
  6. Mr Nyabero relied on the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules and the case of *Kenya Power & Lighting Company Ltd v Rose Anyango & another [2020] eKLR* and submitted that the judgment of the Trial Court is of a substantial amount of Kshs 1,689,878.55 which amount cannot be refunded if the same is to be paid out to the respondent, whose source of income is not known. In addition, Mr Nyabero stated that the applicants are ready and willing to issue a bank guarantee to this Court for the entire decretal sum in Mombasa PMCC No 1492 of 2015 from a reputable commercial bank and/or furnish this Court with security as required by law.
  7. Mr Aboubakar, learned Counsel for the respondent relied on the provisions of Order 42 Rule 5 of the Civil Procedure Rules, 2010 and submitted that an appellant who files an appeal must have been a party to the suit whose decree is being appealed against. He pointed out that the application herein is supported by the affidavit of Pauline Waruhiu a Legal Counsel at Directline Assurance Company Limited, insurers of the 1<sup>st</sup> defendant's motor vehicle in the trial suit. He stated that it is not supported by the affidavit of the directors of Jamil Coach Company Limited or the 2<sup>nd</sup> applicant, Lawrence Kalume Katana. The respondent's Counsel contended that it is clear that it is the Insurance Company that seeks to appeal, but not having been a party to the trial suit, the insurance Company has no legal capacity to prefer an appeal.



8. He relied on Section 10 of the *Insurance (Motor Vehicle Third Party Risks) Act* and submitted that Directline Assurance Company Limited has a duty to settle the decretal sum in issue. He further cited Section 2 of the same Act and submitted that none of the instances stated in the said Section apply to this case. Mr Aboubakar submitted that the applicants have not demonstrated sufficient cause for this Court to enlarge time within which to file the intended appeal. He referred to the Trial Magistrate's observation at page 5 of his judgment and stated that it shows that at the time of delivery of the judgment, the parties were aware that it would be delivered as the practice is that Courts notify the parties by posting cause lists for delivery of judgments on the Judiciary website and also send to the Law Society of Kenya website.
9. He asserted that email addresses for parties were compiled by the Law Society of Kenya and sent to the Judiciary and it was a requirement for parties in any proceedings to provide their email addresses and phone numbers. In addition, Mr Aboubakar stated that the Trial Court's judgment was already typed, printed and was in the Court file and therefore, there was no credible explanation offered by the applicants for the delay in filing an appeal.
10. Mr Aboubakar submitted that as observed by the Trial Magistrate, the defence did not adduce evidence to support its denial thus these observations demonstrate that the applicants were not serious in contesting the suit against them and by extension, they were not keen to prefer an appeal against the said judgment. He contended that the learned Trial Magistrate was guided by binding authorities in reaching the sum of Kshs 1,689,878.55 and the same cannot be said to be excessive in the circumstances. He also stated that the Court considered principles of loss of dependency, loss of expectation of life, pain and suffering, as well as special damages, which are the principles that are always considered in cases of this nature. He submitted that the appeal herein does not raise any arguable ground.

#### **Analysis And Determination.**

11. I have considered the application filed herein, the affidavit filed in support thereof, the grounds of opposition by the respondent and the written submissions by Counsel for both parties. The issues that arise for determination are-
  - i. Whether Directline Assurance Company Limited has the legal capacity to prefer an appeal;
  - ii. Whether the application for leave to file an appeal out of time is merited; and
  - iii. Whether the applicants have satisfied the conditions set down to warrant grant of an order for stay of execution pending appeal.
12. In the affidavit filed on behalf of the applicants, it was deposed that Directline Assurance Company Limited are the insurers of motor vehicle registration No xxxx, at whose instance Mombasa SRMCC No 1492 of 2015 was defended. It was averred that on August 24, 2020, judgment was delivered against them for Kshs 1,689,878.55 and being aggrieved and dissatisfied with part of the said judgment, they instructed their Advocate to file an appeal but they missed the deadline set to appeal within 30 days, since the said judgment was delivered in the absence of parties. They stated that they got to know about the judgment after two months and it took them an additional one month to procure the judgment from the Court.
13. The applicants averred that they have proper grounds of appeal thus the intended appeal is arguable. They further averred that the inadvertent delay on their part is highly regretted and they should not be penalized since they had nothing to do with it. In addition, they contended that the delay occasioned is not so inordinate as not to be in excusable. They claimed that they stand to suffer irreparable substantial



loss as there is a likelihood that they would not recover the decretal amount if it was paid to the respondent.

Whether Directline Assurance Company Limited has the legal capacity to prefer an appeal.

