



Chege v Sparrow Transport Limited & another (Miscellaneous Civil Case E109 of 2024) [2025] KEHC 2969 (KLR) (13 March 2025) (Ruling)

Neutral citation: [2025] KEHC 2969 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS CIVIL CASE E109 OF 2024
FN MUCHEMI, J
MARCH 13, 2025**

BETWEEN

ARTHUR MACHARIA CHEGE APPLICANT

AND

SPARROW TRANSPORT LIMITED 1ST RESPONDENT

JOSEPH DUNCAN NGIGI IRUNGU 2ND RESPONDENT

RULING

Brief facts

1. The application dated 3rd July 2024 seeks for orders of leave to file an appeal out of time against the judgment in Thika CMCC No. E104 of 2023 delivered on 15th May 2024. The applicant further seeks for the orders of setting aside the said judgment pending the hearing and determination of the appeal.
2. The respondent opposed the application and filed an undated Replying Affidavit.

Applicant's Case

3. The applicant states that judgment in Thika CMCC No. E104 of 2023 was delivered on 15th May 2024 whereas the trial court found him 100% liable and awarded general damages to the 2nd respondent in the sum of Kshs. 1,100,000/- and Kshs. 7,490/- as special damages. Being aggrieved with the said judgment, the applicant is desirous to lodge an appeal against the said judgment but the statutory period of filing an appeal had already lapsed.
4. The applicant states that following the delivery of the judgment, the trial court granted 30 days stay of execution which has since lapsed. The applicant further states that he has never received a copy of the judgment from the court despite calling for the same until 3rd July 2024. Furthermore, the applicant is apprehensive that the respondent may proceed with execution. The applicant attributes the delay



in filing the appeal in time to the fact that he never received a copy of the judgment since delivery of the same on 15th May 2024.

5. The applicant states that the respondent has not disclosed or furnished the court with any documentary evidence to prove his financial standing. The applicant is further apprehensive that if any party payments of the judgment sum are released to the 2nd respondent as a condition for stay, such payments will be utilized and alienated and recovery of the same will be arduous in the event the appeal succeeds.
6. The applicant avers that his insurance is ready, willing and able to furnish the court with a bank guarantee as security of the entire decretal amount from DTB Bank. The applicant further avers that it is the interest of fairness and justice that the entire decretal sum be secured through a bank guarantee without any partial payment as his appeal is primarily on the trial court's determination on the issue of quantum of damages.
7. The applicant states that the intended appeal raises pertinent issues and has a high chance of success.

The 2nd Respondent's Case

8. The 2nd respondent states that the application lacks merit, is misconceived and does not meet the threshold for granting of orders for stay of execution pending appeal. The 2nd respondent further states that the application is brought in bad faith and is intended to delay satisfaction of the decree further and frustrate him from realization of the fruits of his judgment.
9. The 2nd respondent states that the application has been brought with extreme undue delay after the expiry of 30 days stay of execution and the same is unmerited and even though the applicant attributed the delay to failure to obtain a copy of the judgment in good time, he did not demonstrate steps taken to obtain a copy of the judgment promptly.
10. The 2nd respondent states that he is a man of means and able to refund any amount that shall be paid to him. Furthermore, this being a money decree, the appeal cannot be rendered nugatory.
11. The 2nd respondent avers that the applicant has not offered any security that may be binding upon him for the due performance of the decree. Furthermore, the bank guarantee is not good and sufficient security. The duration of the purported bank guarantee is 12 months from 6th July 2023 which expired on 6th July 2024 and there is no evidence of renewal at the lapse of the duration. The 2nd respondent further argues that there is a possibility of the bank not honoring the guarantee and that the bank not being a party to the suit would make it difficult for a successful party to enforce any orders he may get concerning the bank guarantee.
12. The 2nd respondent avers that the bank guarantee is not a safe kind of security owing to the fact that most public service vehicles underwriters including M/s Directline Assurance Company Limited have collapsed or are on the verge of collapsing and it would be fair to direct the applicant to pay half the decretal sum and deposit the remaining half in an interest earning account in the parties' advocates' joint name.
13. The 2nd respondent states that the applicant's advocate was served with the tabulation letter calling for settlement of the judgment on 16th May 2024 without any response. Thus the application is an afterthought and intended to delay the fruits of justice to him.
14. The 2nd respondent avers that the application has been brought with unreasonable delay and granting the orders will tremendously prejudice his rights denying the fruits of justice contrary to Article 48 and 50(1) of *the Constitution*.



The Law Whether the court should exercise its discretion to grant the applicant leave to file his appeal out of time;

15. Section 79G of the *Civil Procedure Act* states:-

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 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.

