



Vitabiotics Limited & another v Ripples Pharmaceuticals Limited & another (Civil Suit 118 of 2015) [2021] KEHC 395 (KLR) (Commercial and Tax) (16 December 2021) (Ruling)

Neutral citation: [2021] KEHC 395 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 118 OF 2015
EC MWITA, J
DECEMBER 16, 2021**

BETWEEN

**VITABIOTICS LIMITED 1ST PLAINTIFF
HARLEYS LIMITED 2ND PLAINTIFF**

AND

**RIPPLES PHARMACEUTICALS LIMITED 1ST DEFENDANT
METRO PHARMACUTICALS LIMITED 2ND DEFENDANT**

RULING

1. The applicants took out a motion on notice dated 3rd December 2020 seeking two principle orders; stay of execution pending filing of an intended appeal and enlargement of time to lodge and serve a notice of appeal. They also sought an order that the Notice of Appeal dated 30th November 2020 be deemed to have been properly filed.
2. The grounds upon which the application was based were that on 7th July 2020, the applicants' counsel was informed that judgment was not ready and that it was to be delivered on notice. The notice on delivery of the judgment was eventually sent on 5th October 2020 to their advocates' administrative office email f but the email did not attach a standard notice on delivery of judgment. The document sent was titled "Rulings and Judgments to be delivered on 9th September 2020 before Lady Justice M."
3. Due to the confusing title and lack of a standard notice, the email did not reach the advocates who had the conduct of the matter at their advocates' offices, nor was the attention of their advocates drawn to that notice. Their advocates only became aware that judgment had been delivered when they were served with notice for taxation on 26th November 2020. Their effort to obtain a copy of the judgment was also not immediately fruitful since the judgment had not been uploaded onto the online platform.



4. The applicants state that they intend to appeal to the Court of Appeal against this court's judgment and that the intended appeal has substantial prospects of success. They are apprehensive that unless the orders sought are granted, their right to a fair appeal will be rendered nugatory. They contend that the respondents in favour of whom judgment was issued are foreign companies with no known assets and, therefore, their apprehension is not unfounded.
5. They filed a supporting affidavit sworn by Niraj Shah on 3rd December 2020, deposing to facts similar to the grounds on the face of the motion.
6. The respondents filed a replying affidavit by Nishil Haria sworn on 9th March 2021. She deposed that the grounds in support of the application were not only misleading but also unsustainable. According to the deponent, the matter was heard and judgment reserved for 7th July 2020. On that day, counsel for the parties attended court virtually when they were informed that the judgment was not ready, and that it would be delivered on notice.
7. The notice for delivery of judgment was eventually sent to the advocates by email and judgment was delivered on 9th October 2020. The respondents maintained that the applicants were not candid in their assertion that there was confusion on the notice, given that they did not take any steps to inquire about the delivery of the judgment. They contended that the right of appeal should be balanced with their right to a judgment and decree. They maintained that the application was unmeritorious and should be dismissed with costs.
8. The applicants filed written submissions dated 15th March 2021 in support of their application. They submitted that enlargement of time is discretionary under section 7 of the *Appellate Jurisdiction Act* and it should be exercised under certain parameters. They cited the decision in *Edward Njane Nganga & another v Damaris Wanjiku Kamau & another [2016] eKLR*, citing *Leo Sila Mutiso v Rose Hellen Wangare Mwangi (Civil Application No. NAI 225 of 1997)*, that whether or not to extend the time to appeal is discretionary and the court should consider the length of the delay; the reason for delay; (possibly) the chances of the appeal succeeding and the degree of prejudice to the respondent if the application was granted.
9. According to the applicants, the delay in filing the notice of appeal was not deliberate. The court session for 7th July was held virtually due to the Covid 19 pandemic when counsel for the parties were informed that the judgment was not ready and that they would be notified when it was to be delivered. The notice was sent by email on 5th October 2020 for delivery of judgment on 9th October, but there was confusion as the notice was sent to the advocates' administrative offices and, therefore, it did not reach the advocates seized of the matter. The advocates only learnt of that judgment had been delivered after they were served with notice on taxation on 26th November 2020.
10. They argued that there was no inordinate delay in filing the Notice of Appeal and that the respondents had not demonstrated the prejudice they would suffer if the application was granted. They cited the decision in *Mumias Sugar Company Limited v Henry Khatolwa Amukoya [2013] eKLR*, that an applicant's right to pursue an appeal overrides the respondent's right to enjoy the fruits of his judgment once it establishes that the respondent will not suffer prejudice.
11. The again cited *Kenya Tea Growers Association & another v Kenya plantation and Agricultural Workers Union [2012] eKLR* for the proposition that an arguable appeal need not necessarily be one that is likely to succeed but one where there is an issue upon which the court would have to pronounce itself on.



