Ngaruiya (Trading as Agro Link Supplies) v Agripartners (K) Ltd (Civil Appeal E146 of 2024) [2025] KEHC 6838 (KLR) (21 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6838 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL E146 OF 2024

PN GICHOHI, J

MAY 21, 2025

BETWEEN

PETER NGARUIYA (TRADING AS AGRO LINK SUPPLIES) ..... APPELLANT

AND

AGRIPARTNERS (K) LTD ..... RESPONDENT

RULING

1. This Ruling is in respect to two application. The first applicant is the Appellant's Notice of Motion dated 30th May, 2024, brought under Order 51, Order 42 Rule 8 of the Civil Procedure Rules and Sections 1A, 1B & 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya, seeking for Orders; -

    1. Spent.

    2. Spent.

    3. The Honourable Court be pleased to stay execution pending hearing and determination of the intended Appeal.

    4. Spent.

    5. The costs of this Application be provided for.

2. The application is premised on the grounds on the face of the Motion and supported by the Affidavit of Peter Ngaruiya (The Appellant trading as Agro Link Supplies) sworn on 27th June, 2024. He states that vide an Order issued on 30th May, 2024, Hon. B.R Kipyegon(PM) at Magistrates Court in Molo entered judgement in favour of the Respondent in the sum of Kshs. 3,000,000 less USD $6,210(Kshs. 758,862) deposited in Court, together with costs and interest of the suit till payment of the decretal sum in full.

3. He states that the Applicant is aggrieved by the entire judgement and has appealed to this Court. His position is that the Appeal has very high chances of success and that unless the Orders sought are granted, the Appeal will be rendered nugatory.

4. He contends that the Applicant will suffer irreparable damages if the Orders sought are not granted as they might not recover the decretal sum if the same is paid to the Respondent and the Appeal succeeds eventually.

5. He concludes that the Respondent will not suffer any damage, if the Orders sought are granted and therefore, it is in the interest of justice that the Orders sought are granted.

6. In response to that application, the Respondent filed a Replying Affidavit sworn by Mobisa Onkoba, the Managing Director of the Respondent, sworn on 11th July, 2024.

7. Terming the Applicant's Notice of Motion as frivolous, vexatious, incompetent, an afterthought and an abuse of Court process, he states that judgment was indeed delivered in favour of the Respondent on 30th May, 2024 and that the Applicant's claim was dismissed because he claimed a product called Seaflow and not Biomite and produced evidence to that effect.

8. He states that it is laughable that the Appellant is changing tune at Appellate stage claiming that it supplied Biomite when he pleaded, in its defence, that it exhausted its stock in May, 2021. Further that the expiry period for the Biomite product is only 3 months and it is not plausible that the same could be available to the Appellant by October, 2022.

9. He elaborates the genesis of the matter and stated that the Respondent had hired the services of the Appellant as its main supplier for its Biomite product but the said contract was terminated in whole in the month of September, 2021 or thereabouts. That during hearing, the Appellant corroborated the Respondent's evidence and admitted that the contract expired in May, 2021.

10. He says that on 21st October, 2022, the Respondent learnt that the Appellant had been selling Biomite products to Bigot Flowers (K) Ltd without any authority, consent or prior knowledge, long after the contract had come to an end, causing them to sue Bigot Flowers(K) Ltd as the 2nd Defendant.

11. He explains that before hearing could take off, Bigot Flowers(K) Ltd filed an interpleader application under Certificate of Urgency dated 2nd November, 2022 asking the court to allow them deposit the sum in dispute of USD$ 6,210/-, being money for the supply of the Biomite product.

12. Further, he says that the amount to be deposited was confirmed to be in relation to Biomite product only and the trial court allowed the application and discharged them from the proceedings. He states that this issue was further clarified in the Appellant's witness statement of 30th May, 2023, when he confirmed that the Respondent was the one manufacturing Biomite and that he had exhausted the stock around May, 2021.

13. He terms the judgement of the trial court as well reasoned hence, the Appeal is unmerited and the Orders sought should not be granted. However, without prejudice to the foregoing, he prays that in the event this Court finds any merit in the stay application, then the Appellant be ordered to deposit half of the decretal sum into his Advocates account and the other half be secured by a bank guarantee.

14. In addition to the Replying Affidavit, the Respondent filed a Notice of Motion dated 9th July, 2024, under Sections 3, 3A and 79G of the *Civil Procedure Act*, Order 42 Rule 2 and Order 51 of the Civil Procedure Rules and all other enabling provisions of the law, seeking for Orders; -

1. The Appeal be struck out for failure to comply with the laid down statutory timelines to wit filling the present Appeal out of time.

