



Mwebia t/a Chini ya Miti Restaurant & Lounge v Muiruri & another (Appeal E069 of 2023) [2023] KEELC 22268 (KLR) (7 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22268 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
APPEAL E069 OF 2023
J OMANGE, J
DECEMBER 7, 2023**

BETWEEN

**FRANCIS JUMA MWEBIA T/A CHINI YA MITI RESTAURANT &
LOUNGE APPLICANT**

AND

**PETER MAIHARO MUIRURI 1ST RESPONDENT
IMMEDIATE AUCTIONEERS 2ND RESPONDENT**

RULING

1. In the Notice of Motion application dated the June 19, 2023 the Applicant seeks the orders that:-
 - a. Spent.
 - b. That this honourable court be pleased to grant leave to file the appeal out of time against ruling delivered by the honourable trial magistrate Hon P.K. Rotich on February 21, 2023 in Milimani Commercial court civil suit MCCC No E467 of 2023.
 - c. That the honourable court be pleased to grant a stay of execution on the ruling delivered by the honourable trial magistrate Hon P.K. Rotich on February 21, 2023 in Milimani Commercial court civil suit MCCC No E467 of 2023.
 - d. Any other orders that the court may deem just and fit.
 - e. That costs of the application.
2. The Application was supported by an Affidavit sworn by the Applicant in which he deponed that he had filed an application dated September 11, 2022. An unfavorable ruling was delivered against him in respect of which he intends to appeal hence the application.



3. He avers that the delay to file the appeal within the stipulated time was occasioned by his sickness that caused a communication breakdown between him and his advocates on record and was not inordinate on his part. Further he asked the court to allow the application and issue stay orders as he shall suffer irreparable loss and damage and that the stay would also ensure that his appeal which has a high chance of success is not rendered nugatory.
4. The Applicant relied on the provision of order 42 rule 6 of the *Civil Procedure Rules 2010* and section 95 of the *Civil Procedure Act*. Counsel cited the case of *Nick salat vs Independent Boundaries and Election Commission & 7 others* (2014) eKLR on grounds /circumstances in which a court can grant leave to file out of time. Counsel further highlighted the principles for grant of stay as enumerated in the case of *Butt Vs Rent restriction tribunal* which principles he stated this honourable court should consider so as not to render his appeal nugatory and lastly, he submitted that the respondent will not be prejudiced if the said stay is granted.
5. The 1st Respondent filed a replying affidavit dated July 4, 2023 in which he deponed that the application herein is overtaken by events as execution has already taken place for instance the Applicants goods had been sold in a public auction and furthermore the premises had been let out to another tenant.
6. He further deponed that the Applicant had not proved the averments that he been sick occasioning the delay in filing and questioned the documents tendered as proof of the sickness stating that the purported institution that had attended to the Applicant was not licensed to provide medical services and as such the court should not rely on the medical report issued by the Applicant.
7. Lastly the Respondent stated that the application is totally defective and an abuse of the court's time and as such should not be entertained and should be dismissed.
8. In their submissions the Respondent reiterated the contents of their replying affidavit and submitted that extension to file out of time is an equitable remedy and not a matter of right and a party seeking to have the same should be a deserving Applicant who gives good reason for not filing the appeal in good time which in this case the Applicant had not provided. He relied on the case of *Nicholas kiptoo Arap Korir Salat v Independent Electoral and boundaries commission & 7 others*.
9. The 1st Respondent submitted that the Applicant had not demonstrated how substantial loss will be occasioned to him unless stay of execution orders are granted as per order 42 rule 6 of the *Civil Procedure Rules*. He stated that he is more likely to suffer loss as he has already lost money arising from non-payment of rent and other fees incurred in the whole auction process.
10. Lastly, he submitted that should the court issue orders for stay then the Applicant should be granted security of costs of the appeal and costs of the application.
11. Having considered the foregoing, the following are issues for the court's determination; Whether the court should grant leave to the Applicant to file the appeal out of time? Whether the court should grant stay of execution as to the ruling delivered on February 21, 2023.

