



**Wainaina v Director of Immigration Services & another; Louodom
(Interested Party) (Petition 99 of 2018) [2022] KEHC 14622 (KLR)
(Constitutional and Human Rights) (28 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14622 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 99 OF 2018
M THANDE, J
OCTOBER 28, 2022**

BETWEEN

DIANA WACEKE WAINAINA APPLICANT

AND

DIRECTOR OF IMMIGRATION SERVICES 1ST RESPONDENT

**CABINET SECRETARY FOR INTERIOR & COORDINATION OF NATIONAL
GOVERNMENT 2ND RESPONDENT**

AND

SERGE LOUODOM INTERESTED PARTY

RULING

1. By a Notice of Motion dated 19.4.22, the Applicant seeks the orders that:
 1. Spent.
 2. The Honourable Court be pleased to grant an Interim Order for stay of execution of the Judgment of the Honourable Court (Honourable Mr. Justice J. A. Makau) delivered on 24th February, 2022 in Constitutional Petition No. 99 of 2018 pending the hearing and determination of this application.
 3. The Honourable Court be pleased to grant leave to the Applicant to lodge an appeal out of time against the Judgment of the Honourable Court (Honourable Mr. Justice J. A. Makau) delivered on 24th February, 2022 in Constitutional Petition No. 99 of 2018.



4. The time limited for the Applicant to file and serve the Respondents with the Notice of Appeal be enlarged and/or extended to allow filing and service of the same within such time as the Honourable Court shall deem fit.
5. There be no order as to costs.
2. The brief background of this matter as can be gleaned from the record is that the Petitioner and the Interested Party are husband and wife and have 2 young children. The Interested Party, a Cameroonian national moved to Kenya 14 years ago and he and the Petitioner are both directors of a company known as Gilliana International Limited. On 26.6.17, the Interested Party went to Cameroon to attend a relative's funeral and for business. Upon his return to Kenya on 19.12.17, Immigration officers denied him entry at the Jomo Kenyatta International Airport. After the Petitioner failed to secure her husband's entry into the country, he returned to Cameroon. The Petitioner later learned that her husband had been declared a prohibited immigrant.
3. The Petitioner then moved to this Court seeking a raft of reliefs, key of which were that the Respondents remove/delete the tag 'prohibited immigrant' placed against the Interested Party and that the Respondents be permanently restrained from prohibiting the Interested Party from entering Kenya. The Petitioner also sought declarations that the Interested Party's rights had been violated by the acts of the Respondents. The Petition was however dismissed in a judgment of 24.2.22, against which the Petitioner now seeks stay and leave to appeal, by the present Application.
4. The grounds upon which the Application is premised is that the Petitioner and the Interested Party delayed in giving instructions to their counsel to appeal against the Judgment as they were oblivious of the strict timelines. The Applicant is apprehensive that if the orders sought are not granted, the Interested Party will be denied his constitutional right of movement in and out of the country thereby affecting the Petitioner's and their children's livelihood, who are solely dependent on him for basic needs and general upkeep. The absence of the Interested Party from Kenya will strain his relationship with his family thereby diminishing the very essence of family as provided for in Article 45 of *the Constitution* of Kenya, 2010. The Petitioner further stated that the appeal is meritorious and raises arguable, factual and legal grounds and has an overwhelming chance of success. Further that it will be impossible for the Applicant to be reimbursed for the time, emotional and psychological damage suffered. The Applicant asserted that she is willing to abide by any orders the Court shall grant towards prosecution of the appeal and that no prejudice will be suffered by the Respondents if the orders sought are granted.
5. The Application is opposed by the Respondent vide grounds of opposition dated 27.4.22. The grounds are that the Applicant has not provided sufficient reasons for the delay in filing the appeal; judgment was delivered in the presence of the Applicant's counsel and hence there is no justification for the delay; the Applicant's counsel has knowledge and understanding of the statutory timelines for appeal and had a duty to advise the Applicant; there is no proof that the Applicant has applied for typed proceedings; that a stay would be of no consequence as the Interested Party left the country on 23.12.17; that by their conduct it is clear that the Interested Party has no regard for the laws of Kenya and cannot therefore seek protection from the same laws; that they have never taken steps to register their marriage which would have assisted the Interested Party in getting a dependent's pass thereby allowing him to take care of the Applicant and their children; that the issues raised relating to Article 45 and 53 of *the Constitution* were canvassed before the Court and raising them again is an attempt to appeal against the judgment of this Court. The Respondents urged that the Application be dismissed in the public interest and in the interest of justice.



6. I have given due consideration to the matter herein and the parties' respective submissions. The issues that fall for determination are:
 - i. Whether the time for filing the notice appeal should be enlarged.
 - ii. Whether leave should be granted to lodge an appeal out of time
 - iii. Whether interim stay of execution should be granted.