16. It is clear from the wording of section 79G of the *Civil Procedure Act* that before the court considers extension of time, the applicant must satisfy the court that that he has good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of *Diplack Kenya Limited vs William Muthama Kitonyi* [2018]eKLR 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.

17. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that:-

“The underlying principles a court should consider in exercise of such discretion should include:-

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
- f. Whether the application has been brought without undue delay.

18. Similarly in the case of *Paul Musili Wambua vs Attorney General & 2 Others* [2015]eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-

“.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of 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.”

19. Applying the above principles to the present case, the judgment herein was delivered on 15th May 2024 and the applicant filed the current application on 15th July 2024. This is approximately two (2) months outside the time limited for filing an appeal. The applicant has attributed its delay for failure to obtain a copy of the judgment despite requesting for the same and only received it on 3rd July 2024.
20. On perusal of the record, judgment was delivered on 15th May 2024 in the presence of counsel for the applicant. Furthermore, the trial court granted 30 days stay of execution. The 2nd respondent’s advocates vide a letter dated 16th May 2024, wrote to the applicant’s advocate informing him of the judgment and tabulated his costs. The said letter was received by the applicant’s advocates on 23rd May 2024 which they acknowledged by stamping on the said document. Thus, it is evident that the applicant knew about the judgment all along and chose not to lodge an appeal within the statutory time for doing so. The delay of two months may not be inordinate, but in the instant case, the applicant has not given any plausible explanation on the reasons for delay.
21. On perusal of the draft Memorandum of Appeal, the grounds of appeal do not raise arguable points of law. Thus, without delving into the merits of the appeal, the intended appeal has no high chances of success. Accordingly, I find that the applicant has not established to the satisfaction of the court why time should be enlarged to enable him file his appeal.

Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

22. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-
 1. “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 orders set aside.
 2. 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 1st 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.
23. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:
 1. Substantial loss may result to him/her unless the order is made;
 2. That the application has been made without unreasonable delay; and



3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
24. Substantial loss was clearly explained in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR:-

“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.
25. The applicant in his affidavit argues that should the 2nd respondent proceed with execution and the appeal is successful, he may not recover the sum paid to the 2nd respondent.
26. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show that how execution shall irreparably affect him or will alter the status quo to its detriment therefore rendering the appeal nugatory. In the instant case, the applicant has shown that he does not know the 2nd respondent’s financial capabilities and that he may not recover the said amount from the 2nd respondent in the event the appeal succeeds. The evidentiary burden shifted to the 2nd respondent to show that he is a person of means and would be able to settle the decretal sum should the appeal succeed. The respondent in this case averred in his affidavit that he is a person of means and would be in a financial position to refund the decretal sum if it was paid to him. However, the respondent, except the averment has not annexed any evidence as to his means.
27. In my considered view the applicant has shown that he will suffer substantial loss.

Has the application has been made without unreasonable delay.

28. Judgment was delivered on 15th May 2024 and the applicant filed the instant application on 15th July 2024 which is a period two months after judgment was delivered. Thus, a delay of two months is not inordinate in my view and is inexcusable.

Security of costs.

29. The purpose of security was explained in the case of Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR the court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.



30. It is noted that the issue of security is discretionary and it is upon the court to make a determination on the same. The applicant has stated that his insurer Directline Assurance Company Limited is ready and willing to furnish the court with a bank guarantee from Family Bank as security. Having perused the bank guarantee as annexed by the applicant, I have noted that the bank guarantee is dated 6th July 2023 for Ksh. 200,000/= to last and is for a period of one year. It is evident that this guarantee has since lapsed and therefore not acceptable. It is noted that the bank guarantee is between Family Bank and the insurer and it does not mention the applicant as an interested party. The said guarantee is not fully executed rendering it an enforceable document legally. As such, this court will decide on a more reliable form of security in the event that this application is successful.
31. Additionally, the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of Samvir Trustee Limited vs Guardian Bank Limited [2007] eKLR the court stated:-
- “The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”
32. The court in granting stay has to carry out a balancing act between the rights of the two parties. The issue that arises is whether there is just cause for depriving the 2nd respondent his right of enjoying his judgment. On the grounds of appeal, it is my considered view that they are arguable and the applicant ought to be given a chance to ventilate his appeal.
33. From the foregoing, the applicant has met the threshold of granting stay of execution pending appeal. Accordingly, the application dated 3rd July 2024 has merit and is hereby allowed with costs to the 2nd respondent.
34. The applicant is hereby granted orders for stay of execution pending hearing and determination of the appeal on condition that he deposits half the decretal amount in court within 30 days and in default, these orders to be vacated.
35. The applicant has 14 days within which to file appeal and serve the memorandum.
36. The costs of this application shall abide in the appeal.
37. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 13TH DAY OF MARCH 2025.

F. MUCHEMI

JUDGE

