



REPUBLIC OF KENYA



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**Co-operative Bank of Kenya v Otuoma (Miscellaneous Civil Application
E004 of 2023) [2025] KEHC 4256 (KLR) (3 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4256 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CIVIL APPLICATION E004 OF 2023**

AC BETT, J

APRIL 3, 2025

BETWEEN

CO-OPERATIVE BANK OF KENYA APPLICANT

AND

BONIFACE CEPHER OTUOMA RESPONDENT

RULING

1. By way of notice of motion application under section 1A, 1B,3A and section 79G of the [Civil Procedure Act](#), order 22 Rule 23, Order 42 Rule 6, and order 51 Rule 1&3 of the [Civil Procedure Rule](#) 2010, the applicant herein seeks the following orders;
 - a. That this application be certified as urgent and be heard exparte in the first instance on the grounds, inter alia, that this application will be defeated and rendered nugatory should the Respondent proceed with execution of the decree from the judgment of 6th October 2023; (spent)
 - b. That this honorable court be pleased to grant the Applicants leave to appeal out of time against the judgment and decree of Honorable Akee (SRM) delivered on 6th October, 2023 at Kakamega Law court
 - c. That this Honorable court be pleased to grant a stay of execution of the resultant decree from the judgment in Kakamega Civil Case No 102 of 2020, *Boniface Cepher Otuoma v Cooperative Bank of Kenya Limited* pending the hearing and determination of the application.
 - d. That this Honorable court be pleased to grant a stay of execution of the resultant decree from the judgment in Kakamega Civil Case no 102 of 2020, *Boniface Cepher Otuoma v Co-operative Bank of Kenya*, pending the hearing and termination of the intended appeal.
 - e. The costs of this application be provided for.



2. The Application is premised on the grounds set out on its face and on the supporting affidavit sworn on 1st February 2023 by the applicant's banking officer where he acknowledged that the respondent had filed a suit against them for damages and breach of statutory duty of care and cost of the suit and the defendant/applicant filed an amended statement of defence and the matter proceeded for hearing on 25th August, 2021 and the respondent closed its case and on 15th June 2022, after the applicants case was heard, the court directed the parties to file written submissions.
3. According to the applicant, the Honorable magistrate was to deliver the judgment on 5th October 2022, which was not ready, and the parties were informed that the judgment would be delivered on notice; however, the notice was never issued to them.
4. They claimed that the judgment was delivered on 6th October 2022 in favour of the respondent without informing them.
5. They aver that they were dissatisfied with the judgment of the lower court and now seek leave of the court to file the appeal.
6. The applicant asserts that if the stay of execution is not granted pending the hearing and determination of the appeal, the respondent will execute, hence rendering the appeal a futile and academic exercise.
7. They hold that the respondent would suffer no prejudice and are willing to deposit a bank guarantee as security.
8. The matter was canvassed by written submissions.

Applicant's Submissions

9. In their submission dated 27th February 2023, the applicants raised two main issues for determination, which they sequentially addressed as follows: whether the court should grant them leave pending appeal and whether the stay of execution ought to be granted.
10. Regarding the first claim for leave pending appeal out of time, they cited section 79 G of the *Civil Procedure Act*, which states that appeals from the subordinate court must be submitted within 30 days from the date of the decree; however, an extension may be granted if there is a good and sufficient cause.
11. They submitted that the judgment at the lower court was to be delivered on 5th October 2022 however it was not ready and the Honorable magistrate gave directions that it would be delivered on notice however she proceeded to deliver it on 6th October 2022 with no notice to the parties and they became aware of the same on 17th January 2023 when the Respondent's advocate sought settlement of the decree. On addressing the issue of the delay, they quoted the case of *Insurance Co. of Kenya Ltd v Ramzan Abdul Dhanji* Civil Application No 179 of 1998 and claimed that the delay was not inordinate, having given a sufficient reason for the delay.
12. On the claim that the court grants them stay of execution pending appeal, they held that it was necessary to preserve the subject matter in dispute and the rights of the appellant and went further to quote order 42 rule 6 of the *Civil Procedure Order* and the case of *Loice khachendi Onyango v Alex Inyangu & Another* (2017) eKLR which narrated the principles necessary to grant the stay of execution.
13. On the first principles of substantial loss, they claimed that if the stay was not granted, the respondent would proceed to execute, which would render the appeal nugatory.
14. On whether the application was made without unreasonable delay, they claim that as soon as they were made aware of the judgment, they applied for a stay, hence no unreasonable delay.



