



**Finezza Capital Holdings Limited v Solomon (Civil Appeal E582 of 2021)
[2022] KEHC 14611 (KLR) (Civ) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14611 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E582 OF 2021

CW MEOLI, J

OCTOBER 27, 2022

BETWEEN

**FINEZZA CAPITAL HOLDINGS LIMITED ALIAS FINEZZA CAPITAL
LIMITED APPLICANT**

AND

RUTH NIVA ONGACHI SOLOMON RESPONDENT

RULING

1. For determination is the motion dated September 14, 2021 by Finezza Capital Holdings Limited aka Finezza Capital Limited (hereafter the Applicant) seeking leave to file an appeal out of time against the ruling of the lower court delivered on July 23, 2021 in Nairobi Milimani Chief Magistrate Commercial Suit No E723 of 2020 and stay of execution of the ex-parte judgment dated December 1, 2020 in favour of Ruth Niva Ongachi Solomon (hereafter the Respondent) pending filing and determination of the intended appeal. The motion is expressed to be brought *inter alia* under Section 1A, 1B & 3A of the [Civil Procedure Act](#) (CPA), Order 42 Rule 6(1) & (2), Order 50 Rule 5 and Order 51 Rule 1 of the [Civil Procedure Rules](#) (CPR).
2. The grounds on the face of the motion are amplified in the supporting affidavit dated September 14, 2021 and further affidavit dated September 23, 2021 both sworn by Peter Njeru Karuana, who describes himself as the managing director of the Applicant, authorized and competent to swear the affidavits. The gist of his affidavit is that on July 23, 2021 the Applicant's motion seeking to set aside *ex parte* judgment and unconditional leave to defend Milimani Chief Magistrate Commercial Suit No E723 of 2020 was dismissed but counsel on record then did not inform the Applicant of the said decision; the Applicant learnt of the ruling on September 8, 2021 when she received warrants of proclamation and attachment. That on September 10, 2021 the Applicant instructed the firm of M/s Mathenge Gitonga & Co Advocates to peruse the court file for purposes of finding out the obtaining



- position and advice accordingly. He asserts that the Applicant is aggrieved and intends to appeal the entire ruling delivered on July 23, 2021 however the statutory time within which to appeal has since lapsed. That failure to file an appeal within time was beyond the Applicant's control and result from the omission of her erstwhile counsel whose mistakes ought not to be visited on the innocent Applicant.
3. He goes on to depose that the decretal sum in question is a colossal amount whereas the *ex parte* judgment was entered without the Applicant being afforded an opportunity of being heard. That meanwhile there is reasonable apprehension that execution will proceed rendering the intended appeal nugatory, due to inadvertent delay and inaction by previous counsel on record. That in view of the foregoing the Applicant will suffer substantial loss if unless the orders sought are not granted. He further reiterates that if execution proceeds, the applicant will be rendered destitute as its tools of trade have been attached. Finally, that the instant motion has been brought without inordinate delay ought to be granted in the interest of justice.
 4. The Respondent opposes the motion through the replying affidavit dated October 4, 2021. She asserts that the ruling of the lower court was delivered on July 23, 2021 and was attended to by both counsel on record contrary to assertions by the applicant that she was unaware of the same; that the motion is devoid of merit having been filed out of time with no plausible reason for the delay; and that the draft memorandum of appeal does not raise any serious grounds. She goes on to contend that the motion is a delaying tactic and an abuse of the court process. He concludes by deposing that the motion ought to be dismissed but in the alternative and in interest of justice, a condition for deposit of security in respect to the decretal sum be imposed.
 5. In his further affidavit, Peter Njeru Karuana reiterates that the Applicant has been condemned unheard and stands to lose its business and going into liquidation as it would be unable to meet its obligations as a going concern if the court were to dismiss the instant motion.
 6. The motion was canvassed by way of written submissions. As a preamble the counsel for the Applicant anchored their submissions on the provisions of Section 79G of the *Civil Procedure Act* and the decision in *First American Bank of Kenya Ltd v Gulab P Shah* [2002] 1 EA 65 on the conditions to be considered by the court in exercising its discretion to enlarge time within which to file an appeal. Concerning the period of delay and reasons thereof counsel called to aid the decision in *Almas Hauliers Ltd v Abdulnasir Abukar Hassan* [2017] eKLR to submit that failure to file an appeal within time was an inadvertent and caused by failure of the Applicant's previous counsel to seek instructions in time and failing to inform the Applicant of the ruling delivered on July 23, 2021. That the instant motion was filed within three (3) weeks after the lapse of the statutory period within which to file appeal which delay is not inordinate. Counsel cited the decisions in *Son Hardware Limited v Development Bank of Kenya Limited* [2019] eKLR and *Kenya Revenue Authority v Everlyne Onyango Obondo* [2021] eKLR to assert that the draft memorandum of appeal raises arguable grounds which ought to be fully ventilated before the court.
 7. Submitting on the order seeking stay of execution pending determination of intended appeal counsel anchored his arguments on Order 42 Rule 6 of the *Civil Procedure Rules* and the decision in *Butt v Rent Restriction Tribunal* [1982] KLR 417 with respect to the applicable principles. It was contended that the Applicant disputes the amount owed to the Respondent and that the Applicant is ready and willing to furnish security for the eventual performance of the decree. In conclusion the court was urged to allow the motion.
 8. Concerning the prayer for leave to file appeal out of time counsel for the Respondent based his submissions on the decision in *Vishva Stones Suppliers Company Limited v RSR Stone Limited* [2018] eKLR. It was submitted that it was incumbent upon the Applicant to demonstrate good and sufficient