2. Costs of this Application be provided for.

15. The grounds are on the face of it and supported by the Affidavit sworn by Mobisa Onkoba on 9th July, 2024. He argues that with the impugned judgement having been delivered on 30th May, 2024, this Appeal was lodged on 2nd July, 2024 which is 3 days late and without any reason for such delay and without prayer for extension of time to file it.

16. He argues that the judgment being sought to be supplied to the Appellant was uploading on the E-Filling platform on 3rd June, 2024 and therefore the court cannot be blamed for the delay. Ultimately, he prays the Respondent's application be allowed as prayed.

17. In response, the Appellant field a Replying Affidavit sworn on 10th July, 2024 denying the allegation that their Appeal was filed out of time arguing that the same was field within the statutory time limits.

18. He elaborated that when judgement was delivered on 30th May, 2024, the trial Court granted them 30 days stay but the delay in filling the Appeal was occasioned by the Court registry who failed to supply them with the decree despite several requests and has not supplied to date.

19. He states that the delay was further exacerbated by Eid-Ul Adha holiday that took place on 17th June, 2024 and the demonstration by "Gen-Z" that blocked the Appellant's advocates from accessing their offices at the CBD on 18th, 20th, 25th and 27th June, 2024 and thus unable to file the Appeal on time.

20. He argues that the delay in filling the Appeal within the shortest time possible was caused by unforeseeable circumstances herein stated above. He thus urges this Court to deem their Appeal properly filed and proceed to determine it on merit.

Appellant's Submissions

21. He submits on only one issue that is , whether the threshold for granting stay Orders has been met as provided for under Order 42, Rule 6 of the Civil Procedure Rules, 2010.

22. He submits that the purpose is to preserve the subject matter in dispute while balancing the interests of the parties based on the circumstances of each case as was held by Asenath Ongeri J, in the case of RWW v EKW [2019] KEHC 6523 (KLR). Further reliance is placed on Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nairobi 15 of 1990 [1990] KLR 365, where the Court of Appeal held that:-

> " Whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 mule 6 (as it then was) of the Civil Procedure Rules is fettered by three conditions namely establishment of a sufficient cause satisfaction of substantial loss and the furnishing of security."

23. As regards sufficient cause, the Appellant submitted that the intended Appeal raises triable issues and risks being rendered nugatory should this application be disallowed.

24. On substantial loss, it was submitted that substantial loss was explained in the case of James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR, where F. Gikonyo, J held that;-

> " 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. Accordingly, he submits that the amount deposited in court is rightfully for the Appellant since the contract with the Respondent had ended, but that the Applicant had not exhausted the last stock of Biomite received from the Respondent and that in any event, the Applicant has paid the Respondent all dues owing to it and thus him receiving the money deposited in Court amounts to unjust enrichment, an issue that can only be resolved in this Appeal and which can only be justly determined if stay of execution order is granted.

26. He reiterates that in balancing the competing interests of the parties, this Court must satisfy itself that no party would suffer undue prejudice as reinforced in Absalom Dova vs. Tarbo Transporters [2013] eKLR where the Court of Appeal stated: -

> " The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce an disadvantage but administers the justice that the case deserves. This is in recognition that both parties have rights'; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory and the decree holder to the decree which includes all benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation..."

27. On timely filing of the Application, he submitted that there was no delay in filing the present Application.

28. On security, it was submitted that the Applicant is required to furnish security to the Court as security for the performance of the judgment debt should the appeal fail and that its purpose was illustrated in the case Arun C. Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others [2014] eKLR where F Gikonyo J, held:

> " 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 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."

29. On that basis, the Applicant submits that it already deposited US $ 6,210 an equivalent of Kshs. 758,862/= with the lower court as security and asserts that the same be adopted as security in the instant matter as well.

30. Lastly, that having satisfied the triple requirements for grant of stay pending appeal, the prayers sought should be allowed as prayed.

Respondent's Submissions

31. The Respondent has submitted on three issues, that is;

    1. Whether the Appeal was filed out of time.

    2. Whether a stay order should be granted and;

    3. If yes, on what conditions.

32. On whether the Appeal was filed out of time, the Respondent cites Section 79G of the *Civil Procedure Act* which provides: -

> " 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 to the appellant 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."

33. In that regard it is submitted that Section 79G of the *Civil Procedure Act* is couched in mandatory terms by use of the word 'shall' and therefore, with the judgment leading to the filing of the present appeal having been delivered on 30th May, 2024 in favour of the Respondent, any aggrieved party was required to file an appeal at the High Court latest by 29th June 2024 but the Appellant filed this Appeal on 2nd July 2024, which is three (3) days late without seeking first the leave of Court for extension of time to file the Appeal out of time.

