



**Kenya Red Cross Society (Emergency Medical Plus Services) v Toyota Kenya Limited
(Civil Appeal E825 of 2021) [2024] KEHC 1033 (KLR) (Civ) (9 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1033 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E825 OF 2021

AN ONGERI, J

FEBRUARY 9, 2024

BETWEEN

KENYA RED CROSS SOCIETY (EMERGENCY MEDICAL PLUS SERVICES) APPELLANT

AND

TOYOTA KENYA LIMITED RESPONDENT

RULING

1. The application coming for consideration in this ruling is the one dated 2/8/2023 seeking reinstatement of this appeal and stay of execution pending the hearing and determination of this appeal.
2. The appeal was dismissed on 26/5/2023 in the absence of the applicant.
3. The application is supported by the applicant’s affidavit and a further affidavit dated 14/11/2023 in which it is deposed that the applicant’s advocate failed to join the virtual court as a result of technical hitches with the link provided in the E-filing system.
4. The respondent vehemently opposed the application dated 2/8/2023 and filing a replying affidavit dated 27/10/2023 in which it is deposed that the applicant had falsified information and adduced untrue statements.
5. The parties filed written submissions in the application dated 2/8/2023 as follows; the applicant submitted that The Orders dismissing the Appeal were issued despite the fact that it is on record the Appellants had made legitimate attempts to prosecute the matter by filing a letter dated 8/6/2022 addressed to the Deputy Registrar requesting for a mention date for directions on the Appeal.



However, the request was not granted and the same was beyond the control of the Appellants or their Advocates on record.

6. The applicant submitted that in this instance the appeal was not ripe for dismissal and there was no indication to warrant a notice to show cause. thus, the only way justice can be fulfilled is to reinstate the appeal and allow the applicant to fully exercise its right of appeal. The applicant indicated further that the appellant's counsel were unable to log into court with the link provided in the E-filing portal and as such it was assumed that the court was not sitting.
7. The applicant argued that in this case there was no prolonged or inexcusable delay to warrant the dismissal. The applicant did its part by trying to get a mention date vide its letter dated 8/6/2022. The delay and failure by the advocate to attend court is reasonable and the appellants should not suffer as a result of the mistakes of the advocate.
8. On the issue of stay pending appeal the applicant submitted that the respondent herein has already withdrawn the full amount deposited in a joint interest earning account which was Kshs. 5,162,100. The respondent is further attempting to execute on unverifiable amounts in excess of the decree and has already sent auctioneers to the appellant's offices. The appellant is therefore at risk of double execution. In support the appellant cited [Esther Wanjiru v Jackline Arege](#) [2014] 1 eKLR where the Court asserted that an order of stay of execution will be granted where the court is satisfied that substantial loss may result to the applicant.
9. The respondent submitted that that the Defendant/Applicant has come before this honorable court with unclean hands. Despite being given a chance to file its appeal, it failed to set down the same for hearing. The provisions of the law are clear and specifically under the [Civil Procedure Rules](#) under Order 43 Rule 35 it provides that:

“ 35.

- (1) Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.
- (2) If, within one year after service of the memorandum of appeal, the appeal shall not have been set down for hearing the registrar shall on notice to the parties list the appeal before the judge in chambers for dismissal. ”

10. The respondent contended that the applicant has not given any reasonable explanation as to why the delay was occasioned nor has it demonstrated its effort to have the appeal prosecuted save for one letter seeking a date for mention which is not exhaustive or evidence of concerted efforts. The applicant should thus not be allowed to benefit from its laxity as the continuous delay continues to prejudice the Applicant who has every right under Article 159 of the [Constitution](#) of Kenya which provides that justice shall not be delayed.
11. On the application of stay pending appeal the respondent submitted that should the application be allowed, the probability of success of the appeal remains in question. The Respondent has demonstrated that indeed there is a debt owed to it by the Applicant following breach of contract back in the year 2015.
12. The issues for determination in this application are as follows;



- i. Whether the appeal should be reinstated for hearing.
 - ii. Whether further stay of execution pending appeal should be granted.
13. On the issue as to whether the appeal should be reinstated, I find that the applicant stated that the appeal was dismissed after the appellant’s advocate was unable to log into the e-filing portal due to technical hitches.
 14. I find that the court has a discretion to set aside an *ex parte* orders upon certain conditions.
 15. In the case of *CMC Holdings Ltd v James Mumo Nzioki* [2004] eKLR, the court held as follows;

“The discretion that a court of law has, in deciding whether or not to set aside *ex-parte* order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error”
 16. The reason the suit was dismissed was attributed to the inability of the appellant’s counsel to join the virtual court.
 17. The mistake of counsel ought not to be visited upon the applicant.
 18. The discretion to reinstate a matter is not meant to assist a party who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice but it is exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error.

(see the case of *Nixon Andati v Moses Mudaki* [2019] eKLR. *Stephen Ndichu v Mouny’s Wines & Spirits Ltd* [2006] KLR was quoted with approval)
 19. It is in the interest of justice that this appeal be reinstated for interpartes hearing and I so order.
 20. On the issue as to whether further stay of execution should be granted pending the hearing of the appeal, the governing provision is Order 42 Rule 6 which states 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 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.
 - (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”.

21. I find that the security for costs which was deposited has already been released to the respondent.
22. In the circumstances the appellant need not supply security for the due performance of the decree.
23. In the case of *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, the court stated as follows;

“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.

.. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

24. The appellant stated in their Replying Affidavit that the entire decretal sum has been paid and further that the respondents are trying to execute for unspecified sums.
25. The respondents on their part said that the entire decretal sum has not yet been settled. In the circumstances, I grant stay of further execution pending appeal.
26. I find that this application was brought within a reasonable time.
27. I allow the application dated 2/8/2023 on the following conditions;
 - i. That the Record of Appeal be served within 15 days of this date.
 - ii. That the appeal be and is hereby admitted for hearing before a single Judge.
 - iii. That the same be fully executed within 60 days.
 - iv. That the same be canvassed by way of written submissions.
 - v. Mention on 5/3/2024 for compliance and for a judgment date.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2024.

.....

A. N. ONGERI
JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

