



**Total Security Surveillance Ltd & another v Oluoch (Civil Appeal
E647 of 2021) [2024] KEHC 1032 (KLR) (Civ) (9 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1032 (KLR)

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

CIVIL

CIVIL APPEAL E647 OF 2021

AN ONGERI, J

FEBRUARY 9, 2024

BETWEEN

TOTAL SECURITY SURVEILLANCE LTD 1ST APPELLANT

EVANS MBUTHINI 2ND APPELLANT

AND

VITALIS ODHIAMBO OLUOCH RESPONDENT

RULING

1. The application coming for consideration in this ruling is the one dated 22/5/2023 brought under Order 45 Rule 1 (1), (2) of the *Civil Procedure rules*, Section 3A and 80 of the *Civil Procedure Act* and all enabling provisions of the law Seeking the following orders;
 - i. That this honourable court be pleased to grant leave for the applicant to file cross appeal out of time.
 - ii. That this honourable court be pleased to review the order dated 21st July, 2022 issued on 17th October, 2022.
 - iii. That this honourable court be pleased to order a half of the decree of the sum of Kshs 2,752,000/= deposited in an interest earning account in joint names of the advocates be released to the applicant immediately to enable him attend medication pending hearing and determination of the appeal herein.
 - iv. That cost of this application be provided for by the respondents.
2. It is based on the following grounds;
 - i. That applicant require a half of the sum of the decree to enable him attend mediation.



- ii. That there is an error on the face of the record, as the court failed to adhere to the principles laid down in the Court of Appeal Civil Application no. 252 of 2000 *Mohan Meakin (K) Limited v Mutunga Kiundi* while arriving at its decision.
3. The application is supported by the affidavit of the applicant Vitalis Odhiambo in which it is deposed as follows;
 - i. That currently the applicant is critically sick as the implant which was inserted on the right upper leg has not been removed and it has started to rot which will lead to amputation.
 - ii. Hence it is in the interest of justice that, a half of the decree of the sum of ksh 2,752,000/= deposited in an interest earning account in joint names of the advocates be released to him immediately to enable him attend medication pending hearing and determination of the appeal herein.
 - iii. That the applicant has been advised by his advocates on record, that this honourable court be pleased to review the order dated 21st July, 2022 issued on 17th October, 2022 as there is an error on the face of the record, that it is now a trite law, that dealing with the applications for stay of executions court shall consider the interest of both parties.
 - iv. That the applicant has been advised by his advocates on record, that the judgment in this matter as delivered on 8th September, 2021 and the respondent served his advocates with the Memorandum of Appeal dated 7th October, 2021 on 20th February, 2023.
 - v. That he was unable to file cross-appeal as he was dissatisfied by the said judgment, since the trial magistrate also erred in law in failing to award him loss of earning capacity and/or diminished earning capacity of Kshs 5,400,000.00 as sought in his submissions.
 - vi. That he has been advised by his advocates on record, that it is in the interest of justice, that this honourable court grant him leave to file a cross-appeal, since the appellants advocates served his advocates with Memorandum of appeal on 20th February 2023 and he was unable to instruct his advocates to file cross-appeal within the stipulated time.
 - vii. That it is in the interest of justice that this application be granted as he is likely to suffer irreparable loss, harm and damage if the same is not granted.
 4. The appellant opposed the application vide a replying affidavit by Lucy W. Kamau dated 28/8/2023 in which it is deposed that the appeal herein was filed in October 2021 and the Respondent could have crossed appealed within time or at least within reasonable time, if indeed he has a valid cross-appeal instead for waiting for almost two years since the Appeal was filed which is undue delay. That it would be unfair for the Respondent to drag this appeal by seeking leave of the court to cross appeal when the Appellants have already filed the Record of Appeal.
 5. She deposed that the appellant fully complied with the conditions of stay pending hearing of the appeal by depositing the judgement sum of Kshs 2,752,000. The respondent did not appeal against the said ruling and hence the respondent cannot come this late praying for review of the same. Further, no valid reason has been advanced why the cross appeal was not filed in time.
 6. The parties filed written submissions as follows; the respondent/applicant submitted that according to the medical report of Dr. Okere dated 8/8/2017, he sustained a fracture of the right femur classified as grievous harm and required Ksh. 250,000.00 to remove the implant, which has not been removed to date, having suffered 40% of permanent incapacity. The court ought to apply the principles laid



