



**Kitua & another v Mwendwa (Miscellaneous Application
180 of 2023) [2024] KEHC 2419 (KLR) (6 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2419 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS APPLICATION 180 OF 2023**

**FR OLEL, J
MARCH 6, 2024**

BETWEEN

LEONARD KYANIA KITUA 1ST APPLICANT

BLUE CLOUDS LIMITED 2ND APPLICANT

AND

BRIAN MWENDWA RESPONDENT

RULING

A. Introduction

1. The Application before this court is a notice of motion application filed on 22.09.2023 brought pursuant to the provisions of section 1A, 1B,3, 3A of the [Civil Procedure Act](#), Order 21, rule 1b, Order 22 rule 22, Order 40 rule 6 , Order 51 rule 1 of the [Civil Procedure Rules](#) and Article 159 (2)(d) of [the Constitution](#) of Kenya. The Applicant seeks the following prayers that;
 - a. Spent
 - b. Spent
 - c. Leave be granted to the Applicant herein to lodge an appeal against the entire judgement and decree in Mavoko CMCC 313 of 2020 out of time
 - d. This honourable court be pleased to stay execution of the decree in Mavoko CMCC 313 of 2020 pending the hearing and determination of the Appeal
 - e. The Honourable court allow the Applicant herein to furnish the court with security in the form of a bank guarantee from the Family Bank any order and/or direction it deem fit to grant in the circumstances
 - f. Spent



- g. Costs of the Application abide the outcome of the appeal
 - h. The honourable court be pleased to issue any other order and/ or direction it deem fit in the circumstances.
2. The Application is supported by a supporting affidavit of the 1st Applicant dated 22.09.2023 in which it was deposed that judgment was entered as against them on 06.07.2023 and the time to lodge the Appeal has since lapsed. It was deposed that when the matter came up on 24.5.2023 the court informed the parties that judgment will be delivered on notice as the magistrate was on transfer however the applicant was not informed and/or given judgement notice when eventually the said judgement was delivered. The Applicant was ready and willing to provide a bank guarantee as security.
 3. The application is opposed by the respondent, who did file his replying affidavit dated 30.10.2023 and stated that the bank guarantee had not been attached and the Applicant should be allowed to deposit the decretal sum in a joint interest earning account.

B. Analysis & Determination

4. I have carefully considered the Application and corresponding affidavits thereto on record.
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.”
5. The principles of granting leave to file an appeal out of time were discussed by the Court of Appeal in the case of *Omar Shurie v Marian Rashe Yafar* (Civil Application No. 107 of 2020) UR 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.”
6. Similarly, The Court of Appeal in the case of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR discussed some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time, They include the following:
 - i) The period of delay;
 - ii) The reason for the delay;
 - iii) The arguability of the appeal;
 - iv) The degree of prejudice which could be suffered by the if Respondent the extension is granted;
 - v) The importance of compliance with time limits to the particular litigation or issue; and



- vi) The effect if any on the administration of justice or public interest if any is involved.
7. The importance of giving a sufficient reason for the extension of time to appeal was discussed in the Court of Appeal case of *Susan Ogutu Oloo & 2 Others v Doris Odindo Omolo* [2019] eKLR where it was held:-
- “In an application for extension of time, the single Judge has discretion. I am aware that the discretion I have is to be exercised judiciously and not whimsically or capriciously. The guiding principles on the issue of extension of time was laid out by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v IEBC* [2014] eKLR Sup Ct Application No 16 of 2014.
- The Supreme Court aptly stated extension of time is not a right of a party; a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court. Of paramount importance, the reason for delay must be explained to the satisfaction of the Court. Further, the application for extension must be brought without undue delay and it must be demonstrated if the respondent will not suffer prejudice if extension is granted”.
8. From the record, the judgment appealed against was delivered on 20th July 2023. The Application herein was filed on 26th September, 2023 and this application was also filed the same date, two months later. I find that the delay is not inordinate. The reason for the delay is that they were not aware of the date the judgement was delivered and were never served with a judgment notice. This is a valid reason the basis upon which stay of execution can be granted.
9. On the issue of arguability of the appeal, the applicant has annexed a draft memorandum of appeal indicating the issues they intend to take up on appeal. In the case of *Atbuman Nusura Juma v Afwa Mobamed Ramadhan* [2016] eKLR the court held that
- “whether the intended appeal has merits or not is not an issue to be determined by a court when dealing with an application of this nature but by the court dealing with the merits of the appeal, that is why the requirement that the intended appeal be arguable is preferred with the word “possibly.”
10. The court can at this point not determine whether the appeal will succeed or not but upon perusal of the memorandum of appeal, it does it raise issues that can be determined on appeal. Lastly, The Respondent will not suffer any prejudice if leave is granted.
11. 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 *Butt v Rent Restriction Tribunal* [1982] KLR 417 and *James Wangalwa & another v Agnes Nalika Chereto* [2012] eKLR)
12. Having found that the delay was not inordinate. I move to the issue of the likelihood of suffering substantial loss. It was sufficient if an applicant seeking a stay of execution demonstrated that he/she 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. See *G. N. Muema P/A (516) Mt View Maternity & Nursing Home v Miriam Maalim Bishar & another* [2010] eKLR, *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR.



13. The applicant in his application has not demonstrated what loss he will suffer nor plead the same and therefore has not fulfilled this condition.
14. On the security, the Appellants indicate that they are willing to furnish the court with a bank security from Family Bank. I have perused the bank guarantee attached and the same is dated 6.07.2023 for a period of 12 months. There is no guarantee that the Appeal will be finalized by 6.07.2024 and so 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. In other words, the court should consider the interest of both parties. See *Kenya Shell Ltd v Kibiru & another* (Supreme); *Mukuma v Abuoga* [1988] KLR 645.

C. Disposition

15. Taking all relevant factors into consideration and in order not to render the intended appeal illusory, and taking into account the circumstances of this case, I do grant issue the following orders;
 - a. Leave is granted to the applicant to file appeal out of time against the judgment delivered in Mavoko CMCC 313 of 2020 and they are directed to file and serve the same within 14 days from the date of issuance of this order.
 - b. An order of stay of execution of the Judgment/decreed in Mavoko CMCC 313 of 2020 is hereby issued pending the hearing and determination of this appeal on condition that the applicant to deposit a sum of Kshs.400,000 (Kenya Shillings Four Hundred Thousand) in court within forty five (45) days from the date hereof.
 - c. In default of complying with order number (c) above, the orders staying execution shall lapse and the respondent shall be at liberty to execute.
 - d. The costs of this Application will be in the cause.
16. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 6TH DAY OF MARCH, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 6th day of March, 2024.

In the presence of;

No appearance for Appellant

Ms Naswa for Respondent

Sam Court Assistant

