



**Wildland Adventures Ltd & another v Njenga (Miscellaneous Civil Application E515 of 2021) [2022] KEHC 16864 (KLR) (Civ) (22 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16864 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL**  
**MISCELLANEOUS CIVIL APPLICATION E515 OF 2021**  
**CW MEOLI, J**  
**DECEMBER 22, 2022**

**BETWEEN**

**WILDLAND ADVENTURES LTD ..... 1<sup>ST</sup> APPLICANT**

**PETER NGUGI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**PHILIP NDUNGU NJENGA ..... RESPONDENT**

**RULING**

1. For determination is the motion dated October 13, 2021 by Wildland Adventures Ltd and Peter Ngugi (hereafter the 1<sup>st</sup> & 2<sup>nd</sup> applicant/applicants) seeking extension of time to lodge an appeal out of time from the judgment entered in Nairobi Milimani CMCC No 4603 of 2014; stay of execution of the judgment the said cause pending hearing and determination of the intended appeal; and that the honorable court be pleased to allow the applicants to provide a bank guarantee for the entire decretal amount Diamond Trust bank as security. The motion is expressed to be brought inter alia under section 3A, 79G & 95 of the *Civil Procedure Act* (CPA) and order 42 rule 6 of the *Civil Procedure Rules* (CPR).
2. The grounds on the face of the motion are amplified in the supporting affidavit sworn by the 2<sup>nd</sup> applicant, who claims to be duly conversant with the facts giving rise to the motion, competent and authorized to swear the affidavit. He deposes that judgment in Nairobi Milimani CMCC No 4603 of 2014 in favour of Phillip Ndungu Njenga (hereafter the respondent) was delivered on May 17, 2021 and aggrieved by the judgment the applicants desire to challenge it on appeal but the statutory period within which to lodge an appeal has lapsed. That delay in filing the appeal was occasioned by the fact that counsel having conduct of the matter had difficulty in locating the applicants who however intend to have their appeal heard and determined without any unnecessary delay; and that the appeal is arguable and raises pertinent points of law.



3. He proceeds to assert that the applicants stand to suffer prejudice and irreparable loss they may not recover the decretal sum if paid over to the respondent and therefore it is mete and just that the execution process be stayed pending the determination of the intended appeal. In conclusion the deponent expresses willingness to provide security by way of a bank guarantee for the entire decretal amount asserting that the respondent will not suffer any prejudice incapable of being compensated by an award of costs.
4. The respondent opposes the motion through a replying affidavit dated November 17, 2021. He points out that the applicants' advocate was served with notice but did not attend court on the date of the judgment; that the motion seeking leave to file an appeal out of time was filed more than four months after the judgment was delivered; and that the unreasonable delay in filing the motion has not been explained.
5. He goes on to assert that the applicants have not evidenced firm intention to prosecute the appeal by requesting for a copy of certified proceedings and the draft memorandum of appeal does not demonstrate an arguable appeal. He views the motion as one brought for the sole purpose of denying him the fruits of successful litigation. He concludes by deposing that the conditions for extension of time within which to file an appeal and grant of stay of execution pending appeal have not been met and the applicants do not deserve to have discretion exercised in their favour.
6. The motion was canvassed by way of written submissions. Submitting on the court's jurisdiction to entertain the instant motion counsel for the applicants called to aid the decisions in *Global Tours & travels Ltd* Nairobi HC winding up cause No 43 of 2000, *Judicial Commission Inquiry into the Goldenberg Affair & 3 others v Kilach* [2003] KLR and *Dennis Mogambi Mangare v Attorney General & 3 others* civil application No 265 of 2011 (UR 75/2011). He stated that the instant motion is premised on order 42 of the *Civil Procedure Rules* and that the draft memorandum of appeal raises issues that merit consideration by the court as an arguable appeal does not mean one that will certainly succeed.
7. While placing reliance on the decisions in *Butt v Rent Tribunal* (1982) KLR 417, *National Industrial Credit Bank Limited v Aquinas Francis Wasike & another* Nairobi civil application No 238 of 2005 and *Kenya Hotel Properties Limited v Willesden Properties Limited* Nairobi civil application No 322 of 2006 counsel reiterated that if stay is denied, the respondent will proceed with execution an event that would render the appeal nugatory.
8. Addressing the court on the prayer of provision of security by way of a bank guarantee counsel contended that the decree is substantial sum and if paid out to the respondent may not be recovered by the applicants in the event of the appeal succeeding; that due to the covid-19 pandemic the applicants' insurer is financially constrained and unable to raise the entire decretal sum but is willing to offer a bank guarantee as security. Reliance was placed on the decisions in *Water Resources Management Authority v Krystalline Salt Limited* [2018] eKLR and *Shanzu Beach Resort Limited Crown Marble & Quartz Ltd* [2020] eKLR in that regard. Finally, that the instant motion will not occasion any prejudice to the respondent and that it is in the interest of justice the same be allowed as prayed.
9. On his part, the respondent's counsel asserted that delay of four months was inordinate and not satisfactorily explained and that no good and sufficient cause had been demonstrated. He cited section 79G of the *Civil Procedure Act*, and pronouncements thereon in *Evans Kiptoo v Reinhard Omwoyo* [2021] eKLR, *Clerk of the National Assembly, Kenneth O Marende (Rtd) Speaker of the National Assembly & 207 others v Timothy Njoya & 22 others* [2015] eKLR and *Dilpack Kenya Limited v William Muthama Kitonyi* [2018] eKLR. He asserted that the respondent will be prejudiced by further litigation.



