



Ransley, McVickers & Shaw Advocates v Blackstone Properties Limited (Miscellaneous Civil Application 160 of 2019) [2022] KEELC 2299 (KLR) (9 May 2022) (Ruling)

Neutral citation: [2022] KEELC 2299 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MISCELLANEOUS CIVIL APPLICATION 160 OF 2019**

JA MOGENI, J

MAY 9, 2022

BETWEEN

RANSLEY, MCVICKERS & SHAW ADVOCATES APPLICANT

AND

BLACKSTONE PROPERTIES LIMITED RESPONDENT

RULING

1. Before this Court for determination is a miscellaneous suit filed vide an Application dated February 21, 2022 and is brought under the provisions of Sections 3A, 75, 78 and 79G of the [Civil Procedure Act](#), Order 42 Rule 6(1), Order 51 Rule 1 of the [Civil Procedure Rules 2010](#) and all other enabling provisions of the Law. The Client/Respondent is seeking for the following Orders:
 1. Spent.
 2. Pending the inter parties hearing of this application this Honourable Court be pleased to stay execution of the Ruling/Decree issued on November 23, 2021.
 3. Leave be granted to the Appellant to appeal out of time.
 4. This Honourable Court be pleased to stay execution of the Judgment herein any ensuing order/decree pending the hearing and determination of the intended appeal.
 5. The costs of this application be provided for.
2. The Application is opposed. The Advocate/Respondent filed a Replying Affidavit sworn by Virginia Wangui Shaw on February 28, 2022.
3. The Application was canvassed by way of written submissions. The parties submitted and a Ruling date was scheduled.



4. The Applicant/Client’s submissions are dated March 11, 2022 and filed on the even date. The Advocate/Respondent’s submissions are dated March 15, 2022 and were filed on March 15, 2022.
5. The Court has now carefully read and considered the Application dated February 21, 2022, counsels’ written submissions and the Pleadings in general and finds that there are only two issues for determination, and that is whether the order of stay of execution should be granted and whether the leave to appeal out of time should be granted.
6. On the first issue for determination, grant of stay of execution pending appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules, the relevant part of which states 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 appeal case of 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.
7. An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See *Antoine Ndiaye vs. African Virtual University* [2015] eKLR.
8. In *Butt vs. Rent Restriction Tribunal* [1979], the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that the power of the court to grant or refuse an application for a stay of execution is discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge’s discretion. Thirdly, 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. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.



9. As to what substantial loss is, it was observed in *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR, that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. 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 ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

10. In the instant case, it is the Applicant/Client’s case that he is aggrieved with the decision and has already prepared a notice of appeal in this matter and a draft memorandum of appeal which he contends will be rendered nugatory if an order of stay is not granted pending the hearing and determination of this application. It is his case that the Ruling dated November 18, 2021 was delivered without notice to the Applicant/Client who has come to know of the Ruling and the Decree after Icon auctioneers turned up to proclaim its goods on 17/02/2022.
11. In opposing the Application, the Advocate/Respondent stated that the present matter relates to taxation proceedings and the undisputed facts are that they filed the Advocate – Client Bill of Costs dated 12/09/2019. The taxing officer then delivered a Ruling on July 15, 2021. It is their contention that the Applicant/Client was aware of the said Ruling, and they did not file a Reference before the Court within the timelines stipulated by law (paragraph 11 of the Advocates Remuneration Order, 24).
12. It is the Advocate/Respondent’s case that what is before the Court is an order adopting the certificate of taxation. They aver that there is no decision on a Reference that the client can appeal to the Court of Appeal, as the client did not file any reference challenging the taxation.
13. The court, in *RWW vs. EKW* [2019] eKLR, addressed its mind to the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

14. The court is called upon to look at the interests of both parties. The Advocate/Respondent stated that the stay of execution of judgment must be balanced equally with the right of the decree holder to enjoy the fruits of his judgment and the rights of the intended Appellant. The Applicant/Client on their part has not adduced any document showing that they will suffer gravely, but they have averred that they are ready and willing to abide by the conditions that may be set by the court including depositing security.



15. With regard to security for costs, the court in *Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others* [2015] eKLR, it was said:

“... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”
16. From the cases referred to above, it is clear that the issue of security is discretionary, and it is upon the court to determine the same. To direct in all cases of money-decrees that the decree amount should be deposited in Court before stay, pending appeal, is ordered, is to defeat the very purpose for which Order 42, Rule 6 is intended, though in suitable cases nothing comes in the way of laying down such a condition.
17. The Applicant/Client’s case is that the prejudicial issue had been raised where they indicated that the subject Misc. Application No. 160 of 2019 is Res Judicata. However, the Court notes that the Taxing Officer already rendered a decision on this whereby she found that the matter had been dismissed on a technicality. I shall therefore not pronounce myself on the same as the issue has already been dealt with. The Taxing Officer proceeded to tax the Advocate-Client Bill of Costs dated September 12, 2019, a ruling was delivered on July 15, 2021 and a Certificate of Taxation dated 6/08/2021 was issued.
18. I agree with the Advocate/Respondent. The issue here is that the Applicant/Client failed to follow due procedure by failing to file an Objection seeking to dispute any items of the taxation to the Taxing Officer and not a matter of res judicata.
19. It is clear under the Advocates Remuneration Order that after the taxation of the bill of costs, the procedure for the challenge of the results therefrom is provided under Paragraph 11 of the said Order. It was incumbent upon the Applicant/Client to exercise the option of filing a Reference and doing so within the timelines provided.
20. The Applicant/Client stated that they were not aware of the Ruling dated November 23, 2021 alleging that it was delivered without notice. From the record, there is evidence that has been adduced by the Advocate/Respondent indicating that they have been serving the Applicant/Client with various mention and hearing notices. The Advocate/Respondent adduced evidence indicating that they served the Applicant/Client with the Application dated September 10, 2021 and a mention notice with respect to the same. The Applicant/Client did not appear in Court despite service. The said application was allowed, and the Certificate of Taxation was adopted as an order of the court as the same was not opposed.
21. The Court also notes that the Client last appeared in Court on 4/03/2021 and then later appeared on February 28, 2022 after Judgment was entered.
22. Service of pleading and court documents to litigants is as blood is to the body. If your body misses blood it misses oxygen and from the little biology I know the body dies. That is the same thing that will happen to a case if one is not served they will not know what is not going on in their case and their case may die.



