Ena Investment Limited v Ondara (Miscellaneous Civil Application E064 of 2024) [2025] KEHC 3122 (KLR) (13 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3122 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

MISCELLANEOUS CIVIL APPLICATION E064 OF 2024

WA OKWANY, J

MARCH 13, 2025

BETWEEN

ENA INVESTMENT LIMITED ..... APPLICANT

AND

FRANCIS ONDARA ..... RESPONDENT

RULING

1. The Applicant filed the Application dated 24th October 2024 seeking leave to appeal out of time and stay of execution pending the hearing and determination of the Application and the intended appeal.

2. The Application is brought on the grounds that the advocate, who had the personal conduct of the matter before the trial court, resigned without informing the Applicant or the law firm on record that judgment had been entered against the Applicant. The Applicant stated that it only learnt of the judgment upon being served with warrants of attachment and notice of sale of its property.

3. The Applicant further averred that it is dissatisfied with the award on quantum of damages and desires to challenge it despite the lapse of time to lodge an appeal. It was also the Applicant's case that the appeal raises triable issues and that mistake of counsel should not be visited upon the innocent litigant.

4. The Respondent opposed the application through his Replying Affidavit dated 25th November 2024 wherein he avers that the Application is incurably defective, bad in law, incompetent and an outright abuse of the court process. He further states that the intended appeal is an afterthought and is solely intended to delay his enjoyment of the fruits of his judgment. He faults the Applicant for failing to disclose that the trial court had granted it orders of stay of execution on condition that it deposits the sum of Kshs. 766,550 which it did not comply with. It was the Respondent's case that the bank guarantee proposed by the Applicant is not a suitable security owing to the multifarious number of unpaid claims by Directline Insurance Company.

5. The Respondent avers that should the Court be inclined to grant the Applicant leave to appeal, then the Applicant should pay him costs of Kshs. 50,000 since the matter has been pending in court for a very long time. He added that it would only be fair that he be allowed to enjoy the fruits of his judgment.

6. The Application was canvassed by way of written submissions which I have considered. The main issue for determination is whether the Applicant has made out a case for the granting of orders for stay of execution and leave to appeal out of time.

Leave to Appeal Out of Time

7. Section 79G of the *Civil Procedure Act* (CPA) 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.

8. Section 79G of the CPA provides for the timelines for filing an appeal and requires that an applicant seeking to file an appeal out of time must provide sufficient and satisfactory reasons for his inability to file the appeal within the stipulated timelines. The court's powers to extend time is discretionary and is governed by a set of principles that were explained by the Supreme Court in the case of Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others [2014] eKLR thus: -

> " 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."

9. I note that the impugned judgment was delivered on 19th June 2024 and the present application filed on 24th October 2024. This means that the Appeal should have been filed on or before 19th July 2024 and it is evident that the delay is for about four months. The reason advanced for the delay is that the counsel who had the conduct of the case resigned from the law firm without notifying the Applicant or the law firm that represented it.

10. This court is of the view that, while it is not in the business of engaging in the internal or administrative affairs of law firms, it is not persuaded that the reasons advanced for the delay in filing of the Application

are plausible. I find it hard to believe that the law firm acting for the Applicant was completely unaware of the resignation of their own employee or the status of the files that were previously handled by the said advocate. It is apparent that the said law firm could have remained unaware of the entry of judgment if the Applicant was not served with the warrants of attachment.

11. The Applicant also claimed that it was not aware of the judgment. My view is that the suit belonged to Applicant even if it had instructed and advocate to act for it and that it was expected to follow up on the status of its case until conclusion. In this regard, I find that the Applicant could not just sit back and claim that it was not aware of the judgment. The claim that it was not aware of the entry of judgment is a sign that the Applicant was an indolent litigant not deserving of this court's exercise of discretionary powers. In Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR thus:-

> "It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel."

12. I find that the Applicant should have made efforts to find out the status of its case instead of giving a blanket excuse of its advocate alleged resignation.

