



**Co-operative Bank of Kenya Limited v Nyalyka Enterprises & Engineering Co Ltd (Miscellaneous Application E012 of 2023) [2023] KEELC 22270 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22270 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
MISCELLANEOUS APPLICATION E012 OF 2023  
LC KOMINGOI, J  
DECEMBER 19, 2023**

**BETWEEN**

**CO- OPERATIVE BANK OF KENYA LIMITED ..... APPLICANT**

**AND**

**NYALYKA ENTERPRISES & ENGINEERING CO LTD ..... RESPONDENT**

**RULING**

1. This is the Notice of Motion dated 14<sup>th</sup> September 2023, brought under;  
Section 79G and 95 of the [Civil Procedure Act](#) and Order 42 Rule 6 and Order 50 of the Civil Procedure Rules.
2. It seeks Orders;
  - i. That the Applicant be granted leave to appeal out of time against the ruling of Hon. V. A Kachuodho Principal Magistrate delivered on 10<sup>th</sup> August 2023 at Kajiado.
  - ii. That the memorandum of appeal annexed hereto be deemed as duly filed and served.
  - iii. That the court be pleased to issue an order of stay of proceedings in CMCC ELC No E146 of 2022 Nyalyka Enterprises & Engineering Co Ltd vs Co-operative Bank of Kenya Limited pending the hearing of the appeal.
  - iv. That cost of the application be provided for.
3. This application supported by the Affidavit of Florence Njuguna its Legal Manager is premised on the grounds that the inordinate delay was occasioned by the Bank's internal processes where different departments had to be consulted hence the delay in issuing instructions to their Advocate. She averred that the annexed Memorandum of Appeal was meritorious, the delay was not inordinate and the Respondent would not be prejudiced if the application was allowed.



4. The Respondent in the Grounds of Opposition and Preliminary Objection dated 20<sup>th</sup> September 2023 the Respondent contends that the application is incompetent, superfluous, fatally defective, misconceived and lacks merit. That the Applicant had not satisfied the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules and this court did not have jurisdiction to determine the appeal which was filed out of time offending Section 79G of the *Civil Procedure Act*.
5. This Application was canvassed by oral submissions.

#### SUBDIVISION

##### **The Applicant's submissions**

6. Counsel for the Applicant submitted that the application sought leave to appeal out of time indicating that the delay was not inordinate. And if allowed, the Respondent would not suffer prejudice which cannot be compensated by costs.

##### **The Respondent's submissions**

7. Counsel for the Respondent contested the application and Memorandum of Appeal submitting that it should be struck out for want of jurisdiction having been filed out of time.

##### **Analysis and determination**

8. I have considered the Notice of Motion, the affidavit in support and the response thereto, the rival submissions and the authorities cited. The issues for determination are:
  - i. Whether the application seeking leave to file the Appeal out of time and Stay of proceedings in CMCC ELC No. E146 of 2022 is meritorious?
  - ii. Who should bear costs of the application?
9. The Applicant avers that the Ruling was delivered on 10<sup>th</sup> August and they filed the application for leave to appeal out of time together with the Memorandum of Appeal on 15<sup>th</sup> September which delay should not be considered as inordinate. The Respondent contested, no good or sufficient reasons have been advanced.
10. The Supreme Court of Kenya in *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR while citing the *Nicholas Salat* case outlined the following principles to be considered in determining the extension:

“the under-lying principles that a Court should consider in exercise of such discretion:

  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 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 on 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 respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

11. The Applicant averred that they needed to consult widely within the different departments after the ruling was delivered on 10<sup>th</sup> August 2023. The Appeal ought to have been filed by 10<sup>th</sup> September. The application seeking extension of time was filed on 14<sup>th</sup> September 2023. This is a four (4) day delay which court does not deem as inordinate delay.

12. I find that this application was filed timeously. The delay has been explained.

13. The Applicant has also sought stay of proceedings in the CMCC ELC No. E146 of 2022. Ngugi J. (as he then was) in *Turbo Highway Eldoret Ltd v Muniu* [2022] KEHC 10197 (KLR) held as follows regarding the issue of stay of proceedings:

In *William Odhiambo Ramogi & 2 Others v the Honourable Attorney General & 3 Others* [2019] eKLR, a 5-judge Bench of the High Court, after looking at our jurisprudential scan on the question of stay of proceedings, authoritatively laid out the principles our Courts have established for the grant of stay of proceedings pending the hearing and determination of an appeal over an interlocutory application to a higher Court. See: *Kenya Shell Limited Vs. Benjamin Karuga Kibiru & another* [1986] eKLR; *Global Tours & Travels Limited (Nairobi HC Winding Up Cause No. 43 of 2000)*; *David Morton Silverstein v Atsango Chesoni* [2002] eKLR: They laid down the following six principles:

- i. First, there must be an appeal pending before the higher Court;
- ii. Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;
- iii. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
- iv. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;
- v. Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and



- vi. Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay.
1. It is my view that the Intended Appeal will be an academic exercise if the proceedings in the lower court are not stayed. It is therefore in the interest of justice that the proceedings in the lower court are stayed.
  2. In conclusion I find merit in this application and I grant the orders sought namely;
    - a. That the Applicant is hereby granted leave to appeal out of time against the ruling of Honourable V.A Kachuodho PM delivered on 10<sup>th</sup> August 2023 at Kajiado.
    - b. That the memorandum of Appeal annexed hereto to be deemed as duly filed upon payment of the requisite fees.
    - c. That the said Memorandum of Appeal be served on the Respondent.
    - d. That the proceedings on CMCC ELC NO. 146 of 2022; Nyalyka Enterprises & Engineer Co. Ltd Vs. Co-operative Bank of Kenya Limited are hereby stayed pending the hearing and determination of the Appeal.
    - e. That costs of this Application be borne by the Applicant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 19<sup>TH</sup> DAY OF DECEMBER 2023.

**L. KOMINGOI**

**JUDGE.**

**IN THE PRESENCE OF:**

Ms. Kamau for Mrs. Karanu for the Applicant.

N/A for the Respondent.

Court Assistant – Mutisya.

***ELC MISC.Ruling No. E012 OF 2023 Page 3 of 3***