reason for not filing the appeal within time. In rebuttal to the Applicant's reason for delay in filing the appeal, counsel citing the decisions in *Shah v Mbogo & Another* [1967] and *Omwoyo v African Highlands & Produce Company Limited* [2002] 1 KLR submitted that the Applicant is guilty of abusing the court process by making general and unsubstantiated allegations against its erstwhile counsel. He however urged that if the court is persuaded by the Applicant's reasons then recourse should be against its former counsel as subjecting the Respondent through rigorous litigation for the Applicant's counsel's mistake would be unfair and occasion delay.

9. It was further contended that the intended appeal lacks merit on account of the Respondent's affidavit material on the chronology of events leading to the instant motion. In rebuttal to the Applicant's submissions on stay of execution counsel relied on the provisions of Order 42 Rule 6 to contend that the Applicant has not demonstrated his financial capability to settle the decretal sum and this court ought to make an order for provision of security for the entire decretal sum. The court was urged to dismiss the motion with costs.
10. The Court has considered the rival affidavit material and submissions made in respect of the motion. However, before delving into the substance of the motion this court has noted that the Applicant had presented the instant motion as Nairobi High Court Misc Application No E582 of 2021. But the physical court file that is presently before this court is Nairobi High Court Civil Appeal No E582 of 2021. The pleadings filed by the respective parties equally reflect the cause as being Nairobi High Court Misc Application No E582 of 2021. This court has equally taken the liberty of perusing the court file titled Nairobi High Court Misc. Application No E582 of 2021 and notes that the same is a separate cause of action involving different parties to the matter before this court. Evidently there must have been a mix up in designation of the matters and the court will take the present cause as a miscellaneous cause as there is no appeal filed as yet, while directing that the cause be re-designated as Nairobi High Court Misc. Application No E582 "B" of 2021 to obviate future confusion.
11. Moving on to the motion, the Applicant's prayer seeking stay of execution pending hearing and determination of the intended appeal does not lie. It is evident on a plain reading of Order 42 Rule 6(1) of the *CPR* that an order to stay execution pending appeal presupposes the existence of an appeal. The filing of an appeal is a condition precedent to the exercise of this court's appellate jurisdiction under Order 42 Rule 6 (1) of the *Civil Procedure Rules*. Although the provision does not expressly say so, this can be inferred from the rule. Further, an analogy can be drawn from Order 42 Rule 6 (4) of the *Civil Procedure Rules* which states that an appeal is deemed filed in the Court of Appeal when the notice of appeal has been given. Equally, Order 42 Rule 6 (6) of the *Civil Procedure Rules* states:

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.” (Emphasis added).
12. 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 Applicant's prayer for stay of execution pending a non-existent appeal. The Court of Appeal in *Abubaker Mohamed Al-Amin v Firdaus Siwa Somo* [2018] eKLR 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.



