



REPUBLIC OF KENYA



**Muinde v Mbithi (Miscellaneous Civil Application E141 of 2023)
[2024] KEHC 3609 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3609 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS CIVIL APPLICATION E141 OF 2023**

MW MUIGAI, J

MARCH 7, 2024

BETWEEN

JUSTUS M MUINDE APPLICANT

AND

DIXON W MBITHI RESPONDENT

RULING

1. Before this court is a notice of motion application filed under Certificate of Urgency dated 1st of August 2024 seeking the following orders that;
 - a. Spent
 - b. Spent
 - c. Pending the hearing and determination of the intended Appeal this Honourable Court be pleased to issue an order restraining the Respondents either by themselves, their servant, agents, assigns or any other persons claiming through the, from repossessing the claimant's proclaimed goods.
 - d. Spent
 - e. Pending the hearing and determination of the intended Appeal this Honourable Court be pleased to issue an order staying the judgment delivered on 5th of June 2023 by the learned Adjudicator, decree issued thereafter and any other consequential orders.
 - f. This Honourable court be pleased to extend the time within which the applicant may lodge a memorandum of appeal.
 - g. The memorandum of appeal annexed herein be deemed as duly filed upon payment of the requisite fees.



- h. Costs of this application be provided for.
2. The Application was supported by the affidavit of Justus M. Muinde dated 31.07.2023 in which it was deposed that he has never been aware of the judgment in Machakos Small Claims Commercial Case number E085 of 2022 and he thought that the same was yet to be delivered. On 27.07.2023 he was informed by his employee that auctioneers from Eastern Kenya Auctioneers visited his premises and proclaimed goods and he called to inquire why they did that. He then called his advocates who confirmed that the judgment had been delivered and he also confirmed that a letter sent to his office in Mutungoni building.
 3. It was contended that the time to lodge the appeal had lapsed and it was in the interest of justice that he be granted leave to appeal out of time.

Replying Affidavit

4. Dixon Watuka Mbithi swore an affidavit dated 28.08.2023
5. and stated that judgment was delivered in the presence of both parties and the applicant did not seek stay of execution or typed proceedings for purposes of lodging an appeal which was an indication that he was satisfied with the judgment. No credible or cogent evidence has been placed before the Honourable court to demonstrate circumstances stopping the applicant from lodging the appeal on time.
6. It was deposed that when execution was commenced, one Edith Muthike Sammy lodged an objection falsely claiming the goods to be hers yet in this Application, the Applicant deposes that the goods are his. The Respondent contends that this shows that there was an arrangement between the Applicant and Esther Muthike Sammy calculated to mislead the court. It was also contended that there was no communication breakdown between the Applicant and his lawyer nor his employees. The Applicant was informed by this counsel vide a letter dated 5.6.2023 that judgment had been delivered.
7. The Applicant contends that he is a businessman, a pastor and the owner of a fully occupied residential cum commercial building within Machakos town therefore capable of refunding any monies paid to be in the unlikely event the Appeal succeeds.

Further Affidavit

8. The Applicant filed further submissions dated 19.09.2023 in which he reiterated that he was not aware of the judgment and only became aware when the auctioneers visited the premises. Further that the failure to read his advocates letter was not deliberate but an inadvertent mistake.

Submissions

9. At the time of writing this judgment, only the Applicants submissions dated 6th November 2023 were on record. Relying on section 79G of the *Civil Procedure Act*, Order 42 Rule 6 and the cases of *County Executive of Kisumu v County Government of Kisumu & others* [2017], *Thuita Mwangi v Kenya Airways Limited* [2003] eKLR and *Amal Hauliers Limited v Abdulnasir Abukar Hassan* [2017] eKLR and submitted that the application was filed three days after he learnt about the judgment thus filed without undue delay. If the orders sought are not granted then the appeal will be rendered nugatory and an academic exercise. Further the Respondent has not indicated that he will suffer any prejudice if the orders are granted.



Determination

10. I have considered the Application, the affidavits and the submissions of both parties on record and find that the issues for determination are as follows;
- a. Whether the court should grant an order of stay pending appeal
 - b. Whether the court should extend time to file the Appeal out of time.
 - c. Whether an order of temporary injunction should be issued pending determination of the Appeal
11. Stay of appeal is governed by Order 42 Rule 6(1) and (2) of the Civil Procedure Rules, 2010 which provides as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except 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 applicant 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 applicant.”

