



**Rotich v Mbula (Miscellaneous Application 300 of 2023)
[2024] KEHC 1439 (KLR) (14 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1439 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS APPLICATION 300 OF 2023**

FR OLEL, J

FEBRUARY 14, 2024

BETWEEN

LOUIS ROTICH APPELLANT

AND

PRISCILLA MBULA MUSAU ALIAS PRICILLA MBULA RESPONDENT

RULING

A. Introduction

1. The application before this court is the Notice of Motion application dated 8th November 2023 brought pursuant to provisions of Section 1A, 1(B), 3A, 79G and 95 of the *Civil Procedure Act*, order 22, rule 22, order 42 rule 6(2), & order 51 rule 1 of the *Civil Procedure Rules* and all other enabling provision of law. Prayers (a) and (b) of the said application are basically spent and the main prayer sought are prayers (c) and (d) for leave to appeal out of time and for stay of execution of the decree dated October 11, 2023, issued in Machakos SCCC No E481 of 2023, the applicant also prayed to be allowed to issue security in the form of a bank guarantee.
2. This application is supported by the grounds on the face of the said application and the affidavit of the appellant dated 8th November 2023, while the respondent opposed this application through her replying affidavit filed in court on 26th January 2024.
3. The Appellant averred that he was wholly dissatisfied by the Judgment of Hon Luova dated October 11, 2023 delivered in Machakos SCCC No E481 of 2023 and had instructed his counsel to prefer an appeal against the same basically challenging the quantum awarded as being on the higher side. He averred that he was late in issuing the said instructions and time to file the appeal had lapsed. He requested the court to excuse his mistake and allow him to file the appeal out of time.
4. The appellant further averred that he has an arguable appeal which has high chances of success and further that the said appeal was meritorious and stood a good chance of success as demonstrated in



the Memorandum of Appeal proposed to be filed. If stay was not granted, he would be exposed to execution to his loss and detriment. His insurer Direct line Insurance company ltd had offered to provide a bank guarantee as security.

5. The Respondent did oppose this application through her Replying Affidavit dated January 24, 2024. she stated that the appeal proposed to be filed was frivolous, unmeritorious and should be dismissed suo moto as the judgment appealed against was sound and balanced. The appellant wanted to file his appeal as an afterthought after she commenced execution proceedings by filing a declaratory suit being Machakos SCCOMM E572 of 2023 *Pricila Mbulu Musau v Direct line Assurance co Ltd*.
6. Further the applicant had been granted an order of stay of execution on December 14, 2023 on condition that he pays her Kes 250,000/= on or before January 29, 2024, but the applicant had failed to do so. He was thus underserving of the orders sought and had not meet the legal threshold for granting stay of the decree herein pending determination of the Appeal.
7. The respondent also stated that the guarantee offered was not valid and had been used severally by the applicant in several court cases. She was entitled to the fruits of her Judgement and therefore prayed that the said application ought to be dismissed.

B. Analysis & Determination

8. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and discern that the only issues which arise for determination is whether time should be extended to allow the Appellant file his Appeal out of time and subsequently, if allowed, should this court grant stay of execution of the Judgment/Decree dated 11th October 2023 issued in Machakos SCCC No E481 of 2023.
9. Section 79G of the *Civil procedure Act* 2010 does provide that

“Every appeal from a subordinate court to the high court shall be filed within a period of 30 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 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.
10. Order 50 rule 6 of the *Civil procedure Rules* further provides that;

“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 powers to enlarge time upon such terms(if any) as the justice of the case may require, and such enlargement maybe ordered although the application for the same is not made until after the expiration of the time appointed or allowed.”
11. There is no doubt that the discretion to extend time is not a right of the party, but is an equitable remedy that is only available to a deserving party after laying a basis to courts satisfaction that there exists reasonable explanation as to why there has been a delay. The court will also consider if any prejudice will be suffered by the respondent and if the application has been brought without unreasonable delay. See *Nicholas Kiptoo arap korir salat v IEBC and 7 others* eKLR.



