



REPUBLIC OF KENYA



KENYA LAW
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**Kiruthu v Mubea & 2 others (Miscellaneous Application E513 of 2022)
[2024] KEHC 427 (KLR) (Civ) (23 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 427 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS APPLICATION E513 OF 2022
JN NJAGI, J
JANUARY 23, 2024**

BETWEEN

ANDREW MURAGURI KIRUTHU PROPOSED RESPONDENT

AND

PETER CHEGE MUBEA 1ST PROPOSED APPELLANT

RDEDRICK NJERU NDUKU 2ND PROPOSED APPELLANT

GEOFFREY MACHARIA WAMBUI 3RD PROPOSED APPELLANT

RULING

1. Vide an amended Notice of Motion dated the 13th March 2023 (amending the Notice of Motion dated 26th August 2022), the proposed Appellants/Applicants sought for the following orders:
 - a. Spent
 - b. Spent
 - c. Spent
 - d. The Honourable court be pleased to grant the proposed Appellants leave to appeal out of time against the whole Ruling and/or Order of Honourable M W Murage (SRM) delivered in Milimani CMCC No. 376 of 2016, Andrew Muraguri Kiruthu Vs Peter Chege Mubea, Noah Njuguna and Godfrey Macharia Wambui on 4th February 2022.
 - e. The Honourable Court be Pleased to extend time to file and serve the Proposed Appellant's Memorandum of Appeal and Record of Appeal against the whole Ruling and/or Order of Honourable M W Murage (SRM) delivered in Milimani CMCC No. 376 of 2016, Andrew



Muraguri Kiruthu Vs Peter Chege Mubea, Noah Njuguna and Godfrey Macharia Wambui on 4th February 2022.

- f. That Pending the hearing and determination of the Appeal, the Honourable court be pleased to stay execution of the Decree and/or judgment delivered in Milimani CMCC No. 376 of 2016, Andrew Muraguri Kiruthu Vs Peter Chege Mubea, Noah Njuguna and Godfrey Macharia Wambui on 20th August, 2018 and any other orders that may be issued pursuant thereto.
 - g. The cost of the application be provided for.
2. The application is premised on grounds on the face of the application and supported by the affidavit of the proposed 1st Applicant, Geoffrey Macharia Wambui. The gist of the application is that the 1st Applicant learnt of the existence of the subject suit on the 3rd June 2021 when the proposed Respondent moved to execute a judgment against him through a Notice to Show Cause. He learnt that an ex parte judgment had been entered against them in the subject matter on the 20th August 2018. His then advocates then moved the court and filed an application dated 15th June 2021 seeking for orders of stay of execution of the ex parte judgment as well as orders seeking leave to defend the suit. However, the application was dismissed on the 4th February 2022 without his knowledge or that of his counsel. The Respondent moved yet again and served him with a Notice to Show Cause to attach his property to recover a sum of Ksh.302,862.46. His then advocates filed the application dated 26th August 2022 that was amended by the current application.
 3. The Applicants in their amended Notice of Motion contend they were never served with summons to enter appearance in the case. That the delay in lodging the appeal was caused by delay in accessing certified copies of the judgment, ruling and proceedings of the trial court. That they stand to suffer substantial irreparable loss and damage unless the orders sought are granted. Further that they are apprehensive that if the decretal sum is paid to the Respondent he would be in no position to refund the amount in the event of their appeal succeeding. That they are willing to furnish reasonable security as this court may deem fit and just.
 4. The application was opposed by the Respondent through the replying affidavit of one Laban Kipchirchir Kirui sworn on 23rd March 2023 wherein he deposes that ex parte judgment was lawfully entered against the Applicants on the 20th July 2016 after they failed to enter appearance upon service with summons. Consequently, that the subsequent execution was lawful.
 5. The Respondent further deposed that the ruling on the application dated 15th June 2021 was scheduled for 2nd December 2021 but it was delivered later on 2nd February 2022. That the application was allowed on condition of payment of throw away costs of Ksh.15,000/= and for the Applicants to file their statement of defence within 14 days which conditions the Applicants did not comply with. Therefore, that there are no adverse orders to be appealed against as the application is meant to stall the matter. That the application does not meet the legal threshold for stay of execution and leave to appeal out of time. That the same is lacking in merit and should be dismissed with costs.
 6. The Respondent deposed that they had difficulty in obtaining a copy of the ruling delivered on 15/2/2022.
 7. The application was canvassed by way of written submissions.