Whether the time for filing the notice appeal should be enlarged

7. The jurisdiction of this Court to enlarge the time, specifically to file a notice of intention to appeal, is stipulated in Section 7 of the [Appellate Jurisdiction Act](#) as follows:

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

8. Where a party intending to appeal has been caught up and is unable to file a notice of appeal on time, the Court under Section 7, has the discretion to extend time for filing such notice of appeal. Such discretion like all other discretion must be exercised judicially.
9. The Supreme Court considered an application for extension of time to file appeal in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR cited by the Applicant. The Court stated:

Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it.

10. The Court went on to state:

[W]e derive the following as 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.
11. The decision to enlarge time for filing appeal and by extension, notice of appeal, is discretionary. This was the holding in the case of *Paul Musili Wambua v Attorney General & 2 others* [2015] eKLR where Koome, JA. (as she then was) stated:
- [I]t is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.
12. Similarly in the case of *Edith Gichugu Koine v Stephen Njagi Thoithi* [2014] eKLR, Otieno-Odek, JA. stated:
- Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.
13. Applying the principles set out in the cited authorities, the Applicant is required to demonstrate that she is deserving of the exercise of the Court's discretion in her favour. She must explain the delay to the satisfaction of the Court and satisfy the Court that the intended appeal has high chances of success.
14. The judgment in respect of which the orders herein are sought, was made on 24.2.22. According to Rule 75(2) of the Court of Appeal Rules, the notice of intention to appeal was to be lodged within 14 days, that is to say by 10.3.22. The Application seeking extension of time was filed on 19.4.22, a period of 49 days after the deadline for filing of a notice of appeal.
15. The reason proffered by the Applicant for the delay is that she and the Interested Party were not aware of the strict statutory timelines for filing an appeal and thus delayed giving instructions to their counsel accordingly. The Respondents opposed this explanation contending that the Applicant and Interested Party were represented by counsel who was present when judgment was delivered. This is the same counsel who now represents the Applicant in this Application. The Respondents' argument is that counsel ought to advise their clients on all available legal options and timelines.
16. It is trite that a case belongs to a litigant and not to her advocate and that a litigant has a duty to pursue the prosecution of her case. The Applicant was obligated to seek advice from her counsel if indeed she intended to appeal the judgment when the same was delivered. Had she done so, she would have been properly advised and would not have been caught up by the statutory timelines. As I consider the implication of the delay on the part of the Applicant to file the notice of appeal, I must be mindful of the provisions of Article 159(2)(d) of *the Constitution* of Kenya, 2010 which enjoins the Court to administer justice without undue regard to procedural technicalities.
17. On the constitutional imperative of administering substantive justice, I am guided by the decision in *Odinga & 5 others v Independent Electoral and boundaries Commission & 4 others* (Petition 5, 3 &



4 of 2013 (Consolidated)) [2013] KESC 6 (KLR) (16 April 2013) (Judgment) where the Supreme Court had this to say about Article 159(2)(d) of *the Constitution*:

The essence of that provision is that a court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties.

18. Similarly in the case of *Kamlesh Mansukhalal Damji Pattni v Director of Public Prosecutions & 3 others* [2015] eKLR the Court of Appeal had this to say about technical lapses:

The policy of the Court is to hear and determine appeals on their merits and to eschew very rigid application of rules of procedure where such application will result in miscarriage or subversion of justice. The philosophy informing this policy is that rules of procedure, as hand-maidens of justice, are designed to help secure justice not to override it. Technical lapses therefore will in appropriate circumstances be excused to obviate injustice that may ensue therefrom. It has been rightly said that “courts are not slaves or robots of technical rules shorn of judicial discretion.

19. It is not disputed that there was a delay in filing the notice of appeal. My view however is that the delay is not so inordinate or unreasonably long as to deny the Applicant the right to have the impugned decision reviewed by way of appeal. The Court must administer substantive justice by allowing the intended appeal to be heard on merit.

Whether leave should be granted to lodge an appeal out of time

20. The Applicant seeks leave to lodge appeal out of time. Under Rule 82 the Court of Appeal Rules, an appeal is instituted by lodging a memorandum and record of appeal, the prescribed fee and security for costs, within 60 days of filing the notice of appeal. Rule 82 provides in part as follows:

1. Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged—
 - a. a memorandum of appeal, in quadruplicate;
 - b. the record of appeal, in quadruplicate;
 - c. the prescribed fee; and
 - d. security for the costs of the appeal:

21. In seeking leave to lodge her appeal out of time, the Applicant relied on Rule 4 of the Court of Appeal Rules which makes provision for extension of time for doing any act required under the Rules as follows:

The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.



