



**Mageto v Amee Management Limited (Environment and Land Appeal E002 of 2023) [2023] KEELC 21405 (KLR) (23 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21405 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E002 OF 2023  
JA MOGENI, J  
OCTOBER 23, 2023**

**BETWEEN**

**PRISKA NYAKERARIO MAGETO ..... APPELLANT**

**AND**

**AMEE MANAGEMENT LIMITED ..... RESPONDENT**

**RULING**

1. The Appellant, Priska Nyakerario Mageto (the applicant herein) through the firm of Mwangambo & Okonjo Advocates originated this application by way of a notice of motion dated 13/07/2023 under Order 22 Rule 22, Order 42 Rules 6, Order 51 Rules 1 and 3 of the Civil Procedure Rules 2010, Section 3 and 3 A, section 79 G and 95 of the Civil Procedure Act, and all other enabling provisions of the Law. She is seeking the orders infra;
  - a. Spent
  - b. That this Honorable Court be pleased to grant leave to the Appellant to file an appeal out of time against the judgment of the Honorable Wendy K. Micheni Chief Magistrate in Milimani Commercial Courts CMCC 4732 of 2019 delivered on 4<sup>th</sup> April 2023.
  - c. That this Honorable Court be pleased to issue an order staying execution of the judgment in Milimani Commercial Courts CMCC 4732 of 2019 delivered on 4<sup>th</sup> April 2023 and the consequent order dated 3<sup>rd</sup> July 2023 pending the hearing and determination of this Application.
  - d. That the cost of this application abide the outcome of the appeal.
2. The application is premised on the applicant's supporting affidavit of twenty-three (23) paragraphs sworn on 13/07/2023 and copies of the order and judgment of the trial court, letters, email and whatsapp communication and a draft memorandum of appeal marked as "PNM1, PNM22 and



PMN3” respectively and annexed thereto. The application is further premised on eleven grounds stated on the face of the same.

3. In brief, the applicant’s case is that on 10/07/2023 the Respondent served the Appellant with an order dated 03/07/2023 and a copy of the judgement requiring them to vacate a portion of the property LR No. 209/398 within sixty (60) days of the judgment.
4. That on 4/04/2023, a judgment was delivered against the appellant by Honorable Wendy K. Micheni Chief Magistrate in Milimani Commercial Courts CMCC 4732 of 2019 where the appellant’s suit was struck out and they were ordered to vacate the suit property within 60 days of delivery of the judgment. That she requested the respondent for the copy of the judgment and also instructed their advocates to embark on tracing the file at the registry to get a copy of the judgment but they could not trace it.
5. That on 10/07/2023, the respondent served the appellant with an order dated 3/07/2023 and a copy of the judgment via WhatsApp and email requiring the appellant to vacate the suit property LR No. 209/398. The appellant regrets the inadvertent delay to file their appeal but states that it was not deliberate because she was not aware that a judgment had been issued against her. That she was only served with the judgment on 10/07/2023.
6. It is her contention that the delay occasioned is not so inordinate further that she states that they stand to suffer irreparable substantial loss if their family is evicted from the suit property and that if the order of stay is not granted the appeal shall be rendered nugatory.
7. The appellant is willing to abide by any terms and conditions that will accompany the granting of the stay order and extension of time to allow them file the appeal.
8. By a 12-paragraphed replying affidavit sworn on 12/09/2023, the respondent, Pravinchandra Meghji Dodhia director for Ameer Management Limited through the firm of Kiarie Kariuki & Giithi Advocates, opposed the application. He prayed for dismissal of the same stating that the appellant has not laid a basis for seeking extension of time and has not provided sufficient evidence. Further that the appellant filed a Memorandum of Appeal without leave of the court over 3 months from the date of judgment.
9. That the respondent will suffer irreparable loss if extension of time is granted. The respondent further deposed that the delay in filing the appeal is inexcusable. That if the orders sought in the application are granted, the respondent is likely to be prejudiced and deprived the enjoyment of the fruit of their judgment.
10. On 27/07/2023 the court ordered and directed that the application be argued by way of written submissions and reserved a ruling date.
11. Accordingly, the applicant’s counsel filed submissions dated 26/09/2023 where brief facts of the matter are set out and framed an issue for determination namely; whether the court should grant the Appellant leave to file an appeal out of time and whether the order for stay of execution pending hearing and determination of the appeal should issue. In the analysis of the issue in favor of the applicant, counsel mainly relied on among others sections 79G and 95 of the *Civil Procedure Act* Chapter 21 Laws of Kenya, and Order 42 Rule 6 of the *Civil Procedure Rules*, *Thuiria Mwangi Vs Kenya Airways* [2003]eKLR, *First American Bank of Kenya Ltd vs Gulab P. Shah & Others* HCC 2255/2000 [2002] 1EA 65, *Juma Nyateko v Fredrick Omondi Okech* [2021] eKLR, *RWW vs EKW* (2019) eKLR and *Reliance Bank Ltd vs Norlake Investments Ltd* [2002] 1EA 227 to buttress the submissions. It was submitted that the applicant has given sufficient reason for the delay in filing the appeal. Further that since the purpose of the court granting a stay is to preserve the substratum of the suit so as not to render the appeal as nugatory, the appellant submitted that they had stayed on the suit property since 1983



