Mukunga v Bwana (Miscellaneous Civil Application E013 of 2025) [2025] KEHC 8260 (KLR) (13 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8260 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

MISCELLANEOUS CIVIL APPLICATION E013 OF 2025

AC BETT, J

JUNE 13, 2025

BETWEEN

PATRICK NGACHE MUKUNGA .... APPLICANT

AND

MALACK BWANA .... RESPONDENT

RULING

1. By an application dated 28th February 2025, the Applicant prayed for orders granting him leave to file an appeal out of time against the judgement and decree of Honourable C. J. Cheruiyot, Adjudicator in Kakamega Small Claims Court Case No. E617 of 2024. Additionally, the Applicant prayed for orders of stay of execution of the said decree pending the filing and determination of the intended appeal.

2. The application, which was premised on Article 159 (1), 2 (a) and (d) of the *Constitution* Section 1A, 1B, 3A, 79G and 95 of the *Civil Procedure Act* and Order 42 Rules 6 and Order 50 Rule 6 of the Civil Procedure Rules was supported by an affidavit sworn by the Applicant on 28th February 2025.

3. The Applicant averred that he intended to appeal against the judgement that was delivered on 27th November 2024 and that he had instructed his Advocates to file a notice of appeal on 29th November 2024 and it was upon being served with notice to show cause that he perused the court file and established that no notice of appeal had been filed. It was the Applicant's deposition that he promptly filed a notice of appeal.

4. The Applicant further deposed that the Respondent did not have a known fixed place of abode and that he stood to suffer substantial loss if an order of stay was not issued and execution proceeded as the Respondent had no means of repaying the decretal sum.

5. The Respondent opposed the application and in a Replying Affidavit sworn on 12th March 2025, deponed that the said application had been served late. He deponed that the Applicant was lying to the court as he had never been represented by an Advocate and has been filing all the documents in person

and ought not to blame an Advocate. The Respondent also averred that the Applicant truly owed him and had even paid him Ksh. 44,000/= while in the trial court.

6. The court directed that the application be canvassed through written submissions and both parties filed their submissions.

7. In his submissions, the Applicant reiterated the contents of his application. The Respondent in turn filed his submissions reiterating the contents of his affidavit and citing the case of Thuita Mwangi v. Kenya Airways [2003] eKLR, urged the court to find that an extension of time is not automatic and must be based on valid reasons. He urged the court to dismiss the application.

8. There are two issues before the court:-

   (a) Whether the court should allow the application for extension of time.

   (b) Whether the court should grant a stay of execution.

9. Regarding the first issue, Section 79G of the *Civil Procedure Act*, provides as follows:

> " 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:
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> 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."

10. The court has wide discretionary powers in determining an application for extension of time within which a party can file an appeal. In the case of Paul Musili Wambua v. Attorney General & 2 others [2015] eKLR, the Court of Appeal held thus:-

> " ...It is now well settled by a long line of authorities by this court that the decision of whether or not to extend 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 whims or caprice. In general, the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted."

11. In Thuita mwangi v. Kenya Airways Ltd (supra) the Court of Appeal enunciated the factors that aid the court in determining whether it should exercise its discretion and extend time to file an appeal and stated that those factors include:-

   (i) The period of delay;

   (ii) The reason of delay;

   (iii) The arguability of the appeal;

   (iv) The degree of prejudice that could be suffered by the Respondent if the extension is granted, the importance of compliance with time limits to the particular litigation or issue; and

   (v) The effect, if any on the administration of justice or public interest if any.

12. The Applicant herein filed his application for leave on 3rd March 2025 which is four months after judgement was delivered. He claims that his Advocate failed him. He did not name the Advocate and this was crucial in view of the Respondent's averment that he was always acting in person. He also did not adduce any evidence to prove that indeed he had given instructions to an Advocate to file an appeal on his behalf.

13. I have perused the Applicant's affidavit. The Applicant neither attached a copy of the impugned judgement nor a copy of the draft memorandum of appeal. He also failed to set out the grounds of appeal in his affidavit to enable the court consider whether he has an arguable appeal or not. All he needed to do was to demonstrate that his intended appeal is probably arguable as was stated in Athman Nusura Juma v. Afwa Mohammed Ramadhan [2016] eKLR where the court held:-

> " ...whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word "possibly"."

14. In the case of Nicholas Kiptoo Korir Arap Salat v. IEBC & 7 others [2014] KESC 12 (KLR), the Supreme Court in considering an application for leave to appeal out of time pronounced itself on the applicable principles as follows:-

> " Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court; A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court; Whether there will be any prejudice suffered by the respondents if the extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

15. As to whether the Applicant is deserving of the orders of stay, the underpinning provisions in the application is Order 42 Rules 6 (1) and (2) of the Civil Procedure Rules which provide:-

> " (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 order set aside.
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> (2) No order for stay of execution shall be made under subrule (1) unless—
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> (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."

16. In view of the aforestated express statutory provisions, the Applicant needs to demonstrate that he may suffer substantial loss if the order is not made, that the application has been made without unreasonable delay, and that he is ready to furnish security to the court for due performance.

17. What amounts to substantial loss was considered in James Wangalwa & Another v. Agnes Naliaka Cheseto [2012] eKLR when the court held:-

> " 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.
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> 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. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:
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> > " ...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."

18. The Applicant has only made a general statement that the Respondent has no fixed abode. The application for stay of execution was brought four months after judgement had been delivered and the Applicant admitted that the Respondent had began the process of execution. In the circumstances the court finds that the delay was excessive.

19. In regard to the element of security, the law is well settled that an Appellant should furnish security to guarantee due performance of such decree or order as the court may ultimately issue against him. This is because, the Appellant is challenging a valid judgement and decree. In the case of Arun C. Sharma v. Ashana Raikundalia T/A Raikundalia & Co., Advocates [2014] eKLR, the court held that:-

> " ...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. The alternative security being offered presents several problems. The first one-the security is owned by another person. This is a civil suit where the Applicants are judgment-debtors. But, the Applicants seem to have borrowed from the criminal procedures where a person stands surety for the attendance of another in court. Civil process is quite different because, in a 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."

20. In the present matter, the Applicant did not tender any security. Secondly, since the Applicant had not complied with the orders made by the court when he was granted the temporary stay on 13th March 2025, the court directed him to deposit half the decretal sum in court within 14 days. To date, he has not done so.

21. The Applicant's inaction is a pointer that he is not willing to furnish security. The Applicant has not adduced sufficient grounds to warrant the orders of stay of execution which in any event are hinged on his securing the extension of time.

22. In respect to the application for extension of time, there are clearly no sufficient reasons advanced for the inordinate delay. Having failed to set out the grounds of the intended appeal, the Applicant failed to persuade the court that he is deserving of its discretion. Although the Applicant has cited Article 159 of *the Constitution*, it has been held that the same is not a panacea of all ills. Justice must be done to both parties in any case and the court cannot turn a blind eye to the fact that the Applicant slept on his rights only to be prompted to move the court by the process of execution.

23. Having carefully considered the grounds set out in the application, the parties submissions, and the circumstances of the case, which was filed in the Small Claims Court and ought therefore to be disposed of more expeditiously than other matters, I find that the Applicant is not deserving of this court's discretion and I therefore dismiss the entire application.

24. The Respondent shall have the costs of the application.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 13TH DAY OF JUNE 2025.

A. C. BETT

JUDGE

In the presence of:

Mr. Masinde for the Applicant

Respondent present in person

Court Assistant: Polycap