



**Simba Drilling Company Limited v Gasambi (Civil Appeal
E195 of 2024) [2025] KEHC 1446 (KLR) (21 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 1446 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E195 OF 2024
JK NG'ARNG'AR, J
JANUARY 21, 2025**

BETWEEN

SIMBA DRILLING COMPANY LIMITED APPELLANT

AND

MWANJALA MASOUD GASAMBI RESPONDENT

RULING

1. The Appellant filed a Notice of Motion application dated 9th July 2024 under under Certificate of Urgency pursuant to Article 50 and 159 of the Constitution, Section 1A, 1B, 3A, 65 and 79G of the Civil Procedure Act, Order 40, Order 42 Rule 6, and Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law.
2. The Appellant/Applicant seeks for leave to appeal out of time against the ruling of Hon. Gatambia Ndung'u (RM) delivered on 22nd February 2024 in Small Claims No. E951 of 2023, that pending the hearing and determination of the appeal, there be a stay of execution of the ruling and decree in the Small Claims Court at Mombasa in Claim No. E951 of 2023, and that costs be provided for.
3. The application is premised on grounds on its face and the Supporting Affidavit of Abdul Haji sworn on 9th July 2024 that a ruling in Mombasa Small Claims No. E951 of 2023 was delivered on 22nd February 2024 by Hon. Gatambia Ndung'u (RM). That the Appellant/Applicant being aggrieved by the said ruling intended to appeal to this court. That vide letters dated 22nd February 2024, the Appellant/Applicant through its advocates on record requested for certified copies of the ruling, certified copies of typed proceedings and a copy of the decree for purposes of lodging the appeal. That the 30-day statutory timeline for lodging appeal lapsed on 23rd March 2024 and by the said date, the Appellant/Applicant was yet to be furnished with the copies. That a reminder letter was done on 3rd July 2024 requesting for the same documents and that the delay in lodging the appeal was attributed to the delay in being furnished with the decree and proceedings which documents are necessary in preparing the appeal. That while the Appellant/Applicant acknowledges the delay in lodging the



appeal, the same is not inordinate or unreasonable for this court to fetter its discretion and lock the doors of justice to the Appellant/Applicant.

4. The Appellant/Applicant averred that the Respondent has commenced execution proceedings and the Appellant/Applicant are apprehensive that they may not recover the sum from the Respondent as he is not in a financial position to refund the sum if the appeal succeeds. That the Appellant/Applicant is engaged in borehole drilling services and attachment of the company equipment and assets will affect the functioning of the company and they will equally incur irreparable losses. That the Appellant/Applicant is willing to provide security for the decretal sum if called upon by the court to do so. That the Respondent does not stand to suffer any prejudice if the orders of stay are granted.
5. The Respondent filed a Replying Affidavit sworn on 29th July 2024 opposing the application that the ruling delivered on 22nd February 2024 was duly and timely uploaded on the e-filing platform and that the Applicant ought to have lodged the Memorandum of Appeal within 30 days. That the ruling was availed on the e-filing platform on 23rd February 2024 and counsel for the Applicant was present when the ruling was delivered and that she even prayed for 30 days stay of execution which was duly granted. That the delay is unexplainable and inexcusable that they were waiting for typed and certified proceedings to discern grounds of appeal.
6. The Respondent states that it is indeed true that the Respondent has been issued with an application for execution of decree, warrants of sale of movable property in execution of decree for money and warrants of attachment of movable property in execution of a decree for money and they were signed and sealed by the trial court on 26th June 2024. That the Respondent has instructed M/s Fantasy Auctioneers to execute the decree and certificate of stated costs both dated 10th June 2024 but the auctioneers have not been successful as the Appellant's base of operation is unknown. That the Appellant has not demonstrated how it will face financial ruin if it fully settles Kshs. 842,952 that is rightfully owed to the Respondent. That it will be prejudicial if the Respondent is kept waiting to enjoy fruits of his judgment and that the Applicant has remitted Kshs. 100,000 to the Respondent's counsel's Absa Bank account as partial payment of the decretal sum plus costs and interests.
7. The Respondent deposed that Order 42 Rule 6 (2) of the [Civil Procedure Rules](#) dictates that for a party to be issued with stay of execution by the appellate court, it must meet three conditions namely: establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. That the application failed to meet the three conditions. That the Respondent will be prejudiced if the application is allowed as he has instructed M/s Fantasy Auctioneers to perform their task in making sure that Kshs. 842,952.00 is paid. That the Applicant has not offered a proposal of furnishing security for this court to strike a balance of interests of both parties.
8. The application was canvassed by way of written submissions. The Appellant/Applicants in their submissions dated 13th November 2024 on whether they should be granted leave to appeal out of time argued that the jurisdiction of this court to grant leave to lodge an appeal out of time is provided under Section 79G of the [Civil Procedure Act](#). That the High Court in the case of [Osman & Another v Kiema](#) (2024) KEHC 13788 (KLR) relied on the Court of Appeal decision in [Thuita Mwangi v Kenya Airways Ltd](#) (2003) eKLR where the court observed factors to be considered in exercising discretion on whether to extend an appeal out of time. The said positions were reiterated in the cases of [Eden Park Country Garden v Wakaridi & Another](#) (2024) KEHC 13511 (KLR) which relied on the case of [Mutiso v Mwangi](#) (1997) KLR 630, and [First American Bank of Kenya Ltd v Gulab P Shah & 2 Others](#), Nairobi (Milimani) HCCC No. 2255 of 2000 (2002) 1EA 65.
9. The Appellant/Applicant submitted that vide a letter dated 22nd February 2024, the Appellant/Applicant through their advocates requested for a certified copy of the ruling, certified copy of the