12. The first issue is whether the application has been filed without unreasonable delay. I note that Judgement in Machakos SCCOMM E085 of 2023 was delivered on 5.6.2023 in the presence of advocates for the plaintiff and the defendant. This application was filed on 01.08. 2023 slightly short of being two months after delivery of the judgment. The Applicant was aware of the judgment but sat on his right to appeal until auctioneers arrived at his door. This court finds that there was delay but it was not inordinate.

13. Secondly, the Applicant has stated that he stands to suffer loss if the orders sought are not granted as his goods were proclaimed on 27.07.2023 and will be auctioned if the orders sought are not granted. Substantial loss was discussed in the case of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, as:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR.



This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

14. On the issue of security, none of the parties has not made any submissions on the same. This is a very important for consideration on whether or not to grant the order of stay pending appeal. The court needs to balance the rights of the parties while granting such orders in order not to deny the successful party from enjoying the fruits of the judgment.
15. This Court finds that the grounds for issuance of stay has been satisfied. The court will at a later stage grant the stay of execution orders under certain conditions.
16. On the issue of extension of time, the court is guided by the considerations discussed in the case of *First American Bank of Kenya Ltd v Gulab P Shah & 2 Others* [2002] 1 EA 65 where it was held that:

“ Factors to be taken into account in an application for extension of time are:

 - (i). the explanation if any for the delay;
 - (ii). the merits of the contemplated action, whether the matter is an arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;
 - (iii). Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant...The Court is clothed with inherent powers and jurisdiction all the time in all causes irrespective of legislative or other juridical foundations of any such cause or matter before it as the juridical root of the Court’s inherent power does not lie in section 3A of the *Civil Procedure Act* but in the nature of the High Court as a Superior Court of judicature.”
17. In this case, the Applicant has not given any reason for delay and I am inclined to agree with the Respondent that the Applicant was indolent. The Applicant contends that he was under the impression that judgment had not been delivered and when he contacted his advocate he confirmed that it had and a letter had been sent to his office. The later act was prompted by the auctioneers visiting his office.
18. From the copy of judgment annexed herein, the judgment was delivered on 5.06.2023 in the presence of Mr. Muema for the Claimant and Ms. Mbilo h/b for Mr. Ngolya. Furthermore, there is a letter dated 5.6.2023 addressed to the Applicant informing him of the delivery of the judgment. I find that the reason for delay is not cogent.
19. As to whether the matter is an arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice, this is an issue that can only be determined on trial.



20. The Court of Appeal in the case of *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR described an arguable appeal as;
- “is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.”
21. I find that the Respondent can be compensated in the form of costs for any prejudice suffered by the extension of time.
22. This Court has also noted that there is a notice of objection under 22 Rule 51 where the objector is Edith Muthike Sammy which seems to be an ongoing case. In the same pleadings, is a notice of stay of execution dated 2.08.2023 in the same case where stay is being sought in this case. The auctioneers are the same, Eastern Kenya Auctioneers.
23. The Notice of Motion dated 2.08.2023 that has been filed by the objector Edith Muthike Sammy has in its affidavit evidence attached the same proclamation notice as the one before this Court. Thus making the application before this court res judicata as the matter of the proclamation notice has been determined and there is stay already issued. This Court is not sitting on appeal, it will therefore leave the issue of who is the owner and whether the proclamation notice is merited to the Trial Court for determination.
24. Notice of Stay of Execution was granted on 2.08.2023 and the same is pending before the court in SCC COMM E085 of 2023 Justus M. Muinde v Dixon W. Mbithi And Edith Muthike Sammy.

Disposition

1. In the circumstances, I hereby grant stay pending the hearing and determination of the Appeal on condition that the Applicant pay the Respondent half the decretal sum within 90 days and;
 2. Deposit the other half in a joint interest earning account in the name of both advocates within 90 days failure to which the order of stay lapses.
 3. Leave is granted to the Applicant to file a Memorandum of Appeal within 30 days from the date of this ruling.
 4. Costs are granted to the Respondent.
- It is so ordered.

RULING DELIVERED DATED SIGNED IN OPEN COURT IN MACHAKOS ON 7TH MARCH, 2024 (VIRTUAL/PHYSICAL CONFERENCE).

M.W.MUIGAI

JUDGE

In the presence of:

Mr. Muema – For The Applicant

Mr. Ngolya - For The Respondent

Geoffrey/patrick - Court Assitant(s)



(Judge Bereaved)

Judgment Released To Registry On 26/3/2024.

M.W.MUIGAI

JUDGE