12. The applicants further argued that their appeal would be rendered nugatory given that the respondents seek to recover a decretal sum of Kshs. 5,000,000, and they are apprehensive that they may not be able to recover the amount if their appeal succeeded. They relied *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR*, that while the legal duty is on an applicant to prove that an appeal would be rendered nugatory because the respondent would not be able to refund the decretal sum, it is unreasonable to expect an applicant to know in detail the respondent's resources or lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.
13. The respondents filed written submissions dated 15th March 2021. They submitted that although section 7 of the *Appellate Jurisdiction Act* confers on the court discretion, whether or not to extend time for lodging a Notice of Appeal or grant stay of execution is a discretionary matter. They cited the decision in *Francis Ndabebwa Twal v Ben Nganyi [2018] eKLR*, for the argument that the power to stay execution of a judgment or decree is a discretionary power.
14. They further cited *Butt v Rent Restriction Tribunal [1982] KLR 417* for the same principle. However, the court observed in that decision, that a judge should not refuse a stay if there are good grounds for granting it, merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings. The court should also consider special circumstances of the case and unique requirements.
15. On the principles applicable for enlarging time to lodge a notice of appeal, the respondents cited the case of *County Government of Mombasa v Kooba Kenya Limited [2019] eKLR*, citing *Karny Zaharya & another v Shalom Levi (civil application No. 80 of 2018)*, (Koome JA, as she then was) that some of the considerations to be taken in to account when dealing with a request to enlarge time include; the length of time of the delay; reasons for the delay; possible prejudice that each party stands to suffer, if any, depending on how the court decides the matter ,among others.
16. The respondents argued that the right of appeal must be balanced with the right of the judgment or decree holder to enjoy the fruits of the judgment, and there must be a just course to deny him this right. They argued that satisfactory and plausible explanation of the delay is key in unlocking the court's flow of its discretionary power. Further, an applicant has to have valid and clear reasons upon which the discretion should be exercised.
17. In the present application, the respondents argued, the judgment was delivered on 9th of October 2020 after parties had received communication on its delivery, but the applicants did not attend court to take the judgment. They only came to court two months after delivery of the judgment. The respondents cited *Gerald Kithu Muchanje v Catherine Muthomi Ngare & another [2020] eKLR*, on the point that although there is no minimum or maximum period of delay, any delay must be satisfactorily explained. They again cited *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR*, on the same principle. They maintained that the period of two months was inordinate based on the flimsy reasons the applicant gave.
18. The respondents again argued that the applicants did not place before the court sufficient materials to enable it exercise its discretions in their favour, and relied on *Mwangi v Kenya Airways Ltd*. They again relied on *Monica Malei & another v R (Eldoret Civil Application No. NAI 246 of 2008)*, that when a reason is proposed to show why there was delay, it should be specific and not based on guesswork.
19. On whether the applicants will suffer prejudice, they argued in the negative, and cited *Masisi Mwita v Damaris Wanjiku [2016] eKLR*, that the applicants had not shown that they would suffer substantial



