



**Osman v First Community Bank Ltd (Miscellaneous Civil Application
E083 of 2023) [2024] KEHC 220 (KLR) (Civ) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 220 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E083 OF 2023**

**CW MEOLI, J
JANUARY 19, 2024**

BETWEEN

GULED OMAR OSMAN APPLICANT

AND

FIRST COMMUNITY BANK LTD RESPONDENT

RULING

1. For determination is the motion dated 20.02.2023 by Guled Omar Osman (hereafter the Applicant) seeking inter alia leave to appeal out of time against the judgment in Nairobi Milimani CMCC No. 5108 of 2016 (hereafter lower court suit) delivered on 16.11.2017, and that the court be pleased to order stay of execution of the decree issued on 03.09.2018 pursuant to the judgment delivered on 16.11.2017 in the lower court suit, pending hearing and determination of the intended appeal.
2. The motion is expressed to be brought under Section 3A, 79G & 95 of the Civil Procedure Act (CPA), Order 22 Rule 22, Order 42 Rule 6 Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules (CPR) and is premised on the grounds thereon as amplified in the supporting sworn by Applicant.
3. The gist of his depositions is that an exparte judgment was delivered in the lower court suit on 16.11.2017 in favour of First Community Bank Ltd (hereafter the Respondent) and a decree issued on 03.09.2018 for the sum of Kshs. 18,146,655.26/-. That he was neither aware of the existence of the lower court suit nor served with summons and as such was not accorded an opportunity to file a defence. That he only became aware of the lower court suit upon being served with a decree via WhatsApp. He goes on to depose that upon being served with the decree, and being unable to satisfy the said decretal sum, he opted to file for bankruptcy which Petition was dismissed on 23.09.2022.
4. That being aggrieved with the lower court's decision, he is desirous of exercising his right of appeal, and that he has since come across a Notice to Show Cause that was scheduled to be heard on 23.03.2023



which was never served upon him. He further states that his intended appeal has a high chance of success and that he is presently in the process of compiling the record of appeal. That if stay of execution is not granted, there is a likelihood of his arrest and committal to civil jail, rendering the intended appeal nugatory. In conclusion, he deposes that unless the motion is allowed, he is bound to suffer irreparable loss, injustice, and unfairness since he has never been accorded an opportunity to be heard.

5. The Respondent opposes the motion through a replying affidavit deposed by Mohammed Aden Mohammed, the recoveries/remedial officer with the Respondent, thus conversant with the facts and competent to depose. He views the motion as an abuse of the court process citing the delay of six years which has not sufficiently been explained. He contends that a prayer for stay of execution should in the first instance be made before the trial court and not before the court to which an appeal is preferred. That the lower court entered a regular judgment against the Applicant on 16.11.2017 and no explanation has been offered why it took the Applicant seven years to present the intended appeal. He goes on to assert that the Applicant was notified of the entry of judgment but rather opted to file bankruptcy proceedings, which were dismissed, paving way for the Respondent to take out execution proceedings as against the Applicant.
6. The deponent takes issue with the motion on the further grounds that, the same is un-procedural and unfounded as the Applicant has never applied to set aside the regular judgment of the lower court and hence the intended appeal is void ab initio there being no issue for determination before this court. That the Applicant has similarly not established that he would suffer substantial loss if the orders sought are not granted, while the Respondent is likely to suffer prejudice given that it loaned the Applicant funds which he has never settled.
7. The deponent asserts that the Applicant has not furnished or intimated to this court that he shall furnish security for due performance of the decree as may ultimately be binding upon him should the intended appeal fail. And that the Respondent, being a financial institution, can compensate the Applicant should his appeal be meritorious. In conclusion, he states that the motion has been filed for the sole purpose of frustrating the decree holder and to defeat justice. Finally urging the court to dismiss the motion with costs so as not to deprive the decree holder of its fruits of successful litigation.
8. The motion was canvassed by way of written submissions. Counsel for the Applicant placed reliance on the provisions of Order 22 Rule 22 of the CPR, the decisions in *Shah v Mbogo & Another* (1967) EA 116, *Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & Another* [2018] eKLR, *Safaricom Limited v Josenga Company Limited & 4 Others* [2021] eKLR and *Tana & Athi Rivers Development Authority v Jeremiah Kimigbo Mwakio & 3 Others* [2015] eKLR. Reiterating the affidavit material on the explanation for delay, he contended that the Applicant has been following up on the matter since he became aware of it, that the Applicant was not accorded an opportunity to be heard, and hence the court ought to grant him leave to lodge an appeal out of time.
9. On the part of the Respondent's counsel, submitting on whether the Applicant has met the requirements for an order of stay pending the intended appeal, he cited the provisions of Order 42 Rule 6 of the *CPR*. And pointed out no explanation has been offered for the delay of six years save for the allegation that the Applicant was never served with summons and pleadings. Moreover, emphasizing that despite the Applicant being aware of the judgment, he failed to challenge the same and opted to institute bankruptcy proceedings dismissed three years before the filing of the instant. Allegedly with the intention of frustrating the Respondent's move to proceed with execution while neither demonstrating the loss he stands to suffer should execution proceed against him nor offering security for due satisfaction of the decree. The decisions in *National Bank of Kenya v Esther Wambui Kariuki* [2017] eKLR and *Francis K. Chabari & another v Mwarania Gaichura Kairubi* [2022] eKLR were called to aid in the foregoing regard.



