



REPUBLIC OF KENYA



**Mwangi & 2 others v Angose (Miscellaneous Application E540 of 2021)
[2022] KEHC 17182 (KLR) (Civ) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 17182 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS APPLICATION E540 OF 2021
DO CHEPKWONY, J
NOVEMBER 24, 2022**

BETWEEN

**JOHN MWANGI 1ST APPLICANT
MARY WANJIRU NJOROGE 2ND APPLICANT
NYERI MOTORS LIMITED 3RD APPLICANT**

AND

LONAH ANN ANGOSE RESPONDENT

RULING

1. Before Court is the applicant's Notice of Motion application dated November 2, 2021 brought under the provisions of Sections 1A, 1B, 3A, 3B, 79G and 95, all of the [Civil Procedure Act](#), Order 22 Rule 22, Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rules 1 and 3, all of the [Civil Procedure Rules, 2010](#). The application is couched in the following terms;
 - a. Spent;
 - b. That this Honourable Court be pleased to the Applicants leave to file a memorandum of appeal out of time.
 - c. Spent;
 - d. That this Honourable Court be pleased to order a stay of execution of the Judgment issued by the Honourable Trial Court on July 13, 2021 pending hearing and determination of the intended appeal;
 - e. Spent;



- f. That the costs of this application abide the outcome of the appeal.
2. The application is anchored on the grounds on its face and further supported by the grounds in the annexed affidavit of Ebby Wanjala sworn on October 21, 2021. In summary the cited grounds are that; -
- a. Judgment was entered on July 13, 2021 where the court held the Applicants 100% liable and awarded the Respondents general damages of Kshs 503,550/=.
 - b. The Applicant seeks to appeal against the said Judgment, but for which time has since lapsed.
 - c. The Defendant denied the Plaintiff's claim by filing a statement of Defence dated September 29, 2014 and parties subsequently filed their written submissions.
 - d. Having considered the pleadings, evidence, written submissions, Hon Kagoni E M delivered his judgment on March 1, 2021 which Judgment was entered against the Plaintiffs with costs awarded to the Defendant.
 - e. Being aggrieved by the impugned Judgment, the Plaintiffs are desirous to lodging an Appeal against the same.
 - f. In spite of the Plaintiffs' desire to lodge an appeal, the delay in furthering its intention had been occasioned by the court's failure to issue the Plaintiffs with typed copies of the Judgment and certified proceedings in time despite numerous requests asking for the same.
 - g. Vide the Defendant's letter dated May 20, 2021, the Defendant has served the Plaintiffs with a bill of costs, threatening to file the same if the Plaintiffs fail to offset the same within 7 days therefrom.
 - h. Such extreme and highly prejudicial consequences before the lodgment, hearing and determination of the intended appeal would subvert the ends of justice and render the Appeal nugatory.
 - i. The Plaintiffs undertake to lodge the intended Appeal and record whereof expeditiously within such time as this Honourable Court may order upon requisite leave being granted.
 - j. The Plaintiffs' intended appeal raises serious questions of both law and fact which the Honourable lower court fell into error, is arguable with a good chance of success and will be rendered nugatory unless the Honourable Court grants the Plaintiff orders for stay of execution pending hearing and determination of this application as well as the intended appeal.
 - k. The application is made in good faith and the Defendant shall suffer no prejudice that cannot be compensated by way of costs if this application is allowed.
 - l. The delay was inadvertent, not deliberate and this application has been brought timeously without unreasonable and undue delay.
 - m. The Plaintiffs are ready and willing to comply with such reasonable conditions that will be set by this Honourable Court for the grant of the orders sought herein.
 - n. It is in the interest of justice that stay of execution be granted pending appeal and period granted for filing the intended appeal be extended.



Respondent's Response

3. In opposition to the application, Moi Teaching and Referral Hospital (the Respondent), filed a Replying affidavit sworn on April 12, 2022 by Julius Onyango Oraro, the Deputy Supply Chain Manager of the Respondent.
4. The Respondent avers that the present application is made with the sole intention of delaying the payment of costs awarded to the Respondent with execution for recovery of the same being imminent.
5. The Applicants have not claimed that they will suffer substantial loss unless the order for stay is made. This court ought to appreciate the fact that the Applicants were already paid the contract sum of Kshs 23,416,914.47 and it moved the trial court for an extra payment of Kshs 9,414,723.47 which was never agreed upon. Expectedly, the suit was dismissed with costs which have since been assessed at Kshs 343,888/=, which sum is but a tiny fraction of the contract sum paid to the Applicants.
6. The Respondent deposes that it cannot therefore be gainsaid that there is no risk of substantial loss being suffered by the Applicants if the order for stay of execution is not granted.
7. The Respondent states that the present application is also made after undue and inordinate delay since Judgment was delivered on March 1, 2021 while the present application was filed on January 28, 2022, 11 months after, with no sufficient explanation for the delay.
8. He further states that the Applicants have also not offered security for the costs assessed at Kshs 343,888/= as the condition for stay. That the intended appeal as captured in the draft Memorandum of Appeal is nebulous, vague and comprises of mere posturing and is therefore not arguable.
8. The Respondent avers that no good cause has also been led to support the application for extension of time within which to file the appeal. Further, the Applicants' contention that the file could not be traced is not supported by a scintilla of evidence.
9. The Respondent deposes that it is only after being served with the Certificate of Costs which paved way for the execution, that Applicants were bestirred to action and they rushed to court for stay thereof through the present application hence our contention that the application is aimed at stalling the recovery of costs.
10. Lastly, it can therefore be surmised from the forgoing that the present application is wholly bereft of merit and it is our prayer that this Honourable Court dismisses the same with costs to the Respondent.

