



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Crown Bus Services & another v Dawa (Miscellaneous Civil Application E002 of 2022) [2022] KEHC 15769 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15769 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
MISCELLANEOUS CIVIL APPLICATION E002 OF 2022  
GMA DULU, J  
NOVEMBER 24, 2022**

**BETWEEN**

**CROWN BUS SERVICES ..... 1<sup>ST</sup> APPLICANT**

**RODGERS LEZENI ISAMA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**MAME DIBA DAWA ..... RESPONDENT**

**RULING**

1. Before me is an application brought by way of notice of motion dated January 24, 2022 under order 21 rule 1b, order 22 rule 22, order 42 rule 6, order 50 rule 6 order 51, rules 1 and 3 *Civil Procedure Rules*, as well as section 3A, 79G of the *Civil Procedure Act* (cap 21), and article 159(2) (a) and (d) of the *Constitution of Kenya* 2010.
2. The application has six (6) prayers, some of which have been spent as follows –
  1. (Spent)
  2. This court be pleased to extend time and grant leave to the applicants to lodge an appeal and file a memorandum of appeal out of time against the judgment and decree of Hon CA Mayamba Principal Magistrate against the applicants on November 12, 2021 in Kilungu Civil Suit No 157 of 2020.
  3. (Spent)
  4. That this court be pleased to grant a stay of execution of the judgment and/or decree issued by CA Mayamba, Principal Magistrate on November 12, 2021 pending hearing and determination of the intended appeal.



5. That the court be pleased to issue any other orders/and or directions it deems fit to grant I the circumstances.
  6. That the costs of the application abide the outcome of the appeal.
3. The application has grounds on the face of the notice of motion that the 30 days period within which an appeal is to be filed has lapsed, that the applicant wishes to appeal out of time, that the applicant preferred to appeal due to the high amount of quantum of damages, that the applicants have a strong arguable appeal, and that the application was filed without unreasonable delay.
  4. The application was filed with a supporting affidavit sworn by Leah Gathenya advocate for the applicants on January 24, 2022 amplifying the grounds of the application. It is deponed in the affidavit that the award of general damages herein was Kshs 1,000,000/=, special damages of 6050/=, plus costs and interest. Annexed to the affidavit is a draft memorandum of appeal.
  5. The application has been opposed through a replying affidavit sworn on March 30, 2021 by Diba Dawa the respondent, in which it was deponed that the applicant failed to disclose when their lawyer received instructions to appeal, and that no plausible explanation for not appealing in time was given, that as the appeal is only on quantum of damages, that half of the decretal amount should be released to the respondent and half deposited in court.
  6. The application was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Kimondo Gachoka & Company for the applicant, as well as the submissions filed by Waiganjo Wachira & Company for the respondent. I note that both counsel cited decided court cases.
  7. Having considered the application, documents filed and the submissions on both sides as well as the law, I am of the view that both the request for extension of time to file appeal, and the request for stay of execution, are hinged on this court's discretionary jurisdiction.
  8. An applicant seeking these discretionary orders has to lay a firm legal basis for the grant of such orders, as they are not granted on sympathy or whim. Several court decisions have dealt with the considerations to be taken into for exercise of this court's discretionary powers. It will in my view be sufficient if I cite the case of *Patel –vs- EA Cargo Handling Services Ltd* (1974) EA 75, wherein the Court of Appeal for East Africa stated as follows–
 

“The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules.”
  9. The judgment herein was delivered on November 12, 2021. The 30 days to appeal expired on December 20, 2021. This application was filed on January 25, 2022.
  10. In my view, the above delay of about one month was not inordinate and as such I will extend time to file appeal.
  11. Coming now to the request for stay of execution of judgment, such request is governed by the provisions of order 42 rule 6(2) of the [Civil Procedure Rules](#), which states as follows –
    - 6(2) No order of 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.
      - b. The application has been made without unreasonable delay.



- c. 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.

12. I have already found above that the application was filed without inordinate delay.
13. With regard to the possibility of substantial loss to the applicants, the decree is a money decree and the intended appeal is on quantum of damages. Thus in my view, if the whole decretal amount herein is paid to the respondent and the appeal succeeds, the applicants stands to suffer substantial loss, if they cannot recover the amount. I will thus grant stay, but subject to the applicants paying the respondent half of the decretal amount.
14. As for provision of security, in my view the part of the decretal amount to be paid by the applicants will be sufficient security.
15. Consequently, and for the above reasons, I allow the application and order as follows –
  1. I extend time and grant leave to the applicants to lodge an appeal and file a memorandum of appeal out of time. The appeal will be filed within 21 days from today.
  2. I grant stay of execution of decree or judgment pending hearing and determination of appeal, provided the applicants pay part of the decretal amount Ksh 500,000/= to the respondent through counsel within 45 days from today.
  3. In default of either 1 or 2 above the stay orders herein granted will automatically lapse.
  4. Costs of this application will abide the decision of appeal if filed; otherwise the costs will be to the respondents.

**DELIVERED, SIGNED & DATED THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2022, IN OPEN COURT AT MAKUENI.**

.....

**GEORGE DULU**  
**JUDGE**