10. That the intended appeal cannot lie before this Court as a default judgment cannot be appealed to facilitate way a new trial as sought here unless the default judgment is set aside. Thus, it submitted that the Applicant's motion was devoid of merit and should be dismissed with costs.
11. The Court has considered the rival affidavit material and submissions in respect of the motion. Alongside the prayer for leave to appeal out of time, the Applicant has sought stay of execution of the lower court judgment and decree pending hearing and determination of the intended appeal. It is evident on a plain reading of Order 42 Rule 6(1) of the [CPR](#), that an order to stay execution pending hearing and determination of an 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) of the [CPR](#).
12. Hence the invocation of the jurisdiction of this court under Order 42 Rule 6 (1) or 6 (6) of the [CPR](#) must be preceded by the filing of an appeal, or compliance with the procedure for filing an appeal, in this case a memorandum of appeal (See Order 42 Rule 1 of the [CPR](#)). Thus, where a party specifically seeks stay of execution pending hearing and determination of an appeal not yet filed, the court may be acting in vacuo by considering the Applicant's prayer for stay of execution pending a non-existent appeal. The Court of Appeal in [Abubaker Mohamed Al-Amin v Firdaus Siwa Somo](#) [2018] eKLR while citing with approval the decision of the High Court in [Rosalindi Wanjiku Macharia v James Kiingati Kimani \(Suing as the Legal Representative of the Estate of Martin Muiruri \(Deceased\)\)](#) [2017] eKLR approved the reasoning that stay of execution pending appeal must be premised on an existing appeal.
13. Earlier, the Court of Appeal in the case of [Equity Bank v Westlink MBO Limited](#) [2013] eKLR while commenting on Rule 5 (2) (b) of the [Court of Appeal Rules](#), whose wording is substantially similar to Order 42 Rule 6 (1) of the [Civil Procedure Rules](#), and on Order 42 Rule 6 (6) of [Civil Procedure Rules](#), left no room for doubt that an application for stay of execution pending appeal could only be entertained before it after the filing of an appeal or a Notice of Intended Appeal. (See also [Balози Housing Co-operative Society Limited v Captain Francis E. K. Hinga](#) [2012] eKLR).
14. Order 42 Rule 1 of the [CPR](#) provides that an appeal to the High Court shall be in the form of a memorandum of appeal. In this case, an appeal is yet to be filed and therefore, there is no basis upon which this court could exercise its appellate jurisdiction under the said provision in a miscellaneous matter. If the Applicant desired to seek an order to stay execution alongside the prayer for the late admission of their appeal, he ought to have first filed the memorandum of appeal in a proper appeal and the relevant application. In my considered view, the words that "an appeal may be admitted out of time" in Section 79G, appears to admit both retrospective and prospective applications. So that leave under the Section may be sought before or after a memorandum of appeal is filed. However, it may be more prudent for a party who also seeks stay of execution pending appeal in the same motion for leave to appeal out of time to have filed the memorandum of appeal in advance.
15. In the circumstances, the prayer seeking a stay of execution of the decree issued on 03.09.2018 pursuant to the judgment delivered on 16.11.2017 in the lower court suit, pending hearing and determination of the intended appeal has no legal anchor and cannot be entertained.
16. Turning now to the prayer seeking leave to appeal out of time the judgment in Nairobi Milimani CMCC No. 5108 of 2016 delivered on 16.11.2017, the power of the Court to enlarge time for filing



