



REPUBLIC OF KENYA



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**Kimani v Mwananchi Credit Limited (Miscellaneous Civil Application
E596 of 2024) [2025] KEHC 2772 (KLR) (Civ) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2772 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

MISCELLANEOUS CIVIL APPLICATION E596 OF 2024

JN MULWA, J

MARCH 13, 2025

BETWEEN

PAUL NG'ANG'A KIMANI APPLICANT

AND

MWANANCHI CREDIT LIMITED RESPONDENT

RULING

1. Before the Court for determination is the motion dated 14/06/2024 filed by Paul Ng'ang'a Kimani (the Applicant) against Mwananchi Credit Ltd (the Respondent) pursuant to Section 1A, 1B, 3A & 79G of the [Civil Procedure Act](#) seeking inter alia:
 - i. Spent
 - ii. That this honorable Court enlarges time to file the annexed Memorandum of Appeal from the entire Ruling of Hon. P.K. Rotich (SPM) in Nairobi Milimani CMCC No. E022 of 2024 delivered on 10/05/2024.
 - iii. That the annexed Memorandum of Appeal be deemed as duly filed upon grant of order (b) above.
 - iv. Spent.
 - v. Spent.
 - vi. Spent.
 - vii. That this honorable Court be pleased to grant an order of temporary injunction restraining the Respondent either by itself, nominated agents, servants and or anyone claiming and or acting under the said Respondent, from advertising, selling and or otherwise alienating all that land



parcel known Nairobi/Block 144/320 (hereafter called the suit property) vide public auction or private treaty whatsoever pending the hearing and determination of the intended appeal.

- viii. That in the alternative, this honorable Court be pleased to grant an order of status quo, maintaining and or otherwise preserving the status quo and in respect the suit property and in particular barring the Respondent from selling and or otherwise alienating the suit property vide public auction or private treaty pending hearing and determination of the intended appeal.
 - ix. That this honorable Court be pleased to issue orders of stay of execution of the ruling delivered on 10/05/2024 pending the hearing and determination of the intended appeal herein.
 - x. Spent.
 - xi. That the cost of this application be provided for.
2. The motion is premised on grounds found at the supporting affidavit sworn by the Applicant. The gist of the deposition is that on 10/05/2024 the lower Court delivered a ruling, ex-parte, dismissing his motion and Respondent's preliminary objection before it. That his counsel on record only got to know of the ruling upon visiting the e-filing portal on 14/06/2024 when the same was uploaded. He goes on to depose that he is aggrieved by the decision of the lower Court and that the delay in filing the appeal was occasioned by the fact that the impugned ruling of the lower Court was delivered in the absence of his advocate and or without notice. That the Respondent may proceed to sell the suit property pending the intended appeal thus rendering the same nugatory and a mere academic exercise as such it is imperative that the orders sought for herein are granted in order to preserve the suit property. He concludes by deposing that the instant motion has been made without inordinate delay and no prejudice is likely to be visited on the Respondent if the motion is allowed as prayed.
 3. The Respondents oppose the motion by way of grounds of opposition alongside a replying affidavit deposed by Saleh Jackline. The nucleus of the opposition is that counsel for the Applicant was at all material times aware of the scheduled ruling date by the lower Court, and in any event, onus was on the Applicant to follow upon on his matter noting that the impugned ruling was in respect of his application. She goes on to depose that the matter was initially slated for ruling on 27/03/2024 when both parties counsel were present that no explanation has been advanced for the steps taken by the Applicant to follow up on delivery of the impugned ruling. That the ruling dismissing the Applicant's motion was a negative order as such there exists no order capable of being stayed however stay should not issue, the Respondent is endowed with the ability to reimburse the Applicant should its intended appeal succeed. In summation, she stated that the intended appeal does not raise any arguable issues therefore the instant motion ought to be dismissed with costs.
 4. The motion was canvassed by way of written submissions, which this Court has duly considered alongside the rival affidavit material. Ex facie it is the Court's postulation that the issues for determination concern: -
 - a. Whether the Court ought to enlarge time within which the Applicant may file its appeal?
 - b. Whether an order of injunction, status quo or stay in respect of the suit property ought to issue in favour of the Applicant pending hearing and determination of the intended appeal?
 - c. Who ought to bear the costs of the motion?



Whether the Court ought to enlarge time within which the Applicant may file its appeal?

5. The power of the Court to enlarge the time for filing an appeal out of time is expressly donated by Section 79G, as well as Section 95 of the CPA. That said, it is trite that for leave to be granted, an applicant is obligated to sufficiently explain to the satisfaction of the Court the cause of the delay. In *Thuita Mwangi v Kenya Airways* [2003] eKLR the Court reiterated the rendition in *Mutiso v Mwangi* [1997] KLR 630 as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

See also: - *Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others* [2014] eKLR.