15. On the final ground of security, they made it clear that they were willing to deposit a bank guarantee as security before the court and are willing to pay the costs awarded.
16. They finally submitted that they should not be condemned unheard and relied on the decision by Justice Lenaola in *Mandeep Chauhan v Kenyatta National Hospital & 2 others* (2013) eKLR, as was mentioned in the case of *Republic v National Land Commission & 2 others ex Parte Archdiocese of Nairobi Kenya Registered Trustees*.

Respondent's Submissions

17. The respondent, in his submission dated 4th December 2024, raised 4 issues for determination, which can be summarized into two being whether the applicant should be granted leave to file an appeal out of time and whether the court should grant the stay pending appeal.
18. On the first issue of whether the court should grant leave to file an appeal out of time, he quoted section 79 G of the *Civil Procedure Act*, which states that appeals ought to be filed within 30 days from the date of the decree. He faulted the applicant's averment that they only learnt of the judgment four (4) months after the delivery date when they were both in court on 5th October 2023 and the delivery was made a day after. He contended that the notice of delivery of judgement was made online and it was up to applicant and its counsel to follow up with the Judiciary to know the outcome of the case. He claimed that the applicant's actions were an afterthought, and the same ought to be dismissed.
19. The Respondent posits that the applicant was out to waste the court's time since the case had earlier been dismissed for want of prosecution. He asserts that the appeal had no basis, and the application for leave to file the appeal out of time should be dismissed.
20. On whether the court should stay the execution pending the determination of the appeal, he noted that the application was brought 4 months after the judgment, and the reasoning by the applicant was not sufficient. He further claimed that the applicant would suffer no loss because the grounds of appeal had no basis and were a waste of the court's time and a ploy to deny him his justice.
21. On the issue of security, the respondent contended that though the applicant claimed it was willing to issue a bank guarantee as security, it was not specific on the bank guarantee it was willing to deposit.
22. He finally submitted that the application for stay of execution should be dismissed for failure to meet the required criteria, and the entire application ought to be dismissed for lack of merit.

Analysis and Determination

23. I have considered the issues raised herein by the parties.
24. It is clear that the two main issues that the court ought to consider are, firstly, whether the applicant has met the conditions to warrant the issue of stay of execution pending appeal, and the second issue is whether the court should grant leave for the applicant to file the appeal out of time.
25. The law governing the granting of orders for a stay of execution pending appeal is codified under Order 42 Rule 6 (1) and 2 of the *Civil Procedure Rules*, which stipulates as follows: -
 1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 the application



being made, to consider such application and to make such order thereon as may to it seems just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is referred may apply to the appellate court to have such order set aside.

2. No order for a stay of execution shall be made under sub-rule (1) unless—
 - (a) The court is satisfied that a 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.”
26. The three conditions to be fulfilled can therefore be summarized as follows;
 - a. That substantial loss may result to the applicant unless the order is made.
 - b. That the application has been made without unreasonable delay.
 - c. Security as the court orders for the due performance.
27. The Court of Appeal in *Butt Vs Rent Restriction Tribunal* [1979] stated what ought to be considered in determining whether to grant or refuse a stay of execution pending appeal. The court said that: -

“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.

Secondly, the general principle in granting or refusing a stay is that, 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.

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.

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 under Order XLI Rule 4(2) (b) of the *Civil Procedure Rules*, can order security upon application by either party or on its motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.”
28. The first condition that the applicant should meet is to demonstrate that it will suffer substantial loss if the stay orders are not granted.
29. According to the applicant, they will suffer substantial loss and the appeal will be rendered nugatory if the stay is not granted, as the respondent would be in a position to execute the decree. On the other hand, the respondent opines that the applicants would suffer no loss as they are a banking institution and are in a position to settle the decree.
30. What would render an appeal nugatory was discussed in the case of *Kenya Industrial Estate Limited & another v Matilda Tenge Mwachia* [2021] eKLR, which stated that:-

“On the nugatory aspect, whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed, if allowed to happen, is reversible; or if it is not reversible, whether damages will reasonably compensate the party aggrieved.”