an appeal out of time is expressly donated by Section 79G, as well as generally, by Section 95 of the Civil Procedure Act. Section 79G of the Civil Procedure Act provides that:

“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.”

17. The principles governing the grant of leave to appeal out of time are settled. The successful applicant must demonstrate “good and sufficient cause” for not filing the appeal in time. In Thuita Mwangi v Kenya Airways [2003] eKLR, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in pari materia with Section 79G of the Civil Procedure Act, reiterated its decision 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.”

18. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court’s discretion in his favor. The Supreme Court in the case of Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The Court stated inter alia that:

“(T)he underlying principles a court should consider in exercise of such discretion include;

1. Extension of time is not a right of any 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 the discretion to extend time, is a consideration to be made 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.
7.”

See also County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] eKLR.



19. There is no dispute that the judgment of the lower court was delivered on 16.11.2017 and a decree being extracted on 03.09.2018. The court has reviewed the explanation proffered by the Applicant for the delay and the response by the Respondent. From the Applicant's own affidavit material, he became aware of the judgment of the lower court on 25.11.2020, the decree having been served upon him via WhatsApp. As rightly observed by the Respondent, the Applicant, rather than applying to set aside and or appeal against the judgment of the lower court, opted to lodge bankruptcy proceedings. Despite this option being well within the Applicant's right, it did not preclude him from taking the former course of action especially given his complaints as to non-service of the process relating to the lower court suit. He only moved this court upon the bankruptcy petition being dismissed, again after a period of delay which was not explained.
20. In the court's view therefore, the explanation offered by the Applicant for the delay of six years is untenable. It is settled that the period of delay as well as explanation for such delay are key considerations in an application of this nature. A party seeking extension of time must not be seen to presume on the court's discretion. In the circumstances of the case, the period of delay, about six years, is inordinate.
21. The Court of Appeal in *Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 Others* [2019] eKLR addressed the question of delay and requirement for explanation as follows;-

“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. There have to be valid and clear reasons, upon which discretion can be favourably exercisable.....”
22. A cursory review of the draft memorandum of appeal exhibited by the Applicant reveals a challenge of the substance of the judgment in the lower court suit of 16.11.2017. However, inexplicably, the Applicant has never attempted to set aside the said the judgment or ex parte proceedings before the lower court, a course of action that would probably have better addressed his grievances on non-service of process in the lower court suit. That said, the language employed in Mutiso (supra) suggests that the requirement concerning the viability of an intended appeal is neither mandatory nor stringently applied in an application of this nature.
23. While the court is equally mindful of the dicta in *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited* [2020] eKLR wherein the court emphasized the right of appeal, the said right must be balanced against the likelihood of prejudice against the Respondent, which in this case appears high, given the delay arising from the Applicant's own choices upon learning of the lower court judgment. And the need to guard against abuse of the process of the court and dissipation of scarce judicial time.
24. In the circumstances of this case, the court is of the considered view that the justice of the matter lies in dismissing the Applicant's motion dated 20.02.2023 with costs to the Respondent. It is so ordered.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 19TH DAY OF JANUARY 2024.

C.MEOLI

.....

JUDGE

I certify that this is a true copy of the original

Signed



DEPUTY REGISTRAR

In the presence of

For the Applicant: N/A

For the Respondent: Mr. Dondo

C/A: Carol