- and enjoyed quiet possession. Further that the appellant was willing to abide by any security conditions that the court may deem necessary to impose. That should the execution proceed the appellant will suffer irreparable loss and that the appeal raises triable issues.
12. The respondent filed their submissions in this application dated 11/10/2023. The respondent considered and analysed the prayers sought in the application by the appellant and noted that they have failed to prove that they deserve the prayers sought and therefore the application should be dismissed. Further that if the court is persuaded to grant the prayers sought then the security to be imposed should be commensurate to the suit property since it is a prime property located on Ngong Road. The respondent referred to the case of *Gilbert Mwangi Njuguna vs Judicial Service Commission & Another* [2020] eKLR.
  13. I have duly considered the application, the replying affidavit and the applicant's submissions in their entirety. On that score, has the applicant satisfied this court that he has good and sufficient cause for not filing the appeal in time?
  14. The applicant asserted that the period of filing an appeal as stipulated under the provision of section 79G (supra), has since lapsed. I take into account the proviso to the said section alongside the provisions of sections 13 (1) and 16A (2) of the *Environment and Land Court Act*, 2015 (2011) regarding appeals.
  15. The applicant further contended that she was not aware of delivery of the judgment in the suit before the trial court. That his advocate on record made an effort to trace the file at the registry to get a copy of the judgment but they could not trace it. The judgment was only served on the appellants on 10/07/2023.
  16. 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.” Emphasis added.
  17. Section 16 A (1)(2) of the *Environment and Land Court Act* is couched in similar terms. It reads: -
    - 16 A (1) “All appeals from Subordinate Courts and local tribunals shall be filed within a period of thirty days from the date of the decree or order appealed against in matters in respect of disputes falling within the jurisdiction set out in Section 13(2) of the *Environment and Land Court Act*, provided that in computing time within which the appeal is to be instituted, there shall be excluded such time that the Subordinate Court or tribunal may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.
    - (2) An appeal may be admitted out of time if the appellant satisfies the Court that he had a good and sufficient cause for not filing the appeal in time.” Emphasis added.
  18. In the instant case, the said Judgment was delivered on 04/04/2023. It is not disputed that both the Applicant and her Counsel were not in Court on that day. The applicant has not provided information on why neither her counsel nor herself were not in court for a matter they have participated in.