14. The respondent submitted that Directline Assurance Company Limited lacks the legal capacity to file the instant application and lodge the intended appeal since they were not parties in CMCC No 1492 of 2015. In *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2014] eKLR*, the Supreme Court held that the issue of locus standi raises a point of law that touches on the jurisdiction of the Court and it should be resolved at the earliest opportunity.
15. It is not in dispute that from the pleadings herein, Directline Assurance Company Limited has not been listed as one of the parties to the suit in the lower Court. The respondent however submitted that the application herein is supported by the affidavit of Pauline Waruhiu a Legal Counsel at Directline Assurance Company Limited, the insurers of the 1<sup>st</sup> applicant's motor vehicle in the suit in the lower Court, and that it is not supported by the affidavit of the directors of Jamil Coach Company Limited or the 2<sup>nd</sup> applicant, Lawrence Kalume Katana, and that makes it clear that it is the insurance company that seeks to appeal. I find the said submission to be misguided and more so, based on paragraph 1 of the affidavit of Pauline Waruhiu, which is reproduced hereunder for ease of reference-

' That I am the legal Counsel at Directline Assurance Company Limited who are the insurers of motor vehicle registration number xxxx and at whose instance the suit SRMCC No 1492 of 2015 was defended and I am conversant with the issues relating to the aforementioned suit and I am duly authorized and competent to make this affidavit by dint of our rights of subrogation under the relevant policy of insurance and at common law and the right to defend, settle or prosecute any claims in the insured name.'

16. It is not in dispute that Directline Assurance Company Limited is the insurer of the 1<sup>st</sup> applicant's motor vehicle in suit in the lower Court. In addition, the respondent in her submissions stated that Directline Assurance Company Limited is obliged to settle the decretal sum pursuant to the provisions of Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act. In light of the foregoing, it is evident that the application herein and the intended appeal have been brought by Directline Assurance Company Limited in the insured's name by dint of its right of subrogation and not in its own capacity, hence the issue of locus standi and/or capacity to appeal does not arise.

Whether the application for leave to file appeal out of time is merited.

17. This Court has discretionary powers to consider applications for extension of time within which a party can lodge an appeal. Section 79G of the *Civil Procedure Act* provides that appeals from subordinate Courts shall be filed within a period of thirty days from the date of the decree or order appealed against. It further provides that 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 in time.
18. The Court of Appeal in *Leo Sila Mutiso v Hellen Wangari Mwangi [1999] 2 EA 231* laid down the factors to be considered by a Court in the exercise of its discretion as hereunder-

' It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the



appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.'

19. The Trial Magistrate delivered his judgment in the lower Court on August 24, 2020. In line with the provisions of Section 79G of the *Civil Procedure Act*, the applicants ought to have filed a Memorandum of Appeal within 30 days, that is, on or before September 23, 2020. The application before this Court was filed on December 7, 2020, which was approximately three (3) months after the lapse of the thirty days' period provided by law. As such, the applicants are required by law to give a plausible explanation as to the delay in lodging an appeal in good time against the judgment by the Trial Court. In this regard, I am guided by the decision of the Court of Appeal in the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR*, where the Court held that-

' The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.'

20. The judgment herein was delivered in the absence of the parties after the Trial Court directed parties to leave their email addresses with the Court for the judgment to be sent to them upon delivery. The applicants however deposed that their Advocate did not leave his email address with the Court on July 4, 2020. The applicants averred that it was not until November 12, 2020 when their Advocate on record inquired at the Civil Court Registry that he was informed that the judgment had since been delivered and he was given a copy of the judgment.

21. It is evident from the applicants' submissions and affidavit in support of the application herein that they did not receive the Trial Court's judgment through email and it took a period of two months before they got to know that judgment had been entered against them and an additional one month to procure the said judgment from the relevant Registry. The applicants are thus blaming the Court and the subordinate Court's Registry for failing to inform them in good time that the judgment had been delivered.

22. It is my finding that from the record, one cannot ascertain whether or not the Trial Court transmitted the judgment in issue electronically to the parties through their Advocates. The respondent does not also disclose whether she received the said judgment through her Advocate's email and/or when she came to know that judgment had been delivered by the Trial Court. In the said circumstances, this Court finds that the applicants have sufficiently and/or satisfactorily explained the delay in preferring an appeal against the decision of the Trial Court.

23. The applicants contend that they have an arguable appeal that raises pertinent points of law. I have gone through the draft Memorandum of Appeal annexed to the applicants' supporting affidavit and it is clear that the applicants are challenging the Trial Court's award in general damages on grounds that it was inordinately high and excessive in the circumstances and that the Trial Magistrate proceeded on wrong principles when assessing damages to be awarded to the respondent. In determining whether an intended appellant has an arguable appeal, Courts are cautioned not to delve into the merits of an appeal as that is the preserve of the Court that will be seized of the appeal.

24. Article 48 of the *Constitution* of Kenya, 2010 guarantees every person access to justice. In addition, Article 50(1) of the said Constitution guarantees every person the right to a fair hearing. The ultimate goal and purpose of the justice system is to hear and determine disputes fully. In view of the above, I am satisfied that the intended appeal herein is arguable.