13. Earlier, the Court of Appeal in the case of *Equity Bank -Vs- Westlink MBO Limited* [2013] eKLR while commenting on Rule 5 (2) (b) of the *Court of Appeal Rules*, whose wording is substantially similar to Order 42 Rule 6 (1) of the *Civil Procedure Rules*, and on Order 42 Rule 6 (6) of *Civil Procedure Rules*, left no room for doubt that an application for stay of execution pending appeal could only be entertained before it after the filing of an appeal or a Notice of Intended Appeal. (See also *Balozi Housing Co-operative Society Limited -Vs- Captain Francis E K Hinga* [2012] eKLR). Order 42 Rule 1;

“(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.”

14. There is no provision for the filing of a notice of intended appeal in the High Court from a decision of the subordinate court and instead, Order 42 Rule 1 of the *CPR* provides that an appeal to the High Court shall be in the form of a memorandum of appeal. In this case, an appeal is yet to be filed and there is therefore no basis upon which this court could exercise its appellate jurisdiction under the said provision in a miscellaneous matter. If the Applicant desired to seek an order to stay execution alongside the prayer for the late admission of their appeal, they ought to have first filed the memorandum of appeal in a proper appeal and the relevant application. 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. However, it may be more prudent for a party who also seeks stay of execution in the same motion for leave to appeal out of time to have filed the memorandum of appeal in advance. In the circumstances, the prayer seeking stay of execution of the ex-parte judgment dated December 1, 2020 pending filing and determination of the intended appeal has no legal anchor and is consequently disallowed.

15. Turning now to the prayer seeking leave to file an appeal out of time, the power of the court to enlarge time for filing an appeal out of time is expressly donated by Section 79G, as well as generally, by Section 95 of the *Civil Procedure Act*. The deponent of the affidavit in support of the motion asserts that delay in filing the appeal and motion was occasioned by the fact that counsel on record in the lower court did not inform the Applicant of the delivery of the ruling and that the Applicant only learnt about it on September 8, 2021 when it received warrants of proclamation and attachment. That upon receiving the warrants of proclamation and attachment, the Applicant on September 10, 2021 instructed the firm of M/s Mathenge Gitonga & Co Advocates to peruse the court file and advice. And that aggrieved by the decision of the lower court the Applicant determined to appeal the ruling however the statutory time within which to appeal had since lapsed. The Respondent vehemently rebutted the above assertion by arguing that the ruling was attended to by both counsels on record at the time.

16. 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, 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:

Provided 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.”



17. As earlier noted herein 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. Further the principles governing leave to appeal out of time are settled. The successful applicant must demonstrate “good and sufficient cause” for not filing the appeal in time. In *Thuita Mwangi v Kenya Airways* [2003] e KLR, the Court of Appeal while considering Rule 4 of the *Court of Appeal Rules* which was in pari materia with Section 79G of the *Civil Procedure Act*, reiterated its decision in *Mutiso v Mwangi* [1997] KLR 630 as follows:

“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 general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of 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 of the application is granted.”

18. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court’s discretion in his favor. On the question of the exercise of judicial discretion, the Supreme Court observed in the case of *Telkom Kenya Limited V John Ochanda And 996 Others* [2015] eKLR that:

“In instances where there is delay in filing the notice of appeal, this Court has inherent jurisdiction to admit such appeal, provided sufficient explanation is proffered for the cause of delay. The design and objective of the Supreme Court Rules is to ensure accessibility, fairness and efficiency in relation to this Court. Parties should comply with the procedure, rather than look to the Court’s discretion in curing the pleadings before it. This Court’s position is that the circumstances of each case are to be evaluated, as a basis for arriving at a decision to intervene, in instances where full compliance with procedure has not taken place....

