



Directline Assurance Company Limited v Ngoroi (Suing as the Legal Representative and Administrator of the Estate of Salesio Kinyua - Deceased) (Civil Appeal E103 of 2022) [2022] KEHC 16696 (KLR) (20 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16696 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E103 OF 2022
RM MWONGO, J
DECEMBER 20, 2022**

BETWEEN

DIRECTLINE ASSURANCE COMPANY LIMITED APPELLANT

AND

LUCY NJOKI NGOROI (SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF SALESIO KINYUA - DECEASED) RESPONDENT

(Application for stay of execution of the Ruling of 18th October, 2022, and any consequential orders therefrom issued by the trial Magistrate in Wanguru PMCC No E081 of 2022.)

RULING

Background of the application

1. The applicant has filed a certificate of urgency seeking stay of execution of the Ruling of 18th October, 2022, and any consequential orders therefrom issued by the trial Magistrate in Wanguru PMCC No E081 of 2022.
2. Aggrieved, the appellant filed a Memorandum of appeal herein on 21st November, 2022, together with the present application. The application is grounded on the affidavit of Kelvin Ngure, the Deputy Claims Manager of the applicant. It is asserted that the respondent filed a claim in the lower court (No E024 of 2021 Lucy Njoki Ngoroi suing as Legal Representative of Salesio Kinyua) v Panij Automobiles Kenya Ltd), in which the trial court awarded the plaintiff Kshs 3,915,230/-. The vehicle of the defendant in that suit Reg No KCU 360V was insured by the applicant.
3. After a decree was obtained against the insured, the judgment creditor sued the applicant for payment thereof. The applicant's defence was, inter alia, that it was not the insurer of the accident vehicle, and



- that it is not liable to satisfy any amount beyond the statutory limit of Kshs 3,000,000/- under Sec 5(b) of the *Insurance (Motor Vehicles Third Party Risks) Act*.
4. According to the applicant, their statement of defence, was not vexatious but raised triable issues, and that the appeal would be rendered nugatory if the application and stay are not granted.
 5. The orders sought by the applicant are:
 - a. That on the grounds set forth in the Certificate of Urgency this matter be certified as urgent and service of the same be dispensed with and heard exparte in the first instance.
 - b. That pending the hearing and determination of this application, there be and is hereby granted a stay of execution of any ruling, decree, execution order and all consequential orders in and/or arising out of Wang'uru Chief Magistrate's Court Civil Case No. E081 of 2022.
 - c. That the Court does make such or further orders in the interest of justice.
 - d. That costs be in the cause.
 6. The respondent filed a replying affidavit to the effect that: the application is misconceived, unmerited and bad in law; that it had been overtaken by events as execution had commenced in earnest and a garnishee order had been issued rendering the application otiose; that the memorandum of appeal had been filed out of time contrary to the provisions of section 79G CPA; that the late filing goes to the jurisdiction of the court to entertain an appeal filed out of time without leave and thus the appeal is non-existent and a nullity; that in the absence of an appeal there is nothing that can be rendered nugatory to warrant any orders for stay of execution; that the application is intended merely to scuttle the respondent's right to enjoy the fruits of its judgment.
 7. The applicant filed a Supplementary affidavit to the effect that: The Memorandum of appeal and notice of motion are both properly on record; that the impugned ruling was issued on 18th October 2022, and the statutory thirty days for filing the appeal lapsed on 18th November, 2022; that the appeal was dated 17th November 2022, but counsel could not file it on 18th November, 2022, due to the fact that the Court had issued a Notice that court registries were closed and a telephone number given for assistance of parties.
 8. Further, that upon calling the said number, counsel for the applicant was advised to file the pleadings electronically, which they did at 1325 hours on that day, as the deadline for filing the appeal was 18th November, 2022; that in the circumstances the applicant ought not be punished for actions that were beyond its control; that the garnishee proceedings were illegal and void ab initio for lack of service of the garnishee application and failure to follow the requisite procedures.
 9. Finally, the supplementary affidavit pleads with the court to invoke its inherent powers under Sec 3A & 79G *CPA* to make such orders as it may deem necessary in the event that it finds for the applicant, considering the provisions of Sec 5(b)(iv) of the *Insurance (Third party Risks) Act*
 10. The parties made oral submissions on 29th November, 2022. The submissions were directed along the lines of their application and supporting affidavit, and relied wholly on both. None of the parties cited and authorities. At the conclusion of the submissions, I issued a temporary stay of execution pending the issuance of this ruling.



Issues for determination

11. Having carefully listened to the parties and considered the material presented in court, the only issue is whether the court should issue a stay of execution pending the hearing and determination of the appeal, as pleaded.
12. The application is grounded on sections 1A, 1B, 3A, 63(e), 65(1)B 79G and 95 of the CPA and Order 42 Rule 6&7 and Order 51 Rule 1 CPR.
13. The starting point in grant of stay is to identify why the stay needs to be granted. In this case the applicant seeks stay of execution of the trial court's ruling first to pre-empt any action being taken on the ruling, and second, to enable the appeal be heard so as not to become nugatory and useless. This is the substantive order sought in prayers b) and c) in the applicant's notice of motion
14. The respondent argues that the court has no jurisdiction to hear this application since the appeal was filed outside of the time-frame allowed under Section 79G, which provides for 30 days as follows:

79G. Time for filing appeals from subordinate courts 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.”