- loss, or that they (respondents) are not capable of repaying the decretal sum if the appeal succeeded. They relied on *Kenya Shell Ltd v Kibiru & another [1986] eKLR*. They argued that they are reputable pharmaceutical companies manufacturing and distributing drugs and are, therefore, able to refund the money should the intended appeal succeed.
20. Regarding chances of the intended appeal succeeding, they argued that the intended appeal has slim chances of success. They maintained that they will instead suffer loss if stay was granted. It was contended that there was no dispute that the 1st respondent is the owner of the trademark while the 2nd respondent has its permission to exclusively deal in its products. They relied on *Athuman Nusura Juma v Afwa Mohamed Ramadhan (CA No. 227 of 2015)*, that the court has to consider whether the appeal has high chances of success.
 21. On whether the decretal sum should be paid pending appeal, the respondents argued in the affirmative, contending that this being money decree, they can refund it. They cited *Cannon Assurance Limited v Peter Mulei Sammy [2019] eKLR*, that the respondent having clearly indicated that it had the means to refund the decretal sum, the applicant had not demonstrated that it would suffer substantial loss. They further cited *Kenya Hotel Properties Ltd v Willesden Investments Ltd [2001] eKLR* that success of an appeal in a money decree would not normally be rendered nugatory. They urged this court to dismiss the application with costs.
 22. I have considered the application, the response and submissions by parties. I have also considered the decisions relied on. The applicants have moved this court for extension of time to lodge the Notice of Appeal. Their reason is that they did not receive the notice for delivery of judgment since the notice went to the administration email address and, therefore, it did not reach the advocates handling the matter. Their advocates only came to learn that judgment had been delivered when they were served with notice on taxation of the bill of costs. They therefore prayed that the court extends time for them to lodge a notice of appeal.
 23. In the applicant's view, the respondents would not suffer any prejudice if time was extended. They also argued that if stay was not granted, their intended appeal would be rendered nugatory since execution would take place before their appeal was heard and determined. The respondent on their part argued that the applicants had not shown good reason for the court to exercise its discretion in their favour; that they had not explained the reason for the delay or that they would suffer substantial loss.
 24. The applicant's main ground for not lodging the notice of appeal is that their advocate did not receive the email since the email address used was for the administrative department. It was for that reason that their advocates did not receive the email on the delivery of the judgment.
 25. The applicants did not explain who gave the email address that was used to send the notice for delivery of judgment. They did not also say that the court used an email address other than the one they provided, thus throw the blame to the court. In that respect, I do not think the applicants were candid to the court. The court could not have invented the email address and used it to send the notice to the applicants. The address must have been provided by the advocates and they should have admitted their mistake and plead with the court to exercise its discretion in their favour.
 26. That notwithstanding, both sides agree that section 7 of the [Appellate Jurisdiction Act](#) confers on the court wide discretion to extend time for lodging a notice of appeal. The only argument on the part of the respondents, was that the discretion should only be exercised where the delay has been satisfactorily explained.
 27. There is no doubt that the court has discretion to enlarge time within which to lodge a Notice of Appeal. The section and decisions of superior courts at all levels agree that a court should act in favour



of allowing a party an opportunity to pursue an appeal rather than be unduly protective of the decree holder's right to enjoyment of the decretal sum at the expense of substantial justice. In *Mumias Sugar Company Limited v Henry Khatolwa Amukoya* (supra), the court observed that an applicant's right to pursue an appeal overrides a respondent's right to enjoy the fruits of his judgment once it establishes that the respondent will not suffer prejudice.

28. In determining whether or not to allow an application to file a notice of appeal or appeal, the court should consider among other factors, the period of delay. In the present application, the delay was about two months. Can that period be said to be inordinate delay? I do not think so. The applicants stated that they came to know of the judgment when they were served with the notice for taxation. They then filed this application seeking extension of time to lodge notice of appeal.
29. In *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, the Supreme Court observed that time is a crucial component in the dispensation of justice and, therefore, justice delayed is justice denied. It is litigants' legitimate expectation where they seek justice that the same will be dispensed timeously, thus the various constitutional and statutory provisions on time frames within which matters have to be heard and determined. However, a party may encounter some delay and the time within which he was to perform an act lapses. If one showed that he had a bona fide cause of action and time had lapsed, but was constrained to pursue within time that cause, because of some compelling reasons, the courts could intervene and indulge such a person if established that he was not at fault.
30. In *Paul Wanjobi Mathenge v Duncan Gichane Mathenge* [2013] eKLR, the Court of Appeal stated the discretion to extend time is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. In exercising the discretion, the court ought to be guided by consideration of factors including, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted.
31. In *Henry Mukora Mwangi v Charles Gichina Mwangi- (Civil Application No. Nai. 26 of 2004)*, the Court of Appeal again held that in an application for extension of time the court is called upon to exercise its unfettered discretion on the set considerations. (See also *Mwangi v Kenya Airways Ltd.* [2003] eKLR).
32. In *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* (Civil Application No. Nai. 255 of 1997), the Court again reiterated that whether or not to extend time for appealing is discretionary and that in general, the matters which the court takes into account in deciding whether to grant an extension of time are the length of the delay; the reason for the delay; the chances of the appeal succeeding if the application was granted and the degree of prejudice to the respondent if the application was granted.
33. *Sir Thomas Bingham M R, addressing the same issue in Costellow v Somerset County Council* [1993] 1 WLR 256, [1993] 1 All ER 952, stated that;