Applicants' Submissions

8. The Applicants submitted that the Respondent has not attached any affidavit of service confirming service of the court process upon any of the Applicants. That as a result of non-service the default judgment is an irregular one as was stated in the case of *Remco Limited v Mistry Jadva Parpat & Co. Ltd & 2 others*, Nrb HCCC No.171 of 2001 (2002)1 EA 233, as cited in *Peter Ndeti Ndolo v William Mutisya Muindi* (2011) eKLR.
9. It was further submitted that there was no proof that the Applicants were served with Notice of Entry of Judgment. More so that the Respondent has not attached the ruling delivered on 4th February 2022 to verify that the order contained a conditional stay of execution of judgment.
10. The Applicants submitted that the application dated 26th August 2021 (that was amended on 13th August 2023) was filed without unreasonable delay after they were served with the first Notice to Show Cause. It was in addition stated that the Applicants have attached correspondence to the trial court seeking to be furnished with typed proceedings, the subject judgment and ruling.
11. The Applicants submitted that they are willing to furnish reasonable security and abide by such conditions as the court may order.
12. It was submitted that in an application for stay of execution the court has to balance the competing interests of the successful litigant who should not be denied the fruits of his judgment and that of the unsuccessful litigant who is exercising his undoubted right of appeal, as stated in the case of *Francis Mburu Kamau v Methi & Swani Farmers Coperative Society*, Murang'a ELC No. 421 of 2017.
13. On the application for leave to file appeal out of time, the Applicants state that failure to file the appeal was occasioned by the fact that they were not served with the court process. The Appellant referred the court to the principles to be considered in deciding whether or not to grant enlargement of time as stated in *Joseph Kakomo Mbenga v Maingi Charles & another* (2018) eKLR where Warsame, J (as he then was) in *Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani)* HCCC 795 of 1997 expressed himself as hereunder:

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...Whereas there is no doubt that the



defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

Respondent's submissions

14. The Respondent on the other hand submitted that the Applicants were served with the court process, failed to appear and ex parte judgment was entered against them.
15. It was submitted that the application dated 15th June 2021 was scheduled for ruling on 2nd December 2021 but was not delivered until 4th February 2022. That the application was allowed on condition that the Applicants paid the Respondent throw away costs of Ksh.15,000/= and file his statement of defence within 15 days in default to which execution was to proceed. That the Applicants did not comply with the conditions and the Respondent proceeded with execution. Therefore, that the application is only intended to stall the matter as it is based on false allegation that the application was dismissed when it was allowed with conditions which were not met.
16. The Respondent however submitted that he has been unable to secure a copy of the said ruling dated 4th February 2022 to show the true position.

Analysis and determination

17. This being a first appeal, the duty of this court is to re-evaluate and re-analyze afresh the evidence adduced at the lower court and draw its own independent conclusions. The Court of Appeal in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, put this duty as follows;

An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.

18. I have considered the grounds in support of the application and the submissions by the respective advocates for the parties. The issues for determination are whether the applications for stay of execution and for enlargement of time to file appeal out of time are merited.

Enlargement of time

19. The Applicant is seeking for extension of time to file an appeal out of time. The application is made under Section 79G of the *Civil Procedure Act*, 2010 and other enabling provisions of the law. Section 79G 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:



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.

20. This court has wide discretion to enlarge time under Section 95 of the *Civil Procedure Act* and Order 50 Rule 6 of the Civil Procedure Rules, 2010. The same provide as follows:

Section 95. Enlargement of time

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

Power to enlarge time [Order 50, rule 6.]

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

21. The factors that the court has to consider in deciding on whether or not to grant an application to file an appeal out of time are as was laid out in the case of *Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi*, cited with approval by the Court of Appeal in *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR where it was held: -

“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 in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly) the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted.”

22. The Supreme Court of Kenya in the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & Others* [2014]eKLR set the following guidelines for consideration in an application for enlargement of time:

- “(1) 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;
- (2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- (3) Whether the court should exercise discretion to extend, is a consideration to be made on a case to case basis;
- (4) Whether there is a reasonable reason for the delay, the delay should be explained to the satisfaction of the court;
- (5) Whether there will be any prejudice suffered by the Respondent if the extension is granted;



(6) Whether the application has been brought without undue delay; and

(7)

23. It is therefore incumbent in an application for enlargement of time for the court to consider whether the application has been made without undue delay, the explanation for the delay and whether there will be prejudice suffered by the Respondent if the extension is granted.

24. The Applicants contend that the impugned *ex parte* judgment was entered on 20th August 2018 and that they filed the instant application on 26th August 2021. The explanation they have given for the delay which of over 3 years is that they were not aware of the case until when the execution process started. The Respondent did not produce any document to show that the Applicants were served with summons to enter appearance. The Applicants could not have appealed if they were not aware of the case. I find that the Applicants have given satisfactory explanation for the delay.

25. The Applicants contend that they have faced challenges in obtaining copies of proceedings, the subject judgment and ruling. The Respondent himself has confirmed that he has faced a similar problem. The Applicants are therefore not entirely to blame for the delay.

26. Besides that, the Respondent has not shown that he will suffer any prejudice if the application to file appeal out of time is allowed. I am thereby inclined to allow the application.

