



Njuca Consolidated Company Limited v Njeru (Miscellaneous Civil Application E738 of 2024) [2025] KEHC 2451 (KLR) (Civ) (13 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2451 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E738 OF 2024
LP KASSAN, J
FEBRUARY 13, 2025**

BETWEEN

NJUCA CONSOLIDATED COMPANY LIMITED APPLICANT

AND

GERALD NJUKI NJERU RESPONDENT

RULING

1. Before this court is a Notice of Motion dated 07.06.2024 brought under Order 42 Rules 1& 2, Order 51 Rules 1 & 5 of the Civil Procedure Rules, Article 159 (2) (d) Constitution of Kenya, Sections 3, 3A and 79G of the [Civil Procedure Act](#) and all enabling provisions of the law wherein the Applicant seeks orders to wit:
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That this Honourable Court be pleased to stay execution of the judgment delivered in Nairobi CMCC No. 4070 of 2016 on 09.02.2024 pending the hearing and determination of this Application and the Applicant's intended Appeal.
 - e. That this Honourable Court be pleased to grant the intended Appellant leave to file a Memorandum of Appeal as per the attached draft against the decision and ruling of Honourable Lucy Ambasi Chief Magistrate in Nairobi CMCC No. 4070 of 2016 delivered on the 09.02.2024 and that time for filing and serving the Memorandum of appeal be extended.



- f. That this Honourable Court be pleased to give such orders and directions as it may deem fit and just.
- g. That the costs of this application be provided for.
2. The said application is premised on the grounds on its face and further supported by the affidavit sworn by the Counsel for the Applicant. The Applicant's case is that judgment was entered against the Applicant on 09.02.2024 for an award of Kshs 2,594,950/= inclusive of costs and interest. An appeal No. E379 of 2024 at Nairobi was filed but withdrawn by the Advocate for the Applicant appointed by the insurance company, Mayfair Insurance due to a disagreement. The disagreement was the cause of the delay in filing of this Application. That the Application has been brought expeditiously and without unreasonable delay. That the Respondent's financial and economic status was unknown and the Applicant is apprehensive that if the sum is paid to the Respondent, the Applicant shall not be able to recover the said amount or any part thereof in the event the appeal is successful. That the Applicant is willing to abide by the stay terms set out by the court and in particular be able to avail deposit against the full judgment sum as security. That the Respondent will suffer no prejudice or substantial loss if the Application is allowed. That the Applicant has a good appeal with overwhelming chances of success. That it would be in the interest of justice to enlarge time within which the Applicant may seek leave to file an appeal.
3. The Application is opposed by the Respondent vide a replying affidavit sworn on 03.09.2024 by Nelson Kaburu Felix Advocate on record for the Respondent. He deponed that HCCA E379/2024 was not an appeal by the Applicant's insurer. That appeal HCCA E379/2024 proceeded for hearing and parties filed their submissions. He deponed that the Applicant failed to deposit the court ordered security in a joint account. That the said appeal came up for submission and reserving of judgment when it was withdrawn in its entirety. He opposed the withdrawal and costs of Kshs 105,000/= were awarded which to date had not been paid. Therefore, there was no jurisdiction under Order 42 for filing an appeal after withdrawal of one. That section 79G on extension of time to file an appeal applied when no appeal had been filed in the first instance. That Order 25 applied to suits and not appeals. As such, the application was an abuse of the court process of all the reliefs sought and were time-barred.
4. The application was canvassed by way of written submissions.

Applicant's submissions

5. The Applicant submitted that the Applicant through its insurer had filed an appeal HCCA E379/2024 which was withdrawn by the insurer when a disagreement arose between it and the insurer. The withdrawal greatly prejudiced the Applicant as the appeal was not heard and determined on merit. This necessitated the Applicant to file the application herein to rectify the situation and seek the Court's indulgence and leave for extension of time to file the appeal out of time. The Applicant submitted that its appeal had merit with very high chances of success. The Applicant relied on the case of Nicholas Kiptoo Arap Korir Salat-vs-Independent Electoral and Boundaries Commission and 8 others Nairobi Application No. 16 of 2013 which set out the circumstances a court should consider in its exercise of its discretion to allow for extension of time. That the application herein was filed expeditiously and accompanied with a draft appeal. The same was filed with speed showing the willingness of the Applicant to conclude the matter. Further, the subordinate court erred in making an inordinately high award as general damages. The award would stand as precedent for litigants where the suit has monetary implications.
6. On the issue of stay of execution, the Applicant submitted that it would suffer substantial loss as the Respondent had not shown it would be in a position to refund the decretal sum were the appeal



successful. That the Applicant was ready to deposit the entire decretal sum in court in form of an insurance bond within 45 days of the order. The applicant prayed that the Application be allowed.