It is this Court’s position of principle that prescriptions of procedure and form should not trump the primary object of dispensing substantive justice to the parties. However, the Court will consider the relevant circumstances surrounding a particular case and will conscientiously ascertain the best course. It is to be borne in mind that rules of procedure are not irrelevant but are the handmaidens of justice that facilitate the right of access to justice in the terms of Article 48 of the Constitution....”

See also *Patrick Wanyonyi Khaemba V Teachers Service Commission & 2 Others* [2019] eKLR.

19. The Supreme Court in the case of *Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The Court stated *inter alia* that:

“(T)he underlying principles a court should consider in exercise of such discretion include;

1. Extension of time is not a right of any 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 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 Respondent if the extension is granted;
6. Whether the application has been brought without undue delay.
7.”

See also *County Executive of Kisumu v County Government of Kisumu & 8 Others* [2017] eKLR.

20. Neither party has refuted the fact that the ruling of the lower court was delivered on July 23, 2021. Unfortunately, this court is unable, without the benefit of the proceedings in the lower court to ascertain whether both counsels on record attended the delivery of the ruling. Notably, the Respondent in her replying affidavit dated October 4, 2021 made reference to a supposed copy of the lower court ruling (Annexure RNOS 5) which annexure is not a copy of the ruling but a notice of the delivery date of the ruling. The Applicant’s further explanation was that it only became aware of the ruling on September 8, 2021 and thereafter instructed another counsel on September 10, 2021 to find out the obtaining situation and remedy the same.
21. The explanation given by the Applicant has not been seriously disputed and appears plausible on face value even though it should always be remembered that a cause of action belongs to the litigant and not counsel. The litigant must keep abreast of his matter before the court. In the instant matter no material evidence was tendered by the Applicant to demonstrate its efforts in that regard either by way of letter of inquiry and or protest letter to erstwhile counsel on record. And as rightly submitted by counsel for the Respondent, a litigant whose counsel has acted negligently has recourse against such counsel. Nevertheless, the motion herein was presented after a delay of approximately two (2) months from the date of the ruling. The delay is therefore not inordinate in the circumstances. It would be a travesty of justice to shut out a party from his right of appeal on account of the failures and or mistake of his counsel to which the litigant has not contributed. In my view, the Respondent herein will not suffer prejudice that cannot be compensated through costs.
22. Concerning the intended appeal, the Respondent disputed the merits of the grounds of appeal contained in the draft memorandum of appeal. The court has perused the said draft memorandum of appeal; it cannot be said to be frivolous ex facie. Moreover, based on the language employed in *Mutiso v Mwangi (supra)* the requirement touching on the viability of the intended appeal is neither mandatory nor stringently applied in an application of this nature. The Court of Appeal in *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited* (2020) eKLR stated that such appeal “need not succeed so long as it raises a *bona fide* issue for determination by the Court.”
23. In *Vishva’s* case, the Court emphasized the right of appeal in the following terms:

“Turning to the request to allow the applicant to exercise his now undoubted constitutionally underpinned right of appeal, the position is.... crystalized in the case of Richard Ncharpi Leiyagu vs. IEBC & 2 Others (*supra*); Mbaki & Others vs Macharia & Another [2005] 2EA 206; and the Tanzanian case of Abbas Sherally & Another vs Abdul Fazaiboy, Civil Application No 33 of 2003; for the holding inter alia that:



- (i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;
- (ii) the right to be heard is a valued right; and
- (iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice;...”

24. In the circumstances of this case, the court is persuaded that in order to facilitate the Applicant’s undisputed right of appeal, the prayer for leave to appeal out of time should be allowed. As such the said prayer is granted. The appeal shall be filed within 14 days of this ruling. The costs of the motion are awarded to the Respondent in any event.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 27TH DAY OF OCTOBER 2022.

C.MEOLI

JUDGE

In the presence of:

For the Applicants: Ms. Njeri

For the Respondent: N/A

C/A: Carol