23. Service of court papers is very critical in any litigation it like blood flowing through a human body failure of which causes serious health ramifications that could be fatal. In the same manner in the same way failure to serve a litigant also has serious ramifications to the suit before the court and it can lead to a miscarriage of justice and the wrong party stealing a match unfairly.
24. It is clear the Applicant/Client was not keen on defending/prosecuting this matter. The circumstances in which an application for leave to appeal out of time and for stay of execution have been prayed for have been referred to already and I think sufficient cause has not been shown for ordering execution to be stayed pending disposal of the appeal.
25. On the second issue for determination, 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 (30) 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.”
26. The applicant’s application for leave to file appeal out of time may only be accepted if it satisfies the court that it had good and sufficient cause for not filing the appeal during the specified time.
27. The court notes that the present application was filed on 23/02/2022 and the Applicant/Client has explained that the delay was caused by the delivery of the Ruling dated November 23, 2021 without notice. The Applicant/Client stated that they only came to know of the Ruling and the Decree after Icon Auctioneers turned up to proclaim its goods on 17/2/2022. They contend that they stand to suffer substantial loss and damages upon execution by the Advocate/Respondent as some of the orders in the Judgment are time bound.
28. In the case of Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR. Odunga J found that:
- “an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so, since as was held in Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633, there is no difference between the words “sufficient cause” and “good cause”. It was therefore held in Daphne Parry vs. Murray Alexander Carson [1963] EA 546 that though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.”
29. As to the principles to be considered in exercising the discretion whether to enlarge time, our case law has developed a number of factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in Mwangi v Kenya Airways Ltd [2003] KLR. They include the following; The period of delay; The reason for the delay; The arguability of the appeal; The degree of prejudice which could be suffered



by the Respondent is the extension is granted; The importance of compliance with time limits to the particular litigation or issue; and The effect if any on the administration of justice or public interest if any is involved.

30. In *Peter Gichuki King'ara v Independent Electoral and Boundaries Commission & 2 others* [2014] eKLR, the court stated that;

“Judicial discretion is always exercised judiciously and for reasons which are stated. The aims that should be encapsulated in the reasons given for the refusal to exercise discretion are meant to further the cause of justice, and to prevent the abuse of the court process. Judicial discretion is never exercised capriciously or whimsically”

31. The applicant was expected to file his appeal within thirty (30) days of the Ruling, he did not do so.
32. From the above, the factors I am enjoined to take into consideration in the determination of an application of this nature are first, the length of the delay. Second, reason for the delay. Third, possible arguability of the intended appeal and fourth, any prejudice to be suffered by the opposite party should the relief sought by the applicant be granted.
33. Starting with the delay, it is not in dispute that the intended impugned Ruling was delivered on November 23, 2021, while the application under consideration is dated February 21, 2022, a period of ninety (90) days. From the evidence presented, the Applicant/Client has not given sufficient reasons for the delay. Simply saying that they were not aware is not sufficient. The Advocate/Respondent has adduced evidence of service to the Applicant/Client. I find that the delay is not plausible, and therefore, not excusable.
34. On whether the applicant has an arguable case I am unable to say that the intended appeal is arguable. The arguability or otherwise of the intended appeal is merely a possible consideration. It is not a mandatory requirement. There is therefore no need for me to determine at this juncture as to whether the appeal is arguable or not.
35. On prejudice, the Advocate/respondent has opposed the application. They aver that the Applicant/Client was aware of the Ruling date. That the Applicant/Client did not file a reference before the Court in the stipulated timelines under paragraph 11 of the Advocates Remuneration Order. That they prepared an Application dated 10/9/2021 seeking the court to enter judgment against the Client in favour of the Advocate, in terms of the Certificate of Taxation dated 6/08/2021 that was issued and served it upon the Client. The Client did not file any response in opposition to the said Application. It is their case that the Applicant/Client failed, refused and/or neglected to attend Court on November 23, 2021 when the Deputy Registrar directed that the matter be mentioned before this Court, despite service. They contend that the present application is to delay the execution proceedings and the timely disposal of the matter. I am inclined to find that there is prejudice that is likely to be suffered by the advocate/respondent should the relief sought be granted.
36. From the foregoing, I find that the present Application is incompetent in so far as it has not followed the provisions of Paragraph 11 of the Advocates Remuneration Order.
37. The Court was unable to comprehend the Applicant/Client's rationale behind filing this application seeking leave to appeal out of time and seeking an order for stay of execution. No sufficient cause has been demonstrated to warrant this court to exercise discretion in favour of the Applicant/Client.
38. In the result and on the basis of the above assessment and reasoning, I find no merit in the Application dated February 21, 2022 and proceed to dismiss the same with costs.



It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY 2022.

MOGENI J

JUDGE

IN THE PRESENCE OF:

Mr. Evayo holding brief for Mr. Sisile for Respondent

Ms Mwangi Purity holding brief for Mr. Waigwa for Applicant

Vincent Owuor Court Assistant