12. In the *Salat case* (*supra*) the supreme court did observe that;

“Extension of time being a creature of equity, only enjoy, one can only enjoy if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time lapse. Extension of time is not a right of a litigant against court, but a discretionary power of the courts, which litigants have to lay a basis where they seek courts to grant the same”
13. The court too could fall back on provisions of section 1A, 1B & 3A of the *civil procedure Act*, which granted the court inherent powers to grant such orders as it may deem necessary and further enjoined court to determine disputes in a just manner while considering the lower rather than higher risk of injustice. In the citation of *Shabbir Ali Jusab v Anaar Osman Gamrai & another* (2013) eKLR it was held that; the court should focus on substantive justice and disregard procedural technicalities.
14. The Judgement Appeal against was issued on October 11, 2023, and the application for extension of time filed on December 13, 2023. The applicant was late by 30 days to file his intended Appeal. The reason offered for the delay through week is plausible and the said extension of time is not seriously opposed by the Respondent. I do therefore allow the same.
15. Stay of execution pending appeal is governed by order 42 rule 6 of the *Civil Procedure Rules*. It is evident from the said provision that power to grant stay of execution pending appeal is an exercise of discretion of the court on sufficient cause being shown by the Applicant that substantial loss may result to the applicant if the orders are denied; the application should be made without undue delay and the court will impose such security as the court may impose for the due performance of any decree or order as may ultimately be binding on the Applicant. See *Amal Hauliers Limited v Abdulnasi Abukar Hassan* (2017) eKLR & *Butt v Rent Tribunal* (1982) KLR 417
16. The appellant filed his application for leave to appeal out of time about two months after Judgement had been entered as against him. The is period does not constitute a period of inordinate delay, while also noting that leave to appeal too has been granted .
17. On the likelihood of suffering substantial loss, and security of the appeal, the court has to balance the interest of the Appellant who seeks to preserve the status quo pending hearing of the appeal and to ensure the appeal is not rendered nugatory and the interest of the Respondent who seeks to enjoy the fruits of his judgment. In other words, the court should not only consider the interest of the Appellant but also consider, in all fairness, the interest of the Respondent who has been denied the fruit of his judgment. See *Attorney General v Halal Meat Produces Limited* Civil Application No. Nairobi 270 of 2008; *Kenya Shell Ltd v Kibiru & another* (Supreme); *Mukuma v Abuoga* (1988) KLR 645.
18. The law is that where the Applicant succeeds, he/she should not be faced with a situation in which he would find himself unable to get back his money. Likewise, the Respondent who has a decree in his favour should not, if the applicant is eventually unsuccessful in his intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security. See Court of Appeal in *Ndubiu Gitabi v Warugongo* (1988) KLR 621; IKAR 100;(1988-92) 2 KAR 100.
19. From the onset this court had noted that this Appeal is only as against raised as against quantum awarded and not liability. On 14.12.2023, I did direct the applicant to pay the respondent a sum of Kshs.250,000/= on or before 29.01.2024 as a condition of granting stay, but the said order has not been complied with. Parties seeking discretionary court orders must come to court with clean hands and adhere to directives issues. Regrettable that is not the case herein and no explanation has been given as to why there has been noncompliance with the court order of December 14, 2023.



Disposition

20. Taking all relevant factors into consideration, I do grant the following orders;
- a. The appellant/applicant is grant leave (7 days) to appeal out of time as against the Judgement/decree dated October 11, 2023 and issued in Machakos SCCC No E481 of 2023.
 - b. Since there is non compliance with the orders dated December 14, 2023 I refuse to exercise my discretion to stay the decree herein.
 - c. The costs of this Application will be in the cause
21. It is so ordered.

RULING WRITTEN, DATE AND SIGNED AT MACHAKOS THIS 14TH DAY OF FEBRUARY, 2024

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 14TH DAY OF FEBRUARY, 2024

In the presence of: -

Ms Ochoki for Appellant

No appearance for Respondent

Sam - Court Assistant