13. My above findings notwithstanding, I find that the four month's delay in filing the appeal is not inordinate in the circumstances of this case. I therefore find that the Applicant is entitled to the right to appeal and I therefore grant it the leave to appeal out of time. I find guidance in the decision by the Court of Appeal in Sokoro Savings and Credit Co-operative Society Ltd v Mwamburi (Civil Application E032 of 2022) [2023] KECA 381 (KLR) (31 March 2023) where it was held thus: -

> "In the case at hand, the applicant's officials cannot be said to have been indolent because they followed up the matter with their advocate to find out the status of their case. It would have been different had the officials taken a long period of time before following up the matter with their advocate. Mere allegation of counsel's indolence is not enough to warrant grant of extension of time. It must also be seen that parties on their part were not careless. The applicant herein moved within reasonable time to follow up on the matter and instructed counsel to file the instant application without unreasonable delay. The delay cannot therefore be said to be inordinate in the circumstances. In my view, the explanation tendered by the applicant is plausible and sufficient considering the delay period was only 43 days. Additionally, I note that the delay occasioned was as a fault of the advocate in the conduct of the matter and the applicant cannot be blamed for the delay. Without evidence to the contrary, I am unable to find carelessness in the actions of the applicant hence the explanation offered for the delay is sufficient."

Stay of Execution

14. Order 42 Rule 6 of the Civil Procedure Rules 2010 stipulates as follows: -

> "(1)No appeal or second appeal shall operate as a stay of execution or proceeding 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 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."

15. The three conditions to be fulfilled for the granting of orders of stay of execution can therefore be summarized as follows: -

    a. that substantial loss may result to the applicant unless the order is made

    b. application has been made without unreasonable delay

    c. security as the court orders for the due performance

16. In Butt v Rent Restriction Tribunal [1979] the Court of Appeal reiterated the conditions to be considered in determining whether to grant or refuse stay of execution pending appeal as follows: -

    a. 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.

    b. 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.

    c. 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.

    d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers can order security upon application by either party or on its own motion. Failure to furnish security of costs as ordered will cause the order for stay of execution to lapse.

i. Undue Delay

17. This court has already noted that the delay in filing the instant application and appeal was not inordinate.

ii. Substantial Loss

18. In Tropical Commodities Suppliers Ltd & Others v International Credit Bank Ltd (in liquidation) [2004] 2 EA 331 the court found that:-

> " Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.'

19. In James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR the court expressed itself as follows: -

> " 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."

20. The same position was stated in Century Oil Trading Company Ltd v Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007 where he stated that: -

> " The word "substantial" cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words "substantial loss" must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement."

21. In the present case, I note that the Respondent did not file an affidavit of means to show or prove that if he is paid the decretal sum and the appeal is successful, he will be in a position to refund the decretal sum. In the case of National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another [2006] eKLR the Court of Appeal held thus: -

> " Once an Applicant expresses a reasonable fact that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show whatever resources he has since that is a matter which is peculiarly within his knowledge."

22. Guided by the above authorities and in the absence of the requisite proof from the 1st Respondent that he is a person of means, I find that the Appellants has established that they will suffer substantial loss if the entire decretal sum is paid to the Respondent before the appeal is heard and determined. The Appellant has therefore fulfilled this condition.

iii. Security

23. The Applicant was also required to furnish security for the due performance of the decree. In Gianfranco Manenthi & Another v Africa merchant Assurance Co. Ltd [2019] eKLR it was held:-

> " The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from

a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails. Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal....Thus, the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree."

24. The Court is also required to balance the interest of the parties to the suit when considering the type of security to be offered. This in recognition of the fact that while the Applicant is entitled to the right of appeal, the Respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the basis for the requirement for security.

25. In Nduhiu Gitahi v Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 the Court of Appeal dealt with the issue of adequacy of security and held as follows: -

> " The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it."

26. In the present case, the Applicant offered a bank guarantee as security for the due performance of the decree which offer the Respondent did not accept on the basis that Directline Insurance Company

has multiple unpaid claims. The Respondent further stated that the trial court had already granted the Applicant a conditional stay of execution which condition the Applicant did not fulfil.

27. My finding is that the Applicant herein does not appear to be sincere in its quest for stay of execution considering that it did not explain why it did not comply with the orders issued by the trial court. Be that as it may and considering the fact that the Applicant is entitled to the right to appeal, I will allow the instant application on the following terms: -

    a. The Appellant/Applicant shall, within 30 days from the date of this ruling, deposit the entire decretal sum in a joint interest earning account to be held in the names of the advocates for both parties.

    b. That in the event of failure to comply with the orders issued in (a) hereinabove, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to proceed with the execution.

    c. I award the Respondent thrown away costs of Kshs. 30,000.

28. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 13TH DAY OF MARCH 2025.

W. A. OKWANY

JUDGE