Save in special cases or exceptional circumstances it can rarely be appropriate on an overall assessment of what justice requires to deny the plaintiff an extension where the denial will stifle his action because of a procedural default, which even if unjustifiable, had caused the defendant no prejudice for which he cannot be compensated by an order for costs.

34. In the present application, it cannot be said that a delay of two months was inordinate. But more importantly, the respondents have not pointed out the prejudice they will suffer which cannot be compensated by costs if time was extended to allow the applicants lodge a notice of appeal. Since the court exercises unfettered discretion, it should in the circumstances of this case act in a manner



- that promotes the sense of justice rather than that make it a prisoner of rules of procedure or practice and, therefore, be inclined to extend time to lodge a Notice of Appeal.
35. The other issue is whether the court should grant stay of execution to allow the applicants pursue their appeal before the Court of Appeal. The applicants argued that their appeal would be rendered nugatory if stay was not granted. According to the applicants, the respondents are foreign companies and if the decretal sum was paid, there was no guarantee that they would get a refund of the money were their appeal to succeed.
 36. The respondents argued that they are able of refunding the money if the appeal succeeded. They maintained that the 1st respondent is the owner of the trade mark while the 2nd respondent was its authorized agent and, therefore, there was no likelihood of the appeal succeeding.
 37. Whether or not to grant stay of execution is also discretionary, again to be exercised judiciously. (*Francis Ndabebwa Twal v Ben Nganyi [2018] eKLR*). In *Butt v Rent Restriction Tribunal* (supra), the court observed that a judge should not refuse a stay if there are good grounds for granting it, merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 38. Granting a stay of execution pending an intended appeal is intended to preserve the subject matter of to enable parties exercise their right on appeal. A court should only exercise or decline to exercise this discretion if there were special circumstances and good cause either way. The inability of the victorious party to refund the decretal amount in the event of a successful appeal would be one of such special circumstances, if proved.
 39. The applicants' concern is that the respondents are foreign companies and, therefore, they may not be able to have the decretal amount refunded if they succeeded on appeal, a claim the respondents have rubbished, arguing that they have the ability to refund the money should the intended appeal succeed.
 40. At this stage, the court is not making a substantive determination of the matter. Its duty is to balance interests of the parties, a successful plaintiff and a defendant who wants to appeal that judgment. The court should be minded to preserve the subject matter of the appeal so that both parties are at arm's length as they pursue the issue on appeal.
 41. In the present application, the applicants fear that their appeal may be rendered nugatory if stay was not granted but they succeeded on appeal given that the respondents are foreign registered companies. The respondents on their part argue that they can payback the decretal sum if the appeal succeeded. In the circumstance of this case, I am inclined to grant stay of execution, but on conditions.
 42. Consequently, the application dated 3rd December 2020 is allowed as follows;
 - a) Leave is hereby granted extending time for the applicants to lodge a Notice of Appeal out of time.
 - b) The Notice of Appeal be lodged within seven (7) days from the date of this order.
 - c) Stay of execution is hereby granted pending determination of the intended appeal on condition that the applicants deposit the decretal amount of Kshs. 5,000,000 in a joint interest earning account in reputable bank in the names of advocates for the parties within thirty (30) days from the day of this order.
 - d) In default of (c) above, the stay order shall stand set aside.
 - e) The applicants shall bear costs of this application.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER 2021



**EC MWITA
JUDGE**

