



REPUBLIC OF KENYA



**Bosire v DAY (Minor suing through father and next friend JYO) & 2 others (Miscellaneous Application E095 of 2022) [2022] KEHC 14473 (KLR) (25 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14473 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
MISCELLANEOUS APPLICATION E095 OF 2022  
JN KAMAU, J  
OCTOBER 25, 2022**

**BETWEEN**

**MARGARET NYANCHAMA BOSIRE ..... APPLICANT**

**AND**

**DAY (MINOR SUING THROUGH FATHER AND NEXT FRIEND  
JYO) ..... 1<sup>ST</sup> RESPONDENT**

**FAHARI CARS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**MARY WANJIRU MWAI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. In her notice of motion application dated April 22, 2022 and filed on April 25, 2022, the applicant sought an order for stay of execution of the judgment and decree that was delivered at Kisumu in Chief Magistrate's Court Civil Case No 494 of 2018 on February 10, 2018 for the sum of Kshs 401,030/= together with costs and interest thereon.
2. The said application was supported by an affidavit of the appellant's advocate, Joan Turgutt, that was sworn on April 22, 2022. The applicant averred that she had delayed in filing an appeal because the 2<sup>nd</sup> respondent's case proceeded and judgment was delivered in her absence. It was her assertion that the aforesaid delay had been explained and was excusable.
3. She added that she was aggrieved by the learned trial magistrate's judgment.  
She contended that unless an order for stay of execution was granted, she would suffer substantial and irreparable loss because the respondent's ability to refund the decretal sum was unknown and that her intended appeal that raised triable issues would be rendered nugatory.
4. She further averred that her insurer was ready and willing to provide a bank guarantee from Family Bank as security pending the hearing and determination of the Appeal herein.



5. In opposition thereto, Stephanie Akinyi, advocate, swore a replying affidavit on May 9, 2022 on behalf of the 1<sup>st</sup> respondent herein.
6. Through the said advocate, the respondent averred that the applicant's application to re-open the case for cross-examination on the question of liability which was similar to the basis of the appeal was dismissed having found to have been unmeritorious.
7. It was his contention that the applicant had failed to demonstrate any reason for delay in filing the appeal herein and that she had come to court with unclean hands. He asserted that the applicant's application was intended to deny him from enjoying the fruits of his judgment.
8. It was his contention that the annexed memorandum of appeal did not raise any triable issues and urged this court to dismiss the present application. It added, however, that in the event the court was inclined to allow the application, then the court ought to order that the applicant deposits the entire decretal sum into an interest earning account.
9. The applicant's written submissions were dated June 6, 2022 and filed on June 10, 2022 while those of the 1<sup>st</sup> respondent and his list of authorities were dated June 23, 2022 and filed on July 6, 2022. The ruling herein is based on the said written submissions which both parties relied upon in their entirety.

### **Legal Analysis**

10. The applicant submitted that she did not fail to file an appeal out of time due to indolence but rather it was because she instructed her advocates to file an appeal after the statutory period had lapsed. She reiterated that the case proceeded and judgment was delivered in her absence.
11. She relied on the provisions of section 79G of the *Civil Procedure Act* that provides that an appeal could be admitted out of time if the applicant satisfied the court that there was good and sufficient cause for not having filed an appeal within a period of thirty (30) days, a position that the 1<sup>st</sup> Respondent agreed with.
12. She also placed reliance on the case of *Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another* [2018] eKLR where it was held that although timelines were important to ensure efficient administration of justice, there were in themselves not a core substantive value.
13. She added that her intended appeal had high chances of success and hence there was need for leave to be granted for her to appeal against the decision of the lower court out of time and for an order for stay of execution to be granted as the substratum of the present application and the appeal would be destroyed.
14. She asserted that it was uncertain if she would be able to recover the decretal sum from the 1<sup>st</sup> respondent in the event she was successful in her appeal. In this regard, she relied on the case of *Dr GN Muema t/a Mt View Maternity & Nursing Home v Miriam Maalim Bisbar & another* [2018] eKLR where this very court held that the applicant therein had not demonstrated his ability to pay the decretal sum in the event the appellant therein succeeded on appeal.
15. She further referred this court to the case of *Justin Mutunga David v China Road & Bridge Corporation (K) Limited* [2019] eKLR where it was held that a bank guarantee was an acceptable way of furnishing security, which it urged this court to accept.
16. It was therefore her submission that she had demonstrated that she had met all the conditions of being granted an order for stay of execution pending appeal.



