



REPUBLIC OF KENYA



**Masaku v Mutio (Miscellaneous Civil Application 179 of 2023)
[2024] KEHC 2349 (KLR) (6 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2349 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS CIVIL APPLICATION 179 OF 2023**

FR OLEL, J

MARCH 6, 2024

BETWEEN

JOHN NYAMAI MASAKU APPLICANT

AND

BENSON WAITA MUTIO RESPONDENT

RULING

A. Introduction

1. The application before this court is the Notice of Motion application dated 22nd September 2023 brought pursuant to provisions of Section 1A, 1B & 3A, of the *Civil procedure Act*, (Cap 21), Order 22 rule 22 Order 42 Rule 6, (1),(2) & Order 51 rule 1 of the *Civil Procedure Rules* and all other enabling provision of law. Prayers (1) and (2) of the said application are basically spent and the main prayer sought are prayers (3), (4) and (5) for leave to Appeal out of time, stay of execution of the decree dated 20th July 2023, issued in Mavoko Cmcc No E606 of 2022, and that they be allowed to provide security in the form of a bank guarantee for the decretal sum.
2. This application is supported by the grounds on the face of the said application and the supporting affidavit of the Applicant John Nyamai Masaku, dated 22nd September 2023, while there is no replying Affidavit or grounds of opposition filed by the Respondent.
3. The Appellant averred that he is wholly dissatisfied by the Judgment of Hon E. Kimaiyo Suter, Principal Magistrate dated 20th July 2023 delivered in Mavoko CMCC No E606 of 2022. Judgement was to be delivered on notice, but when delivered no notice was issued and therefore parties were unaware of the same. A further delay was occasioned by the unavailability of a copy of the Judgement delivered to enable the applicant make an informed decision as to whether to prefer to Appeal or not. He had been dissatisfied with both finding on liability and quantum and believed that he had an arguable appeal which had high chances of success. Further that the said appeal proposed to be filed



was meritorious and stood a good chance of success as demonstrated in the Memorandum of Appeal annexed.

4. The appellant was apprehensive that there is strong likelihood that the respondent would apply for warrants of execution consequent of which he is likely to attach the appellant's assets and if sold that would cause him substantial loss and render the appeal filed to be rendered nugatory. Finally, the Appellant stated that her insurer, Directline Insurance Company Ltd, was ready and willing to provide a Bank guarantee for the decretal amount pending hearing and determination of this Appeal.
5. The Respondent did not file any Replying Affidavit and/or grounds of opposition, but be that as it may the court is still bound to consider the said Application on its Merit.

Analysis & Determination

6. I have carefully considered the Application, its Supporting Affidavit, as filed and do find that, the issues for determination is whether the Appellant has met the conditions necessary for allowing the court to exercise its discretion to allow him to Appeal out of time and further to him grant of orders of stay of execution pending hearing and determination of this Appeal.
7. 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.
8. Further Order 50 rule 6 of the *Civil procedure Rules*, 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.”
9. In the Supreme cause citation of *Nicholas Kiptoo arap Korir Salat v IEBC & 7 Others* (2014) eklr 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 seek s equity must do equity. Hence, one has to lay a basis that he was not at fault so at 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 gran the same.”
10. 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 (Supra).



11. The order sought to be appealed against was made on 20. 07. 2023 and the application for extension of time was filed on 26.09. 2023, which is a period of about two (2) months. This period cannot be said to be inordinate. Further the applicant has adequately explained himself to the extent that, no Judgement notice was issued and there was a further delay in getting the typed Judgement. The prayer for leave to Appeal out of time is therefore merited.
12. 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
13. Leave having been granted to appeal out of time, the first limb of the appeal being filed on time does not arise. 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.
14. 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

Disposition

15. Taking all relevant factors into consideration, and especially considering that the Appellant did not lead any evidence during trial, I do order that;
 - a. The Appellant is granted leave to file his Appeal out of time and the same must be filed and served within the next 14 days from the date of this Ruling.
 - b. The Appellant/Applicant will pay the respondent half of the decretal sum issued under the decree dated 20th July 2023, issued in Mavoko CMCC NO E606 OF 2022 and provide a bank guarantee for the other half of the decretal sum, which guarantee will be specific to this appeal and shall be valid for the entire period of the Appeal- until its determination.
 - c. This condition is to be met within 45 days from the date of this ruling or in default, this application shall be deemed to have been dismissed with costs 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 Applicant

Mr. Kiptanui for Respondent

Sam Court Assistant