Stay of execution

27. The application for stay of execution pending appeal is brought pursuant to the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules which provides as follows:

(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 Applicants 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 Applicants”.

28. An Applicant for stay of execution pending appeal has to satisfy the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules, 2010. These are that:

1. The application was brought without unreasonable delay.

2. The Applicant will suffer substantial loss unless the orders sought are granted.

3. The Applicant has given security for due performance of the decree as may be binding on him.

29. The court has already dealt with the question of delay and has found that it has been satisfactorily explained.

30. An Applicant for stay of execution pending appeal is further required to demonstrate that he/she will suffer substantial loss if the orders sought are not granted. In the case of *Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997, Warsame J.*(as he then was) held as follows on the question of substantial loss:

For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such



contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...

31. In *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, it was observed that for a party establish substantial loss he/she has to show:

..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.”

32. In *Kenya Shell Limited v Kibiru & another* (1986) KLR 410, Platt Ag. JA (as he then was) expressed himself as follows on this subject:

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”.

33. The issuance of orders for stay of execution by a court are meant to prevent an Applicant from suffering substantial loss. If then a party does not show that he/she will suffer substantial loss, there would be no reason of granting the application.

34. The Applicants have stated that they are apprehensive that they will suffer substantial loss if money is paid to the Respondent before the determination of the proposed appeal as he may not be in a position to refund their money in the event of a successful appeal. They cited the case of *Simon Mbirua Karangu v East African Breweries* (2020) eKLR where the court cited the case of *G. N. Muema p/a(sic) Mt View Maternity & Nursing Home vs Miriam Maalim Bishar & Another* [2018] eKLR, where it was held as follows: -

“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an] applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”

35. The Respondent made no response on the averment by the Applicants that he may not be in a position to refund any money paid to him in the event of a successful appeal. Once the Applicants had made that averment, the burden of proof shifted to the Respondent to demonstrate that he was in a position to refund any money paid to him in the event of a successful appeal. It is the Respondent himself who knows his financial capability and therefore better suited to demonstrate that he was in a position to refund the money. Since he did not respond to the issue, I find that the Applicants may not be in a position to recover their money from the Respondent in the event of a successful appeal. This may occasion the Applicants substantial loss. The Applicants have therefore demonstrated that they stand to suffer substantial loss if stay of execution is not granted.



36. The third condition for grant of stay of execution pending appeal is that the Applicant has to offer security for the due performance of the decree. This is meant to give the Respondent something to fall back to in the event that the appeal is not successful. In *Arun C. Sharm Vs. Ashana Raikundalia T/A/ Rairundalia & Co. Advocates & 2 Others* [2014] eKLR, the court stated:

“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...”

37. In *Focin Motorcycle Co. Limited Vs. Ann Wambui Wangui & Anor* [2018] eKLR, it was stated that:

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security.”

See also *Gianfranco Manenthi & Another vs Africa Merchant Assurance Co. Ltd* [2019] eKLR.

38. The court in *Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & Another* (2018) eKLR, further stated that:

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment.”

39. The security offered by the Applicant must be sufficient. The court in the case of *Mwaura Karuga T/ a Limit Enterprises v Kenya Bus Services Ltd & 4 Others* (2015) eKLR stated as follows:

...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.

40. The Applicants herein have offered to provide security. That is good faith on their part which is an indication that their intention is not to stall the matter as submitted by the Respondent.

41. In an application for stay of execution pending appeal, the court is required to balance the competing interests of the two parties where one party is exercising its undeniable right of appeal and the other which has a judgment in its favour and who should not be deprived the fruits of the judgment without just cause. This position was aptly articulated in the case of *Kenya Commercial Bank Ltd –vs- Sun City Properties Ltd & 5 Others* [2012] eKLR where it was held:

“In an application for stay, there are always two competing interest that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded



from his appeal being rendered nugatory. These two competing interests should always be balanced.

42. In balancing the interests of the two parties in this matter, I am persuaded that I should allow the application for stay of execution pending appeal on condition that the Applicants deposit the decretal sum in court.
43. In view of the foregoing, the court makes the following orders:
 1. Prayers 4, 5 and 6 of the Amended Notice of Motion dated 13th March 2023 are allowed on condition that the applicants do deposit, within 60 days from the date hereof, the decretal amount in an interest earning account to be opened between the respective advocates for the parties.
 2. The Applicants to file and serve the Memorandum and Record of Appeal within 60 days from the date hereof.
 3. The orders granted herein shall stand vacated in the event that the Applicants fail to comply with the orders within the time given by the court.
 4. The costs of this application to abide by the outcome of the proposed appeal.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF JANUARY 2024

J. N. NJAGI

JUDGE

In the presence of:

Mr. Kariuki G.E. for Applicants

Mr. Kirui for Respondents

Court Assistant – Amina

30 days right of appeal.