10. On the prayer seeking stay of execution, counsel anchored his submissions on the provisions of order 42 rule 6 of the *Civil Procedure Rules*. He contended that there was inordinate delay in filing the motion and that the applicants did not attempt to prove substantial loss. He asserted that security is determined by the nature of the judgment in each case and that the subject of the instant appeal is a money decree in respect of which the entire decretal sum ought to be deposited in an interest earning account. He relied on *Conesus Mburu Njuguna v Samson Kitire Kuna* [2007] eKLR. The court was urged to dismiss the motion with costs.
11. The court has considered the rival affidavit material and submissions made in respect of the motion. Firstly, regarding the prayer seeking stay of execution pending the intended appeal, 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 applicants 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 v 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 v 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 v 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. 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 applicants 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.

15. 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 prayers seeking a stay of execution of the judgment in Nairobi Milimani CMCC No 4603 of 2014 and provision of a bank guarantee as security for the entire decretal sum pending hearing and determination of the intended appeal have no legal anchor and cannot be entertained.
16. Turning now to the prayer seeking extension and leave to lodge an memorandum of 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*.
17. 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.”

18. 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] eKLR, 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.”

19. 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 or her 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 handmaiden 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.

20. 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.

21. The judgment of the lower court was delivered on May 17, 2021. Further, the respondent has attached to his affidavit material a judgment notice and return of service (annexure PNN2) as evidence of the fact the applicants counsel was aware of the date the judgment of the lower court. It is claimed that delay in filing the appeal was due to the fact that counsel having conduct of the matter had difficulties in locating the applicant(s). The explanation appears limp because no material has been placed before the court to demonstrate counsel's attempt to reach the applicants upon delivery of the judgment.
22. Besides, cases belong to litigants and not counsel hence the onus is always on the litigant to follow up on the position of his or her matter at every given opportunity. The delay in this case is about five (5) months. In the circumstances of this case, the delay is inordinate and has not been explained in any plausible manner. A party seeking extension of time must not be seen to presume on the court's discretion. The court therefore agrees with the respondent that indeed the applicants have not demonstrated good and sufficient cause why they failed to file the memorandum of appeal within prescribed time.



23. In this age of instant electronic communication, no party can be taken seriously when he claims that he could not be reached by his counsel. There was no requirement for the physical attendance of the applicants in the advocate's offices to give instructions on the judgment. In the circumstances, the court is not satisfied that the applicants have demonstrated good and sufficient cause for failing to file their appeal within the prescribed time. In the result, it seems to me that the justice of the matter lies in dismissing the motion with costs. It is so ordered.

**DELIVRERED AND SIGNED ELECTRONICALY AT NAIROBI ON THIS 22<sup>ND</sup> DAY OF DECEMBER 2022**

**C.MEOLI**

**JUDGE**

**In the presence of:**

For the Applicants: Mr. Gulenywa

For the Respondent: Mr. Mwaniki

**C/A: Adika**