17. The 1<sup>st</sup> respondent also agreed with the applicant on what constituted the conditions of an applicant being granted an order of stay of execution. However, it relied on the cases of *Kenya Shell Limited v Kibiru* [1986] KLR 410 where Gachuhi Ag JA (as he then was) held that an applicant had to demonstrate what loss he was likely to suffer in a money decree before an order for stay of execution pending appeal could be granted.
18. He also relied on the case of *Machira t/a Machira & C Advocates v East African Standard (No 2)* [2002] KLR 63 where one of the holdings was that a successful party ought not to be denied the fruits of his judgment and the case of *Gianfranco Manenthi & another v Africa Merchant Assurance Co Limited* [2019]eKLR where it was held that the right of appeal was not intended to assist litigants in delaying execution of decrees through filing of vexatious and frivolous appeals.
19. He contended that in the event this court was inclined to allow the application, then the security ought to cover the decretal sum in full as it was clear from the case of *Mwuara Karuga t/a Limit Enterprises v Kenya Bus Services Limited & 4 others* [2015] eKLR that the words “ultimately be binding” were deliberately used to refer to the entire decretal amount that would be payable if the appeal was lost.
20. As seen hereinabove, he also relied on section 79G of the *Civil Procedure Act* and referred this court to the case of *Edithe Gichungu Koine v Stephen Njagi Thoithi* [2014] eKLR in which it was held that in considering an application for extension of time, a court had to consider the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application was allowed, whether the matter raised issues of public importance amongst other consideration.
21. It was his submission that the duty of the court was to ensure the just, expeditious, proportionate and affordable resolution of disputes. He pointed out that this was a 2018 matter and litigation had to come to an end.
22. He argued that the present application was an afterthought and delaying the cause of justice and that the Applicant having failed to show sufficient cause for the delay, the same ought to be dismissed with costs to him. He also submitted that in the event the court was to allow the same application, then he ought to be paid throw away costs in the sum of Kshs 35,000/=.
23. In exercising its discretion to allow an application seeking extension to file an appeal out of time, a court has to be satisfied that the omission to file the same within time was excusable. In other words, there must be a plausible explanation for the delay in filing the appeal.
24. It was apparent from the court record that the decision the Applicant intended to appeal against was delivered on February 10, 2022. The present application was filed on April 25, 2022. About two and a half (2 ½) months had since passed. This was not an inordinately long period. The fact that the applicant was not aware of when the decision was delivered persuaded this court to find and hold that the delay in filing an appeal within the time stipulated in section 79G of the *Civil Procedure Act* was not inordinate and/or unreasonable and that the reason for the delay that the applicant advanced was excusable.
25. The court perused the draft memorandum of appeal that was annexed to present application but did not consider the merits or otherwise of the grounds of appeal that were set out therein as that was strictly under the purview of the Court of Appeal. All that the court was expected to do was to consider if an applicant had demonstrated that it has an arguable ground of appeal which in this case the applicant herein demonstrated.
26. In considering whether or not to grant an order for extension to do any act, the court was also required to consider if the opposing side would suffer any prejudice if extension of time was granted. This



court was not satisfied that the 1<sup>st</sup> respondent would suffer any prejudice if the applicant exercised her constitutional right of appeal. If there was any prejudice, then the 1<sup>st</sup> respondent did not demonstrate the same.