Whether the court should grant leave to the Applicant to file the appeal out of time.

12. 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 appellants 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.”

13. The decision whether or not to grant leave to file an appeal out of time or to admit an appeal out of time is an exercise of discretion. The court in determining whether to exercise the discretion in favour of an Applicant should be guided by the factors that have been laid out by various courts. In the case of *Thuita Mwangi v Kenya Airways Ltd* [2003]eKLR the court provided the following checklist;
 - i. The period of delay;
 - ii. The reason for the delay;
 - iii. The arguability of the appeal;
 - iv. The degree of prejudice which could be suffered by the if Respondent the extension is granted;
 - v. The importance of compliance with time limits to the particular litigation or issue; and
 - vi. The effect if any on the administration of justice or public interest if any is involved.
14. The ruling in this case was delivered on the February 21, 2023 while the instant application was filed on the June 19, 2023, three months after the decision to be appealed against was rendered. The Applicant has submitted that the delay can be attributed to him falling sick and staying out of contact with his then advocate who could not lodge a notice of appeal without instructions. The Applicant has attached a prescription sheet from a pharmaceutical company as evidence of his illness.
15. This is the only document brought forth by the Applicant. While the 1st Respondent challenges the report on grounds that it does not state with precision what the Applicant was being treated for. I note that the report is signed by a medical doctor. In these circumstances I am inclined to grant the extension of time.
16. On the question of whether the court should grant stay of execution as to the ruling delivered on February 21, 2023. The Courts jurisdiction to grant stay is derived from of order 42 rule 6 (1) of the *Civil Procedure Rules* which provides;

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.
16. The Applicants are required to establish that if the application is not allowed, substantial loss would result. Substantial loss has been defined in several judicial pronouncements. In the case of *Francis K. Chabari & another vs Mwarania Gaichura Kairubi* [2022] eKL Justice C. K. Yano quoted Geoffery Muriungi & another v John Rukunga M’imonyoso as to define substantial loss as follows;

“the undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. I always refer to that eventuality as “reducing the successful appellant into a pious explorer in the judicial process”. The said state of affairs is what is referred to as “substantial loss” within the jurisprudence in the High Court, or “rendering the appeal



nugatory” within the juridical precincts of the Court of Appeal: and that is the loss which is sought to be prevented by an order for stay of execution pending appeal”

17. The Applicant in his supporting affidavit has averred that he is a business person having been in the business of operating a restaurant and lounge. He stated that he employed 14 members of staff who would be unable to provide for their families if the court did not intervene. The loss of livelihood of these 14 families amounts to substantial loss.
18. Having reviewed the facts of this case, submission by counsel, the relevant law and principles that have been clearly set out by the courts, I am in the end guided by the principles set out in the case of *Transporters Ltd. vs. Absalom Dova Lumbasi* [2012] eKLR, thus:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination.”
19. It is therefore the court ‘s duty to ensure that the 1st Respondent is not prejudiced by any orders it may issue but at the same time ensure that the Applicant has an opportunity to prosecute his appeal. In balancing the two positions I allow the application in the following terms;
 - a. Extension of time is granted to the Applicant to file an appeal.
 - b. stay of execution of the ruling delivered by the honourable trial magistrate Hon P.K. Rotich on 21st February 2023 in Milimani Commercial court civil suit MCCC No E467 of 2023 is hereby granted subject to condition (c) and (d) below.
 - c. The Applicant is to deposit an amount of Kshs 500,000 in court as security for costs within 30 days.
 - d. The Applicant is to file the record of appeal within 90 days.
 - e. In default of compliance with (c) and (d) execution is to issue.
 - f. Costs are to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 7TH DAY OF DECEMBER 2023.

JUDY OMANGE

JUDGE

In the presence of: -

Mr. Okumu for Appellant/Applicant

Mr. Munge for 1st Respondent