6. The circumstances that led to delay in filing of the intended appeal within time have been explained in the applicant’s affidavit; that the impugned ruling was delivered in the absence of both the Applicant and counsel without notice; The Respondent has assailed the explanation by arguing that respective counsel to the parties hereto were alive to the initial scheduled ruling date of 27/03/2024 whereas onus was on the Applicant and or counsel to follow up on delivery of the ruling in any event.
7. Vide his affidavit material the Applicant has annexed a hand-written copy of the impugned ruling as (Annexure PKN 3) of which a cursory perusal shows that the impugned ruling was indeed delivered on 10/05/2024 in absence of counsel or the parties. Meanwhile, (Annexure PKN 5) demonstrates that the Applicant’s counsel requested for a copy of impugned ruling on 14/06/2024 however (Annexure PKN 4) is not out rightly illustrative of the fact that the impugned ruling was uploaded on the latter date, as purported by the Applicant; that nothing was offered to demonstrate that parties were indeed aware of the delivery date on 10/05/2024 or that notice was issued when the impugned ruling was actually delivered.
8. Further, the delay herein appears to be slightly over a month, and it would seem an explanation has been offered for the same, in compliance with the holding of Makhandia JA in *Patrick Wanyonyi Khaemba v Teachers Service Commission, Board of Management, Kapletingi Mixed Day Secondary School & Francis Tanui* [2019] KECA 112 (KLR), wherein it was observed that; -

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained; hence a plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour.

9. Upon the above explanation, the Court is satisfied with the explanation advanced by the Applicant, and the delay in itself does not appear to be so inordinate. It would be a travesty of justice for the Court to drive the Applicant from the seat of justice for what appears to be omissions of the lower Court. Besides, it does not seem that the Respondent will suffer any prejudice that cannot be compensated through costs if the motion is allowed.



10. Concerning the arguability of the intended appeal, the Court of Appeal in the case of Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited [2020] eKLR stated that;

“...an arguable appeal need not (be one that will) succeed so long as it raises a bona fide issue for determination by the Court.”

11. In the circumstances, the Court is persuaded that to facilitate the Applicant’s undisputed right leave ought to be granted to the Applicant to file his appeal out of time.

Whether an order of injunction, status quo or stay in respect of the suit property ought to issue in favour of the Applicant pending hearing and determination of the intended appeal?

12. Firstly, on the quest of an order for stay of execution, it is undisputed that the impugned ruling of the lower Court delivered on 10/05/2024 had the effect of dismissing the Applicant’s motion. The Respondent while calling to aid the decisions in Bernard Njoroge Kibaki t/a Njowa Njemu Enterprises v Equity Bank Limited & Another [2020] e KLR, Kaushik Panchamatia & 3 others v Prime Bank Limited & Another [2020] e KLR, and Western College Arts & Applied Sciences v Oranga & Others [1976] KLR 63 has vehemently argued on the matter that the Magistrate dismissed the application citing lack of merit, but did not issue any particular orders that were supposed to be implemented by either the applicant or respondent as such it is trite law that there can be no stay of negative orders.

13. The Applicant offered no response to the Respondent contestation. This Court is inclined to agree with the Respondent, as observed by the Court of Appeal in Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme v Millimo, Muthomi & Co. Advocates & 2 others (Civil Appeal (Application) E383 of 2021) [2022] KECA 491 (KLR), that a negative order in the form of dismissal is incapable of being stayed. To that end, no order of stay of execution or injunction can be sustained.

14. Secondly, on whether an injunction or order of status quo in respect of the suit property ought to issue in favour of the Applicant pending hearing and determination of the intended appeal, it is evident on a plain reading of Order 42 Rule 6(1) & (6) of the CPR, that an order to stay execution and injunction pending hearing and determination of an appeal or intended appeal presupposes the existence of an appeal. The filing of an appeal is a condition precedent to the exercise of this court’s appellate jurisdiction under Order 42 Rule 6(1) & (6) of the CPR of the CPR. Hence, the invocation of the jurisdiction of this Court under the latter provisions must be preceded by the filing of an appeal, or compliance with the procedure for filing of an appeal, in this case a memorandum of appeal.

15. For the foregoing, the Applicants motion dated 14/6/2024 partially succeeds by way of an order that leave is granted to the Applicant to file the memorandum of appeal within 7 days of this order, in the manner of the draft memorandum of appeal annexed to the supporting affidavit.

The Applicant is condemned to pay costs of the application. Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 13TH DAY OF MARCH 2025.

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JANET MULWA.
JUDGE