31. In *RWW v EKW* [2019] eKLR, it was equally stated that;
- “The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal, if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”
32. The applicant claims that they have an arguable case with a high chance of success, and if the stay is not granted, the appeal would be rendered nugatory and reduced to a mere academic exercise.
33. On the other hand, the respondent states that he has the right to enjoy the fruits of the judgment since the case was determined on merit and in his favor.
34. He maintains that the applicant has not demonstrated that it will suffer irreparable harm.
35. I have looked at the parties' submissions and note that the applicant has filed their draft memorandum of appeal. and is willing to cater for the costs and deposit some form of security pending the stay order being granted. The Respondent, on the other hand, has not given any material as to his ability to repay the decretal sum in case the appeal succeeds; they have not provided any evidence that they shall suffer substantial loss if the stay is not granted. Accordingly, I am persuaded that a substantial loss has been proved.
36. The second consideration is whether the application was made without undue delay. I have perused the court records and note that the judgment by the Honorable Magistrate was delivered on 6th October 2022, and the application and draft memorandum of appeal were made on 1st February 2023, which is 4 months after the judgment was delivered.
37. According to the applicants, the judgment was to be delivered on notice; however, they were unaware of when the judgment was delivered until 17th January, 2023, when the respondent's counsel came to execute the decree. The applicants have explained the reason for the delay, which I find is sufficient, and as such, in the interest of justice, I find that the delay was not inordinate.
38. On the final element, the applicant is required to offer security for the due performance of the decree, and the Court is entitled to take into account the fact that no such security has been offered in deciding an application thereunder. I agree with the position in *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 Others* [2015] eKLR, where it was held that:-
- “... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words “ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under Order 42 rule 6 (2) (b) of the *Civil Procedure Rules* includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”
39. The Applicant indicated that they are willing to provide a bank guarantee. As security which the respondent opposes, claims that they were not specific on the kind of bank guarantee that is to be deposited as security.



40. The Court of Appeal in *Ndubiu Gitabi v Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100, expressed itself 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 that is immaterial. In an application for stay pending appeal, the court is faced with a situation where judgment 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.”

41. I am inclined to agree with the respondent, although the applicant are willing to put up a security in form of a bank guarantee, the same has not been specified as to respondent and further there is no guarantee that the same will be renewed if the guarantee expires or that it is tailored to cater to the interest of the Respondent to the finalization of this Appeal.

42. In the case of *Mwaura Karuga t/a Limit Enterprises –vs- Kenya Bus Services Ltd & 4 others* [2015] eKLR where it was held that:-

“... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under Order 42 rule 6 (2) (b) of the *Civil Procedure Rules* includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”

43. In the circumstances, I will hereby grant a stay of execution pending the hearing and determination of the Appeal on condition that the Applicant deposit half the decretal sum into an interest-earning account in a reputable commercial Bank, to be held by both the advocates parties to this appeal.

44. The final issue for determination is whether the court should grant leave pending appeal.



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

“Every appeal from a subordinate court to the High Court shall be filed within 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.”

46. It is clear from the wording of section 79G of the *Civil Procedure Act* that before the court considers extension of time, the applicants must satisfy the court that they have good and sufficient cause for filing the appeal out of time.

47. The Court of Appeal in the case of *Edith Gichungu Koine v Stephen Njagi Thoithi* [2014] eKLR, Odek JJA observed that the several facts which the court has to consider, when considering an application for extension of time, were that:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

48. The judgment appeal against was delivered on 6th October 2022, and this application was filed on 1st February 2023. This is a period of about 4 months later which in my view is not inordinate, considering that no notice was issued to the parties and the same is not disputed by the respondent.

49. As regards the reason for delay, the applicant stated that the judgment was to be delivered on notice as directed by the court only for them to learn from the respondent’s counsel on 17th January 2023 when they came to execute the decree that it was delivered in favor of the respondent and immediately filed the appeal, in the interest of justice and since the applicant has a right to be heard under Article 50, I do in the interest of justice allow him to appeal out of time.

50. Considering all relevant factors and in order not to render the intended appeal illusory, I do grant the following prayers:-

- a) Leave is hereby granted to the Applicant to file their Appeal out of time within the next fourteen (14) days.
- b) A stay of execution of the judgment and decree herein is granted on condition that the Applicant deposit the entire decretal sum into an interest-earning account in a reputable commercial Bank, to be held by both Advocates for the parties within thirty (30) days from the date of this ruling to be held in trust for the Respondent until the determination of this appeal.
- c) The Record of Appeal shall be filed and served within sixty (60) days.
- d) The costs of the application to abide by the outcome of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 3RD DAY OF APRIL 2025.

A. C. BETT



JUDGE

In the presence of:

Ms. Owuor for Applicant

No appearance for Respondent

Court Assistant: Polycap