Submissions

11. On March 18, 2021, parties were directed to canvass the application by way of written submissions and the Applicants' submissions are dated June 7, 2022 while those by the Respondent dated June 8, 2022 in opposition to the application.

Analysis and Determination

12. I have considered the Notice of Motion application before Court, the response thereto and the submissions by both Counsel for the parties alongside the cited authorities. The issues arising for determination by this Honourable Court are:-
 - a. Whether the application for leave to file appeal out of time is merited; and,
 - b. Whether or not the applicant is entitled to stay of execution pending the hearing and determination of the intended appeal.



13. Before I begin to determine this matter, it is important to mention that the trial court record including the Judgment was never availed in this proceedings. However, I will proceed to make my determination based on the material that has been placed before me.
14. The brief background of the application is that the trial court delivered a Judgment on March 1, 2021 and the Applicant being aggrieved by the said Judgment, preferred this application dated January 21, 2022 seeking for stay of execution and leave to file an appeal out of time.
15. It is important to outline the provisions of the law guiding Courts in applications of this nature seeking for stay of execution and leave to file an appeal out of time while keeping in mind that leave is a discretionary remedy exercisable by Courts only to a deserving party upon proof that indeed leave is necessary.
16. The statutory parameter on appeals from a subordinate court to the High court is provided for under Section 75G of the *Civil Procedure Act*, which provides as follows;

“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. Therefore, a party must satisfy the above provisions of the law for the Court to exercise its discretion on whether or not to grant leave as sought. In the case of *Karny Zabarya & Another vs Shalom Levi* CA No 80 of 2018, Koome JA (as she then was) stated that:

“In considering whether to grant leave to a litigant to file his or her appeal out of time, the Court will have regard to factors such as: the reasons for the delay, if any, that each party stands to suffer depending on how the Court exercises its discretion; the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constituency underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes, the public interest issues implicated in the appeal or intended appeal and whether prima facie, the intended appeal has chances of success or is a mere frivolity.”
18. On this point, the question that begs for answers is whether the Applicants have met the threshold for filing an appeal out of time as set out above.
19. In the instant application before Court, the Applicants' application is dated January 21, 2022 and the Judgment being challenged was delivered on March 1, 2021.
20. Section 75G of the *Civil Procedure Act* requires an appeal from a subordinate court to be filed within 30 days yet the current application was brought almost after 11 months.
21. The Applicants have attributed the delay in filing the application to the Court for failing to provide the certified copies of proceedings on time and also to the Covid-19 pandemic which led to the scaling down of the Court's operations.
22. The Applicants' have annexed a letter dated June 4, 2021 addressed to the Executive Officer of the Court requesting for typed copies of proceedings and Judgment. In my view the same letter was



prompted by a letter from the Respondent dated May 21, 2021 asking them to settle the claim, failure to which they would proceed to file the Bill of costs as annexed on the letter.

23. The delay in bringing the current application before court is almost 11 months from the date the trial Court delivered its decision. In the circumstances of this case, looking at the time when the Judgment was delivered and the time when the application was filed, there is no good reason advanced for not complying with procedural timelines set out by the law.
24. It is therefore my humble view that the Applicant has not satisfactorily explained the reasons for the delay to warrant this court exercise its discretion in its favour in line with Section 75G of the Civil Procedure Act and the application fails on the issue of leave to file appeal out of time.
25. This court having found that the applicant has not met the threshold for the grant of leave to file appeal out of time, there is no need to determine the second limb of the application which is stay of execution.
26. Accordingly, I make a finding that the Applicants' application dated January 21, 2022 is unmerited and is hereby dismissed with no orders as to costs.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2022.

D O CHEPKWONY

JUDGE

In the presence of:

M/S Machiro holding brief for Mr Kebongo counsel for Respondent

Court Assistant - Simon