34. He terms the justification of the delay based on Eid-Al Adha holiday and Gen-Z' demonstration as not a ground for stopping time from running in such an application and that in any event, the cumulate days in issue is only 5 days leaving 25 days of delay unexplained.

35. For emphasis, he argues that Order 50 Rule 2 of the Civil procedure Rules provides that; -

> " Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceedings, Sunday, Christmas Day and Good Friday, and any other day appointed as a public holiday shall not be reckoned in the computation of such limited time."

36. He therefore argues that the above provision allows removal of public holidays in computation in instances where the limited period is less than 6 days, which is not applicable in this case.

37. On the allegation that the Appellant has not been supplied with the decree, the Respondent submits that the Appellant did not require a decree in order to draft his Memorandum of Appeal as all that was needed is the Judgement which was uploaded on the Efilling platform on 3rd June, 2024. That in any event, the Appeal ought to be filed timeously and amended later if need be. In support of this argument, reliance is placed in the case of Tonui v National Bank of Kenya [2022] (KLR) where the

Applicant had, like in instance the case, put the blame for the delay squarely at the court's feet, R. Lagat Korir J held:-

> "I find the explanation by the Applicant to be inadequate. It is also salient to note that the Applicant failed to attach a Certificate of Delay to support his argument that he was not supplied with proceedings expeditiously."

38. Further reliance is placed on the case of Paul Njage Njeru v Karija K Mugambi [2021] Eklr, where Justice Patrick Otieno held that:-

> "The Court takes the learning that the timeline of filing a memorandum of appeal is different from the timeline of filing a record of appeal. Filing a memorandum of appeal does not require the filing of typed and certified proceedings. An Advocate may peruse the Judgment and craft grounds of appeal which can be amended later. Nothing stopped the Applicant from filing a Memorandum of Appeal within the stipulated 30 days and if need be, upon the receipt of the typed proceedings, apply to make amendments."

39. It argues that to date , the Appellant has failed to file a decree from the lower court or seek for the extension of time for appeal and even if an application of extension was to be filed, sufficient reason for the delay has to be proffered as discussed in the case of Susan Ogutu Oloo & 2 Others Vs Doris Odindo Omolo [2019] eKLR where the Court of Appeal held:-

> "In an application for extension of time, the single Judge has discretion. I am aware that the discretion I have is to be exercised judiciously and not whimsically or capriciously. The guiding principles on the issue of extension of time was laid out by the Supreme Court in Nicholas Kiptoo Arap Korir Salat v IEBC (2014) eKLR Sup. Ct. Application No 16 of 2014.The Supreme Court aptly stated extension of time is not a right of a party; a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court. of paramount importance, the reason for delay must be explained to the satisfaction of the Court. Further, the application for extension must be brought without undue delay and it must be demonstrated if the respondent will not suffer prejudice if extension is granted".

40. He submits that the Appellant's failure to file his appeal within the timelines prescribed in Section 79G of the *Civil Procedure Act* cannot amount to a procedural technicality which can be cured by Article 159(2)(b) of *the Constitution*. In support of this argument, reliance is placed on the case of Anaclet Kalia Musau (suing on behalf of the estate of Vincent Mangalo Kalia (Deceased) v Attorney General & 2 others [2015] eKLR where R.E Aburili J held as follows:-

> "Statutory provisions limiting time within which a substantive cause of action should be brought cannot be equated to procedural technicalities envisaged under Article 159(2) (d) of *the Constitution*. They are not procedural lapses that do not go to the root or substance of the matter under consideration such as filing suit by way of Notice of Motion instead of plaint or citing wrong provisions of the law."

41. On the prayer for stay of execution, the Respondent submits that the application dated 30th May 2024 is unmerited as it fails to meet the test set out under Order 42 rule 6 of the Civil Procedure Rules, 2010. In support of the grounds to be satisfied, the Respondent cites the case of Gianfranco Manenthi

& Another Vs Africa Merchant Assurance Company Ltd [2019] eKLR, where while expounding the grounds an Applicant has to meet in stay of execution application, Reuben Nyakundi J, observed that:-

> "... 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 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 degree 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 judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... This 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."

42. With regard to substantial loss, the Respondent relies on the decision in *Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civil Case No. 368 of 2001* where Musinga, J (as he then was) held that:-

> "...substantial loss' is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum."

