



**Muthoni v Mwiki (Commercial Arbitration Cause E063 of 2023)
[2025] KEHC 863 (KLR) (Commercial and Tax) (17 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 863 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL ARBITRATION CAUSE E063 OF 2023**

**MN MWANGI, J
JANUARY 17, 2025**

BETWEEN

ISABELLA MUTHONI DECREE HOLDER

AND

ELIEZAH MWITHALI MWIKI JUDGMENT DEBTOR

RULING

1. The judgment debtor/applicant filed a Notice of Motion application dated 18th March 2024, pursuant to the provisions of Order 50 Rule 5, Order 21 Rule 12(2) & Order 51 Rules 1, 3 & 4 of the *Civil Procedure Rules*, 2010, Article 159(3) of the *Constitution of Kenya*, 2010, Sections 1A, 1B & 3A of the *Civil Procedure Act*, and all other enabling provisions of the law. The applicant seeks orders that this Court deems the Notice of Appeal dated and filed on 28th February 2024 as being properly filed despite having been filed out of time. The applicant also prays for stay of execution of the ruling and order delivered on 9th February 2024 pending the hearing and determination of the intended appeal, and/or in the alternative, that this Court allows the applicant to pay the decretal sum through an initial deposit of Kshs.500,000/= and settle the balance thereof in 18 equal monthly instalments.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Scott Sala, an Advocate of the High Court of Kenya, and learned Counsel for the applicant. He averred that an Arbitral Award of Kshs.3,171,002.83 was recognized by this Court on 18th May 2023, and that the applicant sought to settle the aforesaid decretal sum in 18 equal monthly instalments with an initial payment of Kshs.500,000/=. He averred that in a ruling delivered on 9th February 2024, this Court directed the applicant to pay the decree holder/respondent Kshs.800,000/= upfront, and settle the balance in five equal monthly instalments.



3. Aggrieved by the said decision, the applicant filed a Notice of Appeal dated 28th February 2024 out of time, due to delays in obtaining a copy of the ruling dated 9th February 2024, thus necessitating the instant application. He urged this Court to allow the applicant to settle the decretal sum in 18 equal monthly instalments, with an initial payment of Kshs.500,000/= in the event that it declines to issue an order for stay of execution, on grounds that the applicant is facing financial constraints that prevent adherence to the orders issued earlier by the Court.
4. In opposition to the application, the respondent filed a replying affidavit sworn on 16th May 2024 by Isabella Muthoni, the respondent herein. She averred that the applicant having filed a Notice of Appeal against this Court's ruling of 9th February 2024 out of time and without any sufficient cause, has filed the instant application seeking to re-litigate matters already determined by this Court, which amounts to an abuse of judicial process. She further averred that prayer (b) in the instant application falls under the jurisdiction of the Court of Appeal, not this Court, and prayer Nos. (c), (d) & (e) of the instant application were already considered and determined by the Court in its ruling of the application dated 5th October 2023. She contended that reintroducing them amounts to requesting this Court to sit on appeal of its own decision.
5. The application herein was canvassed by way of written submissions. The applicant's submissions were filed on 28th May 2024 by the law firm of Mucheru Law LLP Advocates. There is however no evidence of filing of written submissions by the respondent in the Court record and the Case Tracking System.
6. Mr. Gathu, learned Counsel for the applicant submitted that the application for extension of time to file a Notice of Appeal was made promptly, as it was filed only five days late. In urging this Court to deem the said Notice of Appeal as being properly filed, Counsel relied on the case of *Charles N. Ngugi v ASL Credit Limited* [2022] eKLR. He further submitted that the delay in filing a Notice of Appeal against the ruling of this Court delivered on 9th February 2024 was as a result of a delay in obtaining a copy of the said ruling, and that the said ruling would have enabled him to make an informed decision.
7. In submitting that an order for stay of execution is meant to preserve the subject matter of a dispute, and to ensure that the appeal is not rendered nugatory in the event it is successful, Mr. Gathu referred to the case of *RWW v EKW* [2019] eKLR. He cited the case of *Sunsand Dunes Limited v Raiya Construction Limited* [2021] eKLR, and argued that the respondent will not suffer irreparable loss in the event an order for stay of execution is granted as any loss can be compensated by an award of damages. He contended that the applicant risks substantial loss in the event that an order for stay of execution is not granted.

Analysis and Determination.