19. The Applicant therefore had upto 04/05/2023 to file her appeal. However, for “good and sufficient cause,” the Applicant may have a window within which to seek and obtain an extension of time to lodge her appeal. The term “good and sufficient cause” has been said to mean one and the same thing – *Qureshi & Another.V. Patel & Others* 1964 E.A.L.R 633. Has the Applicant demonstrated “good and sufficient cause” to warrant the order of extension of time? That is what I shall now interrogate in the following paragraphs.
20. In the case of *Hon Attorney General .V. The Law Society Of Kenya & Another* C.A Civil Appeal No 133 Of 2011 (2013 eKLR), Musinga J.A described the term “good and sufficient cause” as follows: -
- “Sufficient cause or good cause in law means: -
- “the burden placed on a litigant (usually by a Court rule or order) to show why a request should be granted or any action excused
- See *Black’s Law Dictionary* 9<sup>th</sup> Edition page 251. Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubt in a Judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.” Emphasis added.
21. In the case of *Nicholas Kiptoo Arap Korir Salat vs I.E.B.C & Others* (*supra*), the Supreme Court re – stated the following principles which should guide a Court considering an application for leave to extend time. These are: -
1. Extension of time is not a right of a 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 per 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 on a case to case basis.
  4. Whether there is 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 s granted.
  6. Whether the application has been brought without undue delay.
  7. Whether in certain cases like election petitions, public interests should be a consideration for extending time.
22. There are also the See also the cases of *Bagajo .V. Christian’s Children Find Inc* 2004 2 KLR 73 and also *Fahmi Twaha .vs. Timamu Abdalla & Others*, Supreme Court Civil Application No 35 of 2014.
23. Guided by the above legal provisions and precedents, it is clear that this Court has a discretion, for “good and sufficient cause,” to consider and grant an extension of time within which a party can file an appeal beyond the thirty (30) day period. That discretion, however, must be exercised judicially on bona fide reasons. It is not to be granted as a matter of course. Rather, it is an equitable remedy and whereas there is no mathematical formula as to what is or is not an unreasonable delay, each case must be considered on its own peculiar circumstances. However, whatever reasons are put forth as justifying good and sufficient cause, they must be rational, plausible, logical, convincing, reasonable and truthful leaving no doubt that what is being pursued is solely in the interest of justice and nothing more.



24. Bearing in mind the uncontested fact that both the Applicant and her Counsel were not in Court and the file could not be traced, it is my view that it would be harsh to punish the applicant when the application for extension of time was filed without inordinate delay.
25. This application was then filed on 13/07/2023. It is clear to me that there is good and sufficient cause to warrant the grant of an extension of time to appeal. The explanation given by the Applicant is plausible, rational, logical, convincing, reasonable and truthful. It does not leave any doubt in my mind that the application is made in good faith.
26. Access to justice is anchored under Article 48 of *the Constitution* of Kenya, 2010. In addition, the unlimited right to fair hearing is stipulated at Article 50 (1) as read with Article 25 (c) of the said Constitution.
27. Under section 95 of the *Civil Procedure Act*, the court is vested with the discretion to enlarge time. Order 50 rules 6 and 8 of the Civil Procedure Rules, 2010 provides for the power to enlarge time and computation of days respectively.
28. In the obtaining circumstances, I am persuaded that the applicant has shown a good and sufficient cause for not lodging the appeal in time. The application is meritorious.
29. On the grant a stay of execution pending appeal is Order 42 Rule 6(1) and (2). That provision states that: -
  - “6 (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 under 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 sub rule (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.” Emphasis added.
30. A party seeking an order for stay of execution pending appeal must satisfy the following conditions: -
  1. Show sufficient cause.
  2. Demonstrate that unless the order for stay is granted, substantial loss will ensue.
  3. File the application without unreasonable delay.



#### 4. Offer security

31. The Applicant has annexed a Draft Memorandum of Appeal and that is sufficient cause. She has also satisfactorily explained the delay in approaching this Court and which is not unreasonable in the circumstances.

32. However, the Applicant was also required to satisfy all the conditions set out in Order 42 Rule 6(1) and (2) of the Civil Procedure Rules, not only some of them. And the cornerstone of such an application for stay of execution pending appeal is substantial loss as Platt Ag J.A (as he then was) put it in Kenya Shell Ltd .V. Benjamin Kibiru & Another 1986 KLR 410 when he said: -

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.” Emphasis added.

33. In Vishram Ravji Halai & Another.V. Thornton & Turpin (1963) Ltd 1990 KLR 365, the Court said:-

“Thus the superior Court’s discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly, the applicant must furnish security. The application must of course be made without unreasonable delay.” Emphasis added.

34. On the issue of substantial loss, Kuloba J captured it well in the case of Machira ‘/a Machira & Company Advocates.vs. East African Standard (No 2) 2002 2 KLR as follows: -

“If the applicant cites as a ground, substantial loss the kind of loss likely to be sustained must be specified, details or particular thereof must be given and the conscience of the Court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order before disposal of the applicant’s business (e.g. appeal or intended appeal).”