43. On that basis, he argues that the Appellant will not suffer any irreparable loss if a stay is not granted as the decretal sum is ascertained and loss (if any) can be quantified. Moreover, the Appellant has not proven that the Respondent will not be able to refund him any sums paid in satisfaction of the decree, when the burden is placed on the Applicant as stated by G.V Odunga J (As he then was) in Michael Ntouthi Mitheu v Abraham Kivondo Musau [2021] eKLR that: -

> "Where the allegation is that the respondent will not be able to refund the decretal sum the burden is upon the applicant to prove Conditions for Stay/Security for Costs."

44. He however submits that in the event this Court orders for stay of execution, then the same be conditional.

45. In respect to security, the Respondent cites the case of Arun C. Sharma (supra) that Court held:-

> "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."

46. Consequently, he urges this Court to adopt the proposal in the Replying Affidavit on security to be offered.

47. In conclusion, the Respondent submits that they have demonstrated that the present appeal was filed out of time and thus their application seeking to strike out the Appeal should be allowed with costs.

Analysis and Determination

48. Having perused the two Applications, supporting and Replying Affidavits together with the annexures thereto and submissions herein, the issues that fall for determination are:-

    1. Whether the Appeal should be struck out by virtue of being filed out of time without leave of Court.

    2. Whether the Application for stay of execution is merited.

    3. Who should bear costs of these Applications.

49. On the Appeal being filed out of time, it is not disputed that the impugned judgment was delivered on 30th May, 2024, while the current Appeal was lodged on 2nd July, 2024. That was three (3) days after the time within which an Appeal can be lodged as of right.

50. It is noted that the Appellant still maintains that time has not run out despite arguing on the same breath that he filed 3 days later. As to when time runs in filling Appeal from the subordinate Courts to High Court was subject of the appeal in Gabriel Osimbo v Chrispinus Mandare [2020] KECA 799 (KLR) where J. Mohammed JA, held:-

> "The time for filing appeals from the subordinate court to the High Court is governed by section 79G of the *Civil Procedure Act*... From the above, it is clear that an appeal from a subordinate court to the High Court is to be filed within 30 days from the date of the decree or order appealed against. Though, in computing the 30 days, the period of time which the lower court certifies as having been requisite for the preparation and delivery, to the appellant, of a copy of the decree or order is to be excluded.

51. The Appellant obviously focusses on the fact that the Appeal was filed only three days late hence filed without unreasonable delay. That was not the issue here as Section 79G of the *Civil Procedure Act* is clear that the appeal shall be filed within 30 days. It is clear that the Appeal was filed after the stipulated timelines and without leave of the Court. There is no application for leave to appeal out of time either.

52. The Appellant rides on the fact that the decree has not been availed to date causing the delay. That again is not an issue as failure to obtain it would have been important for an application for leave to appeal out of time which is not the case here.

53. As is stands, the Appeal is not properly before Court having been filed out of time and without any leave of Court. Faced with a similar application in the case of Salat v Independent Electoral and Boundaries Commission & 7 others [2014] KESC 12 (KLR) , the Supreme Court held: -

> "What we hear the applicant telling the Court is that he is acknowledging having filed a 'document' he calls 'an appeal' out of time without leave of the Court. Pursuant to rule 33(1) of the Court's Rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the Court's Rules, this Court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of

that time before he can proceed to do that which the law requires. By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such 'an appeal', is tantamount to moving the Court to remedy an illegality. This, the Court cannot do. To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the Court. Such a filling renders the 'document' so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this Court's Registry. This is irregular as that document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time, the much he can do is to annex the draft intended petition of appeal for the Court's perusal when making his application for extension of time; and not to file an appeal and seek to legalize it. Petition No. 10 of 2014 having been filed out of time and without leave (an order of this Court extending time), is expunged from the Court's Record." [Emphasis added]

54. Consequently, the current Appeal filed out of 30 days' period provided for under Section 79G of the *Civil Procedure Act* and without leave of Court or a prayer for such leave in the current application, the Appeal is a nullity. That ought to have been annexed as a "Draft Memorandum of Appeal" to an application for leave to appeal out of time which is not the case here.

55. The application dated 30th May, 2024 seeking stay of execution pending appeal filed in the circumstances herein is incompetent as it is based on the nullified appeal, justification for the delay notwithstanding.

56. In conclusion the Respondent Notice of Motion dated 9th July, 2024 is merited and allowed in the following terms: -

    1. The Appeal dated 14th June, 2024 and filed in this Court on 2nd July, 2024 is struck out.
    2. The Appellant/Applicant's Notice of Motion dated 30th May, 2024 is equally struck out.
    3. Considering the nature and circumstances of this matter, each party is ordered to bear its own costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 21ST MAY , 2025.

PATRICIA GICHOHI

JUDGE

N/A for Appellant

Mr. Mbaka for Respondent present

Ng'eno , Court Assistant