8. Upon consideration of the instant application, the grounds on the face of it and the affidavit filed in support thereof, the replying affidavit by the respondent and the written submissions by Counsel for the applicant, the issues that arise for determination are -
 - i. Whether an order deeming the applicant's Notice of Appeal dated 28th February 2024 as being properly filed should issue;
 - ii. Whether the applicant has met the conditions to warrant being granted an order for stay of execution pending the intended appeal; and
 - iii. Whether the applicant should be allowed to settle the decretal sum in instalments.



Whether an order deeming the applicant's Notice of Appeal dated 28th February 2024 as being properly filed should issue.

9. Appeals from decisions of the High Court are provided for under Rule 77 of the [Court of Appeals Rules](#) which provides that –
1. A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court.
 2. Each notice under subrule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against the decision for which appeal is lodged...
10. The import of the above provisions is that a party dissatisfied with a decision of the High Court may appeal to the Court of Appeal by filing a Notice of Appeal at the High Court within fourteen (14) days after the date of the decision he/she wishes to appeal from. In this case, the applicant seeks to appeal against this Court's ruling delivered on 9th February 2024. As such, the applicant ought to have filed a Notice of Appeal on or before 23rd February 2024 pursuant to the provisions of Rule 77(1) & (2) of the [Court of Appeal Rules](#).
11. The decision relied on by the applicant in support of its application for extension of time is a High Court decision which refers to Section 79G of the [Civil Procedure Act](#), which provides for the time for filing of appeals from Subordinate Courts, and grants the High Court the discretion to admit such appeals out of time. The applicable provisions of the law when it comes to the High Court's discretion to extend time to file a Notice of Appeal are stipulated in Section 7 of the [Appellate Jurisdiction Act](#) which states that -

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.

12. It is however noteworthy that in this case, the applicant does not seek an order for extension of time to file a Notice of Appeal against this Court's ruling delivered on 9th February 2024, but for his Notice of Appeal dated 28th February 2024 to be deemed as being properly filed. The question of whether or not a Court can deem a Notice of Appeal filed out of time as being properly filed was the subject of discussion by the Supreme Court in the case of [Salat v Independent Electoral and Boundaries Commission & 7 others](#) [2014] KESC 12 (KLR), where it was held that –

However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires.

By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such 'an appeal', is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.

To file an appeal out of time and seek the Court to extend time is presumptive and inappropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the 'document' so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this Court's Registry. This is irregular as that document is unknown in law and the same should



be struck out. Where one intends to file an appeal out of time and seeks extension of time, the much he can do is to annex the draft intended petition of appeal for the Court's perusal when making his application for extension of time; and not to file an appeal and seek to legalize it. Petition No. 10 of 2014 having been filed out of time and without leave (an order of this Court extending time), is expunged from the Court's Record.

13. Bound by the above decision, this Court finds that the applicant's Notice of Appeal dated 28th February 2024, which was filed without leave of the Court is a nullity, and of no legal consequence. For this reason, it cannot be deemed to have been properly filed.
14. In view of the above finding and the fact that there is no pending appeal against this Court's ruling delivered on 9th February 2024, this Court shall not determine the issue of whether an order for stay of execution pending appeal should issue as that would be an academic exercise.

Whether the applicant should be allowed to settle the decretal sum in instalments.

15. It is not in contest that the applicant filed an application dated 5th October 2023 seeking to settle the decretal sum by making a deposit of Kshs.500,000/=, and to pay the remainder thereof in 18 equal monthly instalments. This Court in a ruling delivered on 9th February 2024 allowed the applicant's application and issued an order directing the applicant to settle the decretal sum in this suit together with costs of the suit and interest due to the respondent by making an initial payment of Kshs.800,000/=, and for the remainder to be paid in five equal monthly instalments.
16. It is not disputed that the said ruling has neither been set aside on appeal, and/or reviewed following an application for review. It is trite that Courts cannot re-evaluate their own decisions unless a formal application for review has been filed, which is not the case herein. In the circumstances, this Court finds that this issue of whether the applicant should be allowed to settle the decretal sum in instalments is not open for determination by this Court, as doing so will require the Court to re-evaluate its own decision, which is contrary to the law and the rules of natural justice.
17. In the end, this Court finds that the instant application is incompetent. Consequently, I make the following orders –
 - i. The applicant's application dated March 18, 2024 is hereby dismissed with costs to the decree holder/respondent.
 - ii. The applicant's Notice of Appeal dated 28th February 2024 is hereby expunged from the Court Record for having been filed out of time, without leave of the Court.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF JANUARY, 2025.

RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Sala for the judgment debtor/applicant

No appearance for the decree holder/respondent

Ms B.Wokabi – Court Assistant.