22. The “Court” referred to in that rule is the Court of Appeal. Rule 2 defines Court as follows:

“Court” means the Court of Appeal and includes a division thereof and a single judge exercising any power vested in him sitting alone;

23. It is clear from the foregoing that the jurisdiction to extend time to appeal, unless specified otherwise in the body of the statute, vests in the Court of Appeal and not in the this Court. Accordingly, this Court cannot assume jurisdiction it does not have.

Whether interim stay of execution should be granted

24. The Applicant seeks stay of the impugned decision pending the hearing and determination of the intended appeal. The Respondents have however opposed this prayer.

25. The jurisdiction of this Court to grant stay of execution is contained in Order 42 of the Civil Procedure Rules. Rule 6 (2) sets out the factors that the Court is to consider in exercising its discretion in determining whether or not to grant a stay of execution:

- (2) No order for stay of execution shall be made under subsection (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 order for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

26. Was the Application for stay sought without unreasonable delay? The judgment in respect of which stay of execution is sought was delivered on 24.2.22. The Application herein is dated 19.4.22. As already indicated, although there was delay in filing the Application, the delay was not unreasonable.

27. On the issue of substantial loss, the Applicant contended that there is need to preserve the subject matter of the dispute otherwise the intended appeal will be rendered nugatory. She further argued that the Interested Party’s family and business interests are in Kenya and his absence from the country will deter his economic rights and deny him an opportunity to fend for his family. This is opposed by the Respondents who argued that an order for stay would be a moot order because the Court did not in its decision remove the Interested Party from the country. The Court only affirmed the decision of the relevant authority to declare him a prohibited immigrant and deny him entry into Kenya. According to the Respondents therefore, with or without the judgment, the Interested Party would still not have access to Kenya given his status. It was further contended for the Respondents that the Court found that the Interested Party remained in Kenya illegally thereby disregarding Kenyan laws.

28. The purpose of an order for stay of execution pending appeal is to preserve the subject matter of the appeal. Failure to preserve the subject before the determination of the appeal, would render such appeal nugatory and a mere academic exercise. In the case of Peter Nakupang Lowar v Nautu Lowar [2022]



eKLR). See also the case of *Butt v Rent Restriction Tribunal* [1979] eKLR Madan, JA in considering an application for stay of execution laid out the principles to be considered as follows:

C appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings.

29. I have looked at the impugned judgment. I note that the Court dismissed the petition having found that the Interested Party had not complied with the laws of this country, the protection of which he sought in the petition. In effect, the Court affirmed the decision by the Respondents to declare the Interested Party a prohibited immigrant and to deny him entry into Kenya. The question that then begs is, what is the subject matter to be preserved herein? An order for stay of execution must serve a purpose. Given that the impugned judgment dismissed the petition, what purpose will an order for stay of execution serve? It is common ground that the Interested Party is not present in the country and was not present when the judgment was delivered. In the premises, grant of stay would be moot as rightly submitted by the Respondents and will serve no purpose at all. Indeed, such order if granted, would be an order in vain, ineffective for all practical purposes and incapable of enforcement.
30. Further, the order made by the Court in the impugned judgment dismissing the petition is a negative order. It is trite law that a negative order is incapable of stay, principally because such order is incapable of execution.
31. In *Kanwal Sarjit Singh Dhiman v Keshavji Jivraj Shah* [2008] eKLR, the Court of Appeal considered stay of a negative order and had this to say:

The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see *Western College of Arts & Applied Sciences vs. Oranga & Others* [1976] KLR 63 at page 66 paragraph C).
32. And in the case of *Raymond M. Omboga v Austine Pyan Maranga Kisii HCCA No 15 of 2010*, the Court considered an application for stay of execution of a negative order and stated:

“The Order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order ... The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise...”
33. In the present case, it is clear that the order of 24.2.22 dismissing the petition is a negative order. The Court did not order any of the parties to do anything or refrain from doing anything. As such the order is incapable of execution, and therefore incapable of stay. It is only a positive order capable of execution that is amenable to stay.



34. In the end and in view of the foregoing, I find that the Application dated 19.4.22 partially succeeds and the same is allowed on the following terms:
- a. Leave is hereby granted to the Applicant to file a notice of appeal out of time.
 - b. The notice of appeal shall be filed by 4.11.22 and in default, leave so granted shall automatically lapse.
 - c. Leave to lodge appeal out of time is hereby declined.
 - d. Stay of execution of the orders of 24.2.22 is hereby declined.
 - e. There Respondents shall have costs.

DATED, SIGNED and DELIVERED in Nairobi this 28th day of October 2022

M. THANDE

JUDGE

In the presence of: -

- **for the Applicant**
- **for the Respondent**
- **for the Interested Party**
- **Court Assistant**

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