25. In determining whether the respondent shall be prejudiced in the event that the application to extend time to file an appeal out of time is allowed, this Court has to balance the competing interests of the parties herein, that is, the injustice to the applicants in denying them an extension of time as against the prejudice to be occasioned on the respondent in granting an extension of time to the applicants. It is worth noting that the respondent did not file a replying affidavit in opposition to the application herein. In addition, there is no evidence to the effect that by the time the application herein was filed, the respondent had extracted a decree and commenced execution. It is therefore my finding that no prejudice shall be occasioned on the respondent in the event the application to extend time to file an appeal out of time is allowed. Consequently, I find that the application to extend time to file an appeal out of time is merited.

Whether the applicants have satisfied the conditions set down to warrant grant of an order for stay of execution pending appeal.

26. The principles that govern the grant of an order for stay of execution pending appeal are provided for under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 as hereunder-

' 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. The Court's power to grant an order for stay of execution is discretionary and the said discretion ought to be exercised judiciously. In dealing with an application for stay of execution, the Court has a duty to balance the interests of the parties by taking into account the fact that the applicants have an undoubted right of appeal, whereas the respondent has a decree which he should not be obstructed from executing unless there is a good reason.

28. From the judgment that was delivered by the Trial Magistrate on August 24, 2020, the respondent was awarded Kshs 1,680,000/= in general damages and Kshs 9,878.55/= in special damages making a total sum of Kshs 1,689,878.55. The respondent was also awarded costs of the suit and interest at Court rates from the date of the said judgment until payment in full. I am of the considered view that Kshs 1,689,878.55 is not a small amount of money. The applicants deposed that they stand to suffer irreparable substantial loss in the event that stay of execution is not granted since there is a likelihood that they will not recover the decretal sum if it is paid to the respondent whose source of income is unknown.

29. In *Kenya Hotel Properties Limited v Willesden Investments Limited [2007] eKLR*, the Court of Appeal stated that Courts have felt that the success of an appeal would not be rendered nugatory if the decree is a money decree so long as the Court ascertains that the respondent is not a man of straw but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant.

30. On the issue of substantial loss, the Court in the case of *Victory Construction v BM (a minor suing through next friend one PMM) [2019] eKLR* made the following observation-

' The same position was adopted by Kimaru, J in Century Oil Trading Company Ltd vs Kenya Shell Limited Nairobi (Milimani) HCMCA No 1561 OF 2007 where it was stated:



'In considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal.'

31. In the present application, the applicants did not put forth their current financial position and explain how the same will be affected in the event that stay of execution is not granted. They however averred that they stand to suffer irreparable substantial loss if stay of execution is not granted, since there is a likelihood that they will not recover the decretal amount if it is paid to the respondent. The respondent on the other hand did not demonstrate her financial capacity to this Court by way of an affidavit of means to demonstrate her ability to refund the applicants the money in the event that they were to be successful in the intended appeal.
32. When considering the application herein, this Court has to ensure that the applicants are not seriously affected by the decision made and at the same time, the respondent is assured that her money will be there for her should the intended appeal not succeed. It is therefore this Court's finding that on a balance of probability, the applicants have demonstrated that they are likely to suffer substantial loss if stay of execution is not granted.
33. The application herein was filed on December 7, 2020 whereas the judgment before the Trial Court was delivered on August 24, 2020, approximately three months from the date of delivery of the Trial Court's judgment. As already held earlier in this ruling, the applicants have satisfactorily explained the delay in preferring an appeal against the decision of the Trial Court and the instant application
34. The applicants in their affidavit in support of the application averred that they are ready and willing to deposit a bank guarantee in Court for the entire decretal sum in Mombasa PMCC No 1492 of 2015 from a reputable commercial bank and/or furnish this Court with security as required by law. In [\*Focin Motorcycle Co Limited vs Ann Wambui Wangui & another \[2018\] eKLR\*](#), it was stated that:

' Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.'
35. This Court's finding is that the application dated December 5, 2020 is merited and the same is allowed in the following terms-
  - i. That the applicants are hereby allowed to file an appeal out of time against the judgment delivered on August 24, 2020 by Hon Lesootia Saitabau, Principal Magistrate, in Mombasa Chief Magistrate's Civil Suit No 1492 of 2015;
  - ii. That the applicants are directed to lodge their appeal within twenty-one (21) days from the date of this ruling;
  - iii. That stay of execution is granted against the judgment delivered on August 24, 2020 by Hon Lesootia Saitabau, Principal Magistrate, in Mombasa Chief Magistrate's Civil Suit No 1492 of 2015, pending the hearing and determination of the intended appeal;
  - iv. That the applicants shall deposit the sum of Kshs 1,689,878.55 in a joint interest earning bank account in the names of the Advocates for the parties within thirty (30) days from the date of



this ruling. In default thereof, the application shall be deemed to have been dismissed and the respondent shall be at liberty to execute; and

- v. That costs of this application will abide the outcome of the appeal.

It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA on this 28<sup>th</sup> day of October, 2022. Ruling delivered through Microsoft Teams Online Platform.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:**

No appearance for the applicants

No appearance for the respondent

Mr. Oliver Musundi – Court Assistant.