- down in the case of Court of Appeal Civil Application No. 252 of 2000, *Mohan Meakin (K) Limited v Mutunga Kiundi*, and have a half-decretal sum released to the applicant for medication.
7. The respondent/applicant further submitted that he was served with the Memorandum of Appeal dated 7/10/2021 on 20/2/2023 almost two years from the date of filing the said Memorandum of Appeal and thus unable to file a cross appeal within the stipulated time.
 8. The appellant/respondent submitted that in respect to the prayer for review, it is the Appellants contention that the same does not fall under the purview of Order 45. The Applicant in support of his prayer for Review has relied upon Dr, Okere's Medical report which was produced during trial and which he further attached to his replying Affidavit in opposition to the Appellants' application for stay of execution pending Appeal. It is the Appellants' submission that this Court made a conscious Decision on the matters in controversy and exercised its discretion in making the orders of 17/10/2022 from the material on record.
 9. On leave to file a cross appeal out of time, the appellant/respondent submitted that the Applicant has not satisfied the conditions under Section 79 G of the *Civil Procedure Act* and Order 45 and Order 80 of the Civil Procedure Rules and hence the Application filed herein should be dismissed with costs.
 10. The issues for determination in this application are as follows;
 - i. Whether the respondent should be granted leave to file a cross-appeal out of time.
 - ii. Whether half the decretal sum deposited as security for costs should be released to the respondent pending the hearing and determination of the appeal.
 11. On the issue as to whether the respondent should be granted leave to file a cross-appeal out of time, the application for leave to file a cross appeal out of time was brought under Order 45 Rule 1 (1), (2) of the Civil Procedure rules, Section 3A and 80 of the *Civil Procedure Act* and all enabling provisions of the law.
 12. The only reference to the term cross appeal in the *Civil Procedure Rules* is in Order 42 Rule 32 which provides as follows;

“ 32. The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further, or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the Respondents although such respondents may not have filed any appeal or cross appeal.”
 13. The above provision, read together with Section 79G of the *Civil Procedure Act* presupposes that a respondent can also file a cross appeal, upon being served with a Memorandum of Appeal.
 14. 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 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.”

15. The respondent/applicant submitted that he was served with the Memorandum of Appeal dated 7/10/2021 on 20/2/2023 almost two years from the date of filing the said Memorandum of Appeal and thus unable to file a cross appeal within the stipulated time.
16. The respondent having admitted that he was served with the Memorandum of Appeal dated 7/10/2021 on 20/2/2023, it was expected that the Respondent, upon being served with the appeal, should have filed a cross appeal within 30 days from date of service which is from 20/2/2023.
17. The Respondent was equally at liberty to file a separate appeal challenging the judgment/decree of the Trial Court upon which the two separate appeals could have been consolidated and heard together. None was filed.
18. I find that the Application seeking leave to cross-appeal out of time is an afterthought.
19. In the case of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR the court stated as follows;

“It is well settled that the decision whether or not to extend 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 delay; and 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.”
20. Similarly, in the case of *Nicholas Kiptoo Arap Koriri Salat v IEBC & Others* [2014]eKLR, the Supreme Court of Kenya stated as follows;
 - “(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) Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
21. I find that in the current case, the respondent has no reasonable reason for the delay to file the cross appeal since the delay has not been explained to the satisfaction of the court.



22. Order 42 Rule 32 states that;

“The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further, or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the Respondents although such respondents may not have filed any appeal or cross appeal.”

23. In the circumstances, the respondent will not suffer prejudice by failure to file the cross appeal.

24. The Record of Appeal (ROA) has been filed and this appeal ought to be expedited.

25. On the issue as to whether half the decretal sum deposited as security for costs should be released to the respondent pending the hearing and determination of the appeal, again I find that the respondent knew that there was an implant that required removal at the time the orders for stay were issued and he did not raise the issue.

26. Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules provides as follows;

Section 80. Review

“Any person who considers himself aggrieved—

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

27. Order 45, rule 1 also states as follows;

“1.

- (1) Any person considering himself aggrieved—
 - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the



court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review”

28. From the above provisions, it is clear that while Section 80 of the *Civil Procedure Act* grants the court the power to make orders for review, Order 45 sets out the jurisdiction and scope of review by hinging review to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason.
29. In the current case, I find that the respondent has not established ground for review of the stay orders since he was aware of his medical condition when the stay orders were granted.
30. I dismiss the Application dated 22/5/2023 and direct as follows;
- i. That the record of appeal to be served upon the respondents within 15 days of this date and the appeal be expedited.
 - ii. That the appeal be and is hereby admitted for hearing before a single Judge.
 - iii. That the appellant files and serves written submissions within 15 days of this date together with the service of the Record of Appeal upon the respondents.
 - iv. That thereafter the respondent to file and serve their written submissions within 15 days.
 - v. The costs of the Application to abide the cause.
 - vi. Mention on 4/3/2024 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