(Emphasis added).

15. The applicant asserts that the appeal is properly filed, and that since the ruling sought to be appealed was issued on 18th October, 2022, the last day for filing the appeal was 18th November, 2022. The appellant argued that on that date counsel went to the registry to file the appeal but found a notice of closure of the registry. As a result, he filed the appeal electronically. He exhibited the email 18th November, 2022 by which he filed the appeal as exhibit “KN2”.
16. The respondent however asserts that the last date for filing the appeal was 17th November, 2022. The parties are thus in disagreement as to the date when the time for filing the appeal lapses.
17. The court takes judicial notice that there was disruption of the court registry on 18th November, 2022 due to the celebrations held for the tenth anniversary of the ELC court. The applicant exhibited the notice as “KN 1”. The court accepts that that was the date on which the applicant filed the Memorandum of appeal via email.
18. The court notes that Order Order 50, rule 8 *CPR* provides for computation of time when expressed in a number of days. The provision is as follows:
 - “ 8. In any case in which any particular number of days not expressed to be clear days is prescribed under these Rules or by an order or direction of the court, the same shall be reckoned exclusively of the first day and inclusively of the last day” [emphasis added]
19. Thirty days under Section 79G CPA would commence running on the day excluding the day of issuance of the ruling, thus commencing on 19th October. The days would expire on 17th November, 2022. I therefore agree with the respondent that the appeal was filed out of time.



20. The appeal having been out of time, there is strictly no appeal extant in respect of which stay can be granted. Accordingly, the applicant is obliged under the proviso to Section 79G to satisfy the court as to the reason for the one-day delay in filing the appeal. This the applicant has not done, choosing instead to blame the closure of the court's registry the subsequent day for filing the appeal on 1th November, when in fact the applicant had dated the appeal 17th November and should have filed it on that same day.
21. The applicant in paragraph 9 of the supplementary affidavit urged that in the likely event that the court held that appeal to be filed out of time, then they beseech the court to invoke its inherent powers under Sec 3A and 79G CPA to make such orders as may be necessary for the ends of justice and have the appeal admitted out of time.
22. There is no doubt that the court's discretion in deciding whether to grant extension of time to file an appeal is broad and unfettered and is exercised, in light of Article 159 of *the Constitution*, to allow a deserving party to be heard on the merits of the appeal rather than to allow a procedural technicality to result in striking out. The fact that striking out is itself a draconian measure, should give the court pause and opportunity to reflect on whether the discretion ought to be exercised in favour or against extending time for the filing of the appeal.
23. In dealing with the question whether justifiable cause has been shown for the delay, the principles laid down by the Supreme Court in *Nicholas Kiptoo Korir arap Salat vs. IEBC & 7 Others [2014]* eKLR are pertinent, The principles were stated as follows:

“(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.”
24. The challenge in this case is that the applicant has made no application for extension of time to file the appeal. Instead it insists that the appeal is filed within time, and as a side note, urges that should the court make the unlikely finding that the appeal was not filed on time then it should willy nilly exercise its discretion out of a sense of justice and admit the appeal out of time. So in fact no application is made for enlargement of time and no explanation has been given for the delay in filing the appeal within the requisite timeframe, so as to benefit from extension of time.
25. The Salat decision, above, is clear that the burden of seeking extension of time and of explaining the reason for the delay to the court's satisfaction rests squarely on the applicant.



26. Here, the applicant does not say whether stay was sought in the lower court and denied; nor why it was unable to file the appeal before the lapse of thirty days, notwithstanding that the lapse was for only one day, and would on that account be easily excusable.
27. The applicant also grounded its application on Order 42 Rule 6 which provides as follows:
- “ 1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
2. No order for stay of execution shall be made under subrule (1) unless—
- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) 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.
3. Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application”
28. The above provision is inapplicable in the circumstances herein as there is in fact no extant appeal in place, and therefore the question of stay pending appeal cannot be addressed.

Disposition

29. Ultimately, whilst the court has the tools for the exercise of discretion, in this case the applicant has not availed to the court with the materials upon which to exercise that discretion to its benefit: there is no application for extension of time; and there is no explanation for the delay.
30. In light of the foregoing, I find and hold that the court has no basis upon which it can exercise its discretion. The application is therefore declined and dismissed with costs.
31. Orders accordingly.

DELIVERED AT KERUGOYA ON THIS 20TH DAY OF DECEMBER, 2022.

RICHARD MWONGO

JUDGE

In the presence of:

1. Awino for the Applicant/ Appellant



2. Mugara holding brief for Mugendi for the Respondent

3. Court Assistant - Murage