- typed proceedings and a copy of the decree for purposes of lodging. That the ruling having been delivered on 22nd February 2024, the 30 days statutory timeline for lodging an appeal was lapsing on 23rd March 2024. That however, as at 23rd March 2024, the Appellant/Applicant was yet to be furnished with the requested decree and proceedings to facilitate the lodging of its appeal. That there being no response, they wrote a reminder letter dated 3rd July 2024 requesting for the aforesaid documents. That delay in lodging the appeal on time was beyond their control and that a delay of 48 days is not inordinate and/or unreasonable for this court to exercise its unfettered discretion.
10. The Appellant/Applicant cited the case of *Re Estate of Owino Ondiegi (Deceased)* (2024) KEHC 13809 (KLR). That a cursory reading of the draft Memorandum of Appeal demonstrates that the intended appeal raises triable and arguable issues with a high chance of success. The Court of Appeal in the case of *Kenafriic Matches Ltd v Match Masters Limited & Another* (2021) KECA 188 (KLR) cited with approval the case of *Stanley Kangethe Kinyanjui v Tony Keter & 5 Others* (2013) eKLR in respect to an arguable appeal. That from the foregoing, the Appellant/Applicant has laid a satisfactory basis for this court to exercise its discretion and grant an extension to appeal out of time.
 11. On whether prayers of stay of execution should be granted as sought, the Appellant/Applicant submitted that the conditions for granting an order for stay of execution are provided in Order 42 Rule 6 of the *Civil Procedure Rules*. That the court has to be satisfied that substantial loss may result, that the application has been made without unreasonable delay, and that such security as the court orders for the due performance of the decree or order may ultimately be binding on him. The Appellant/Applicant relied on the holding in the case of *RWW v EKW* (2019) KEHC 6523 (KLR) where the court was faced with a similar application.
 12. The Appellant/Applicant submitted that the Respondent has commenced execution proceedings and there is imminent danger that if execution is effected, the Appellant/Applicant may never recover sums from the Respondent as he is not in a financial position to refund the same if the appeal succeeds, that the appeal may be rendered nugatory, that the company equipment and assets which are the only source of income and/or daily livelihood will be attached and sold off in settling the decretal sum, and that it will cripple functioning of the company and incur irreparable financial losses. The Appellant/Applicant stated that they are willing to provide security for the decretal sum and that the application has not been brought with undue and/or unreasonable delay and that the reason for delay has been demonstrated. The Appellant/Applicant therefore prayed that the application is allowed as prayed.
 13. The Respondents filed submissions dated 3rd December 2024 on whether this court should issue stay of execution orders pending hearing and determination of the appeal by relying on the case of *James Wangalwa & Joseph Simiyu Mukenya v Agnes Naliaka Cheseto*, Misc. Civ. Application No. 42 of 2011. The Respondent submitted that the Applicant should only be granted stay of execution pending appeal on the basis that they offer security by depositing the decretal sum and certificate of stated costs in a joint interest earning account.
 14. I have considered the Notice of Motion application dated 9th July 2024, the Replying Affidavit sworn on 29th July 2024 and submissions by the parties. The issues for determination are: -
 - a. Whether leave to appeal out of time against the ruling delivered on 22nd February 2024 in Mombasa Small Claims No. E951 of 2023 should be granted
 - b. Whether an order of stay of execution of the ruling and decree in Mombasa Small Claims No. E951 of 2023 should be granted pending the hearing and determination of the appeal
 - c. Who should bear costs