Respondent's submissions

7. The Respondent submitted that the Applicant has not provided any evidence as to how the application would be rendered nugatory or why there would be irreparable loss as not every act of execution causes loss. It was not under oath that the Respondent has no means. He submitted that in *Shell-vs-Karuga* (1986) eKLR it was held that substantial loss was the cornerstone for the grant of stay of execution and such loss must be demonstrated and not inferred. He prayed that the court dismisses the prayer for stay of execution as no demonstration of loss has been shown. The Appeal No. E379 of 2024 was filed by the Applicant as a party to the suit and not the insurance company as such only the Applicant withdrew the case. Further, that the allegation of a disagreement was not proved as no evidence was adduced in support thereof. Although insurance *companies act* for their insured under the doctrine of subrogation, any act contrary to the insured's interests can be remedied by filing of a breach of contract case. The Respondent submitted that there was no provision for withdrawal of an appeal and the applicant was barred from filing another appeal. That there was no provision enabling a court to grant leave to file an appeal which has been withdrawn. That under Section 79G leave to appeal out of time applies only when no appeal has been filed in the first place. That although there was no provision in law, the Applicant ought to have filed an application to reinstate the withdrawn appeal. However, it is only when an appeal is struck out that a party can restart the process but not when the same is withdrawn.
8. I have considered the Application, responses and the submissions filed herein. The main facts relating to the Application herein are not in dispute. These include the existence of the judgment in Nairobi CMCC No. 4070 of 2024 delivered on 09.02.2024 in favour of the Respondent and the subsequent filing of an Appeal No. E379 of 2024 which was withdrawn.
9. The issues for determination herein are
 - i. Whether the Applicant herein should be granted leave to appeal out of time against the judgment in Nairobi CMCC No. 4070 of 2016.?
 - ii. Whether a stay of execution should be granted against the judgment in Nairobi CMCC No. 4070 of 2016 pending the appeal?
 - iii. Who should bear the costs?
10. The Respondent argues that there was no provision for the withdrawal of an appeal and as such, the applicant was barred from filing another appeal. This means an appeal can be withdrawn at anytime before it is heard by giving notice in writing to the court.
11. The Respondent argues that there is no provision for filing a fresh appeal after withdrawal. However, this implies that a withdrawn appeal does not automatically bar a fresh appeal but may require leave, especially if the appeal had progressed substantially before the withdrawal. Whether the Applicant ought to have applied for re-admission or filed a fresh appeal, generally re-admission applies where a matter has been dismissed for non-attendance or procedural lapses Order 42 Rule 20. However, if an appeal has been voluntarily withdrawn, re-admission is not an available remedy. A party having withdrawn an appeal may still file a fresh appeal if within time or with leave of the court if out of time. Thus like, the application herein wherein the Applicant is seeking leave to file an appeal out of time.



12. Section 79G of the *Civil Procedure Act* provides that the appeals from the subordinate court to the High Court must be filed within a period of 30 days from the date of the decree or order from which the appeal lies. It provides:

“ Every appeal from a subordinate court to high court should be filed within a period of thirty days from the date of the decree or order appealed against, From such period any time the lower court may certify as having been requisite of a copy of the or order. Provided that an appeal may be admitted out of time if the appellant satisfied the court that he had good and sufficient cause for the filing of the appeal in time.”
13. It allows for the extension of time within which an appeal ought to be filed is a matter of judicial discretion. An applicant seeking enlargement of time to file an appeal must show that he has a good cause for doing so.
14. The court in exercise of its discretion is supposed to take into account the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted and whether the matter raises issues of public importance. (See Court of Appeal in Edith Gichungu Koine-vs-Stephen Njagi Thoithi (2014) eKLR).
15. In addition, Section 95 of the *Civil Procedure Act* grants to the court the “discretion, from time to time, to enlarge” any time fixed for the doing of any act under the Act. See also, Order 50 Rule 6 of the Civil Procedure Rules. Thus it is incumbent upon the Applicant to satisfy the court that it had good and sufficient cause for not filing the appeal in time, and is deserving of the court’s discretion.
16. The judgment in the primary suit Nairobi CMCC No. 4070 of 2016, was delivered on 09.02.2024. Appeal No. E379 of 2024 was filed within time and had been heard but was withdrawn on 27.05.2024 before judgment was reserved. Subsequently, this application was filed on 07.06.2024 about 10 days after the withdrawal of appeal HCCA E379/2024 with costs. This time in my view cannot be said to be inordinate or excessive.
17. The reason for the delay given by the Applicant was that there was a disagreement between the Applicant’s advocate appointed by the insurance company Mayfair Insurance that led to the initial withdrawal of Appeal E379 of 2024 and the delay in filing this application. In Andrew Kiplagat Chemaringo-vs-Paul Kipkorir Kibet (2018) eKLR, the court held:

“ The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”
18. Herein the delay was occasioned by a disagreement between the Applicant and its Insurer. This can’t be attributed in any way to the Respondent.
19. As to whether the Respondent will suffer any prejudice, this has to be weighed against a party’s constitutional right to be heard (See Court of Appeal case Vishva Stone Suppliers Company Limited-vs-RSR Stone (2006) Limited (2020) eKLR.). The Applicant deposed that the Respondent will not suffer any prejudice if the orders of leave are granted. The Applicant has expressed his chances of appeal succeeding. The Respondent’s deposition as to the prejudice he will suffer cannot dislodge the clear prejudice the Applicant stands to suffer.



20. Where a party is aggrieved and wishes to pursue an appeal it would be fair to exercise discretion in his favour and especially where the delay in filing the appeal is not inordinate and the adverse party will not be prejudiced in any way. The discretion of the court must always be exercised judiciously. The Applicant having expressed his intentions to be heard by this court on appeal, it is my considered view that he ought to be given an opportunity to pursue the appeal.
21. For the above reasons, the Applicant has satisfied the conditions for grant of leave to appeal out of time. The prayer in that respect (prayer (e)) as thus is merited and the same is hereby allowed. The appeal to be filed within 21 days from the date of this ruling.
22. The prayer for leave to file an appeal having been allowed, this court will then proceed to determine the issue as to whether there ought to be stay of execution of the order, judgment of the trial court pending the hearing and determination of the appeal. The principles upon which the above prayer can be allowed are now well settled from the authorities from this court and from the superior courts.
23. Generally, a stay of execution is provided under Order 42 Rule 6 of the Civil Procedure Rules 2010 which provides:

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”
24. For orders of stay of execution to be granted, the Applicant must satisfy the conditions to wit that substantial loss may result to the Applicant unless the order is made; that the application has been made without undue delay; and that 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. See *Amal Hauliers Limited-vs-Abdulnasi Abukar Hassan* (2017) eKLR.
25. The court ought to fairly take into account the interests of the Respondent, who has been deprived of the benefits of his judgment, in addition to the Appellant's right to ventilate their case which the court should not be quick to deny. See *Kenya Shell Ltd. v. Kibiru & others* (Supreme); *Attorney General v. Halal Meat Produces Limited*, Civil Application No. Nairobi 270 of 2008; and *Mukuma v. Abuoga* (1988) KLR 645.
26. Where the Applicant is successful, he or she shouldn't be in a position where he or she can't obtain their money back. Additionally, if the Applicant ultimately fails in his intended appeal, the Respondent who has a decision in his favour shouldn't find it difficult or impossible to enforce the decree. This is the guarantee security of costs gives to parties. See *Nduhiu Gitahi & Ano.-vs-Anna Wambui Warugongo* (1988) 2 KLR 100.
27. Taking all relevant factors into consideration, I do order that;
 - a. The Applicant is granted leave to file an appeal out of time and the same must be filed and served within the next 21 days from the date of this ruling.
 - b. The Applicant will deposit the entire decretal sum into an interest earning account in the joint names of the parties' advocates within 30 days from this Ruling date.
 - c. In default of any of these conditions, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.
 - d. The costs of this Application will be in the cause.



28. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13TH DAY OF FEBRUARY 2025.

L. P. KASSAN

JUDGE

In the presence of:-

Munuki holding brief Gaya for the Applicant

Kaburi for the Respondent

Carol – Court Assistant