35. The Judge went on to add that: -

“Moreover, a Court will not order a stay upon a mere vague speculation; there must be the clearest ground of necessity disclosed on evidence ..... Another common factor in favour of the applicant is whether to proceed further or to execute may destroy the subject matter of the action and deprive the appellant or intended appellant of the means of prosecuting the appeal or intended appeal. So, really, stay is normally not granted, save in exceptional circumstances.”

36. Gikonyo J described it as follows in James Wangalwa & Another.vs. Agnes Naliaka Cheseto (2012 eKLR):-

“..... the fact that the process of execution has been put in motion, by itself, does not amount to substantial loss .... The applicant must establish other factors which show that



the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. That is what substantial loss would entail .....

37. I have perused both the Applicant's supporting affidavit in support of this application. There is no mention of what substantial loss, if any, the Applicant will suffer if there is no order for stay of execution pending appeal except for paragraph 17 where the applicant states:- ".....irreparable substantial loss if my family is evicted from the suit property we have enjoyed peaceful and uninterrupted business environment since 1983". Yet that is the cornerstone of such an application.

38. No evidence has been placed before this Court suggesting that the Respondent has commenced the procedure of eviction as alleged by the applicant.

39. There is therefore no substantial loss that has been established.

40. On security, the Applicant has averred at paragraph 20 of the supporting affidavit that she is ready and willing to abide by any conditions which this Court may impose for the due performance of any decree or order that may ultimately be binding on her. As was held in *Wycliff Sikuku Walusaka .V. Philip Kaita Wekesa* 2020 eKLR: -

"The offer for security must of course come from the Applicant himself as a sign of good faith to demonstrate that the application for stay of execution pending appeal is being pursued in the interest of justice and not merely as a decoy to obstruct and delay the Respondent's right to enjoy the fruits of his Judgment."

41. The Applicant has therefore surmounted the hurdle of providing security.

42. Finally, as Counsel for the Respondent has rightly submitted, the Applicant's suit was dismissed. That was a negative order which cannot be stayed save perhaps for costs which, according to those submissions, were not awarded. Therefore, there is really nothing to stay. The case law on stay of execution pending appeal is clear that for such an order to be granted, there must be a positive order. In the case of *Western College of Arts and Applied Sciences.V. Oranga & Others* 1976 – 80 1 KLR 78, the Court of Appeal for East Africa stated thus: -

"But what is there to be executed under the Judgment the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In *WILSON.V. CHURCH*, the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case, the High Court has not ordered any parties to do anything or to refrain from doing anything or to pay any sum."

43. In *Co – Operative Bank Of Kenya Ltd .V. Banking Insurance & Finance Union Kenya* 2015 eKLR, the Court of Appeal held that: -

"An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of Judgment."

44. As I have already stated above, it is not in dispute that the Applicant's suit was dismissed. So, there is really no positive order due to be performed as a result of the Judgment sought to be appealed. Therefore, the Applicant's case having been dismissed and in the absence of any positive orders having been made capable of execution, there is nothing to warrant the grant of orders of stay of execution pending appeal.



45. Given the foregoing and having considered the Notice of Motion dated 13/07/2023, this Court makes the following orders: -

1. Leave is hereby granted to the Applicant to file and serve her appeal out of time.
2. The appeal be filed and served within fifteen (15) days from the delivery of this ruling.
3. The Record of Appeal be filed and served within forty-five (45) days from the date of serving the appeal.
4. If the Applicant does not file their record of Appeal within the time stipulated in (3) above, the window granted to file the Appeal shall automatically lapse.
5. The prayer for stay of execution pending appeal is declined.
6. Costs of the application shall abide the outcome of the appeal.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 23<sup>RD</sup> DAY OF OCTOBER 2023.**

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**MOGENI J**

**JUDGE**

**In the virtual presence of: -**

Ms. Nyanchera holding brief Mr Mwagambo for the Appellant

Ms. Githii for the Respondent

Caroline Sagina: Court Assistant

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**MOGENI J**

**JUDGE**