27. Indeed, every party has a right to access any court or tribunal to have its dispute heard and determined in accordance with article 50(1) of the *Constitution of Kenya, 2010*. Even where a party delays in doing an act, there is always a provision that would give it reprieve to seek justice.
28. Notably, order 50 rule 6 of Civil Procedure Rules, 2010 empowers the court to enlarge the time to do a particular act.

Order 50 Rule 6 of *Civil Procedure Rules* stipulates as follows:-

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise”.

29. Taking all the factors hereinabove into account, it was the considered view of this court that the applicant ought to be given an opportunity to have her intended appeal heard on merit as she would suffer great prejudice if she was denied an opportunity to fully present her appeal to be heard on merit.
30. Turning to the order of stay of execution pending appeal, the present application was brought under order 42 rule 6 of the *Civil Procedure Rules* which empowers a court to stay execution of its own orders or an appeal court to stay orders of the decision which was intended to be appealed from.
31. Before an order for stay pending appeal under order 42, rule 6(2) of the *Civil Procedure Rules* can be granted, an applicant has to demonstrate the following:-
  1. That substantial loss may result unless the order is made.
  2. That the application has been made without unreasonable delay.
  3. Such security as the court orders for the due performance of the decree has been given by the applicant.
32. The three (3) conditions for the grant of an order for stay of execution must be met simultaneously as they are conjunctive and not disjunctive.
33. Notably, the decretal sum was colossal. The 1<sup>st</sup> respondent did not file an affidavit of means to demonstrate that he would be able to refund the applicant any amount of the decretal sum if the same was released to him and the applicant succeeded on appeal.
34. Even so, the 1<sup>st</sup> respondent may very well have been able to refund it if the applicant was successful on appeal. However, the rigours of recovering the said amount could amount to substantial loss. This very court made a similar finding in the case of *Dr GN Muema t/a Mt View Maternity & Nursing Home v Miriam Maalim Bisbar & another* [2018] eKLR. It was for that reason that this court came to the conclusion that the applicant had satisfied the first condition of being granted an order for stay of execution pending appeal.



35. As the court had found and held hereinabove that the present application was filed without undue delay, this court was persuaded to find that the Applicant had satisfied the second condition for being granted an order of stay of execution pending appeal.
36. The applicant was ready and willing to furnish security. This court was satisfied that she demonstrated that she had met the third condition for the granting of an order of stay of execution pending appeal. Having said so, this court took the view that a bank guarantee was not a suitable form of security considering that there was a possibility of the bank not honouring the bank guarantee as the bank issuing the same would not be a party to the suit therein making it difficult for a successful appellant to enforce any orders he or she would get regarding the said bank guarantee, if at all. This court therefore determined that the security to be furnished herein would be in form of money.

### **Disposition**

37. The upshot of this court's decision was that the applicant's notice of motion application dated April 22, 2022 and filed on April 25, 2022 was merited and the same be and is hereby allowed in the following terms:-
  1. That an order for stay of execution of the Judgment and decree of Hon L Akoth (RM) that was delivered at Kisumu in Chief Magistrate's Court Civil Case No 494 of 2018 be and is hereby granted pending the hearing and determination of the appeal on condition the applicant shall deposit the sum of Kshs 401,030/= into an interest earning account in the joint names of the advocates for the parties herein within thirty (30) days from the date of this Ruling.
  2. For the avoidance of doubt, in the event, the applicant shall default on paragraph 37(1) hereinabove, the conditional stay of execution shall automatically lapse.
  3. The applicant be and is hereby directed to file and serve her record of appeal within one hundred and twenty (120) days from the date of this ruling.
  4. This matter will be mentioned on February 7, 2023 to confirm compliance and/or for further orders and/or directions.
  5. Costs of the application herein shall be in the cause.
  6. Either party is at liberty to apply.
38. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF OCTOBER 2022**

**J. KAMAU**

**JUDGE**