15. The Appellant/Applicant is seeking for leave to appeal out of time against the ruling delivered on 22nd February 2024 in Mombasa Small Claims No. E951 of 2023 pending the hearing and determination of the appeal. The Appellant/Applicant is citing that delay in lodging the appeal is attributed to delay in being furnished with the decree and proceedings which documents are necessary in preparing the appeal.
16. The Respondent in opposition states that the ruling was delivered on 22nd February 2024 and was duly and timely uploaded on the e-filing platform on 23rd February 2024. That counsel for the Appellant/Applicant was present in court when the ruling was delivered and even requested for 30 days stay of execution, time within which the Memorandum of Appeal ought to have been lodged.
17. Section 79G of the *Civil Procedure Act* provides: -
- 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.
18. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* (2014) eKLR set out the considerations to guide the court in exercising its discretion in applications for extension of time as follows: -
- “i. 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;
 - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
 - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
 - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - vi. Whether the application has been brought without undue delay; and
 - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
19. The Appellant/Applicant states that vide a letter dated 22nd February 2024, they requested for certified copies of the ruling, typed proceedings and decree. That time for lodging the appeal was lapsing on 23rd March 2024 and that they were yet to be furnished with the said documents. That on 3rd July 2024, they sent a reminder letter. This court notes that copies of the said letter have been furnished to this court.
20. I find that the delay is excusable and cannot be faulted on the Appellant/Applicant. The prayer therefore meets the test for the court to exercise its discretion in favour of the Appellant/Applicant.



21. On whether an order of stay of execution of the ruling and decree in Mombasa Small Claims No. E951 of 2023 should be granted pending the hearing and determination of the appeal, the Appellant/Applicant stated that the Respondent has commenced execution and that there is imminent danger that if execution is effected, the Appellant/Applicant may never recover sums from the Respondent as he is not in a financial position to refund the same if the appeal succeeds, that the appeal may be rendered nugatory, that the company equipment and assets which are the only source of income and/or daily livelihood will be attached and sold off in settling the decretal sum, and that it will cripple functioning of the company and incur irreparable financial losses. The Appellant/Applicant stated that they are willing to provide security for the decretal sum and that the application has not been brought with undue and/or unreasonable delay and that the reason for delay has been demonstrated.
22. The Respondent has admitted that he has indeed commenced execution. He states that he was issued with an application for execution of decree, warrants of sale of movable property in execution of decree for money and warrants of attachment of movable property in execution of a decree for money which were signed and sealed by the trial court on 26th June 2024. That the Respondent instructed M/s Fantasy Auctioneers to execute the decree and certificate of stated costs both dated 10th June 2024 but the auctioneers have not been successful as the Appellant's base of operation is unknown. That the Appellant has not demonstrated how it will face financial ruin if it fully settles Kshs. 842,952 that is rightfully owed to the Respondent, and that the Applicant has not offered a proposal of furnishing security for this court to strike a balance of interests of both parties.
23. Order 42 Rule 6 (2) of the [Civil Procedure Rules](#) provides as follows: -
- 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.
24. The provision above sets out conditions that the Appellant/Applicant ought to satisfy in an application for stay of execution pending appeal and they include that substantial loss may result to the applicant unless the order is made, that the application has been made without unreasonable delay, and that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the Appellant/Applicant has been given.
25. I am satisfied that the Appellant/Applicant has demonstrated that substantial loss may be suffered if stay is not granted as the Respondent has not furnished this court with proof of ability to repay the decretal sum in case the appeal succeeds. On whether the application has been made without unreasonable delay, this court will not belabor on the issue as it has been dealt in the prayer herein above. As to security for due performance of the decree or order, the Appellant/Applicant stated that they are willing to provide security as may be ordered by court. I therefore find that the Appellant/Applicant has satisfied conditions for grant of stay of execution pending appeal.
26. In the upshot, the Appellant/Applicant's Notice of Motion application dated 9th July 2024 is allowed as follows: -
- a. The Appellant/Applicant is granted leave to file and serve the Memorandum of Appeal within 7 days from the date of delivery of this ruling.



- b. The Appellant/Applicant will thereafter have 60 days within which to file and serve the Record of Appeal.
- c. The Appellant/Applicant shall within 30 days of this ruling deposit the entire decretal sum into an interest earning account in a reputable commercial bank to be held by advocates for the parties.
- d. Costs shall be in the cause.

DELIVERED VIRTUALLY VIA CTS AT MOMBASA THIS 21ST DAY OF JANUARY, 2025.

J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

..... Advocate for the Appellant

..... Advocate for the Respondent

Court Assistant – Shitemi

