



**Shop & Deliver t/a Betika v Juma (Civil Appeal 255 of 2023)
[2024] KEHC 3061 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3061 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 255 OF 2023
SM MOHOCHI, J
MARCH 14, 2024**

BETWEEN

SHOP & DELIVER T/A BETIKA APPLICANT

AND

DAVID JUMA RESPONDENT

RULING

Introduction

1. This weaponized litigation emanates from a small claim where such matters are not anticipated for appeals
2. This is a Notice of Motion Application dated 21st November 2023, the Applicant is seeking the following reliefs;
 - a. An extension of time to deposit the decretal amount in the joint interest earning account within 30 days.
 - b. Interim Stay of execution of the judgment dated 17th of August 2023 against the appellant until the Appellant successfully deposits the decretal amount in Court.
 - c. Appellant to be granted leave to deposit the decretal amount in Court within 30 days.
 - d. Costs of the application to be provided for.
3. On the 1st November 2023 the Respondent filed a Notice of Motion seeking that the Appeal be struck out for non-compliance with the court’s directions dated 15th September 20233
4. This Court disadvantaged the Respondent by delay in delivery of this ruling and is aware of the simultaneous application to strike the Appeal filed and wish to remind the parties that this court



considers such litigants from the small claims courts to be vexatious subject to be condemned to costs where appropriate.

5. The Respondent opposed the Application by filing a sworn replying Affidavit dated 23rd November 2023, the Applicant filed its written submissions on the 4th of January 2024.

Applicant's Case

6. As whether the Court should allow extension of time to deposit the decretal amount in the joint interest earning account as per the orders dated 15th September, 2023?
7. That by Court's ruling dated 15th of September 2023, the Appellant was directed to deposit the decretal amount in a joint interest account within 21 days as a condition for the Court granting a stay pending appeal.
8. That unfortunately the Appellant was unable to comply with the orders/ timelines issued by this Honourable Court for reasons beyond their control. The delay was caused by the delay by the Bank in processing the account opening forms.
9. That the Appellant now seeks for the extension of time to deposit the decretal sum in court or in a joint- interest account, as earlier ordered by the Court.
10. The Appellant reiterates that the failure to comply with the ruling was beyond their control as they would not intentionally disobey court orders.
11. The stay pending appeal was very important to the Appellant, because without the stay of the execution, the Respondent herein would execute against the Appellant, and this would destroy the substratum of the Appeal and equally prejudice the Appellant's Right to Appeal.
12. That the power to grant a stay of execution pending appeal, is enshrined in Order 42 rule 6(2) of the Civil Procedure Rules which provides:
 - (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.
13. That, the Court in its wisdom exercised its discretion to grant the Appellant conditional stay pending Appeal through the Ruling. The Appellant was at all times willing to comply with the orders. However, the bank through its administrative bureaucracies caused delay and the Appellant was not able to deposit the amount within the stipulated time.
14. The Respondent submits that the Appellant should not be condemned for events beyond their Control and this Court of Justice and mercy should exercise its discretion by extending the time to deposit the decretal amount in the bank as directed in the ruling or in the alternative deposit the decretal amount in Kenya.
15. The Respondent submits that; this Honorable Court should be guided by Article 159 (2) (d) of the Constitution of Kenya which states that that courts should administer justice "without undue regard to technicalities of procedure." The issue of not complying with the timelines directed by the Court is one of procedure and not substance. The Appellant has a strong and viable Appeal and therefore the Court should not concentrate on the lack of adherence to the procedural technicalities but rather on safeguarding the Appellants rights. Furthermore, the lack of adherence to the timelines was not intentional nor was it caused by the Appellant herein.



16. That this Honourable Court is cognizant that unforeseen circumstances and delays may occur in the normal course of business. Hence, the Appellant should not be condemned due to these circumstances. No order for stay of execution shall be made under sub rule (1) unless-
17. The Appellant urges this Court that, Failure to extend the time to deposit the decretal amount or failure to order the decretal amount to be deposited in Court will be draconian and would be highly prejudicial to the Appellant as the Respondent will proceed with execution, what then will be the purpose of the Appeal?
18. That on the other hand, allowing this Application will not prejudice the Respondent as the Appellant is willing to comply with any order the Court may give so as to be granted stay pending appeal.
19. The Appellant urges the Court to borrow from the case of National Bank of Kenya Ltd V Alfred Owino Bala [2015] eKLR where the Court held that;

“it was unreasonable for the lower Court to dismiss an Application by the Appellants therein for extension of time to deposit the decretal sum. The Court stated that:

“the lower court went ahead and dismissed the Appellant's application for extension of time to deposit the decretal sum on 15th January 2015.

In my humble view, this was an unreasonable move by the trial court. The fact that it had given a temporary stay of execution order pending for it to consider and hear both parties meant that the Appellant's Advocate must have brought to the lower Court's attention the fact that the decretal sum had already been deposited and hence they had complied with the lower Court's order.”

20. That the Respondent submits that the Courts are reluctant to dismiss a motion for extension of time as it would be highly prejudicial to the Appellant. This Honourable Court following in the same footsteps, should not dismiss this Application.
21. That Further in the case of Jonathan Mang'ere v Fridah Chebet [2018] eKLR the Court allowed an application for extension of time to deposit the decretal amount where it was shown that the Appellant was unwell and was unable to Comply with the Court order to deposit the decretal amount within 45 days. The Court noted that:

“the note indicates that the appellant was unwell and without evidence to Contrary I will give him the benefit of doubt as he has explained the circumstances that caused him not to comply with a consent order. The respondent shall not be prejudiced if an extension of 7 days is granted. The applicant shall deposit the sum of Kshs. 150,000/= in a joint interest earning account held in the names of the advocates to the parties herein within 7 days from the date herein. A stay of the arrest warrants meant to commit the applicant to civil jail shall issue for 7 days.”

22. That furthermore, the powers for the extension of time are discretionary in nature and must be confined to the rules of reason and justice. The Supreme Court in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others (2014) eKLR gave the following guiding principles to consider in determination of extension of time:

“ 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 ought to exercise the discretion to extend time, is a Consideration to be made on a case-to-case basis:
 4. Whether there is reasonable reason for the delay, which ought to be explained to the satisfaction of the Court:
 5. Whether there would be any prejudices suffered by the respondents if the extension was granted:
 6. Whether the application had been brought without undue delay:".
23. That delay is inexcusable unless the Applicant shows sufficient cause to justify the delay and that any such extension shall not prejudice the Respondent.
 24. That, in the present case, the delay in depositing the decretal amount in a joint interest account was occasioned by the Bank's delay in effecting the necessary signatories, the Appellant was not able to finalize the account opening and the depositing of the decretal amount in the account within the stipulated time. This was no fault of the Applicant and was caused by the administrative bureaucracies of the Bank.
 25. That the Appellant's Advocates informed the Respondent/Applicant's Advocates of the delay occasioned by the bank in opening the account and the request by the bank for additional information. The delay was therefore not in bad faith but was beyond the control of the Applicant.
 26. That the question here narrows to whether the delay is excusable. Excusable delays are delays that are unforeseeable and beyond the control of the party. Non-excusable delays are delays that are foreseeable or within the party's control. Obviously, the distinction between these two is significant in that it determines whether a party is liable for the delay as was illustrated in the case of Njoroge v Kimani (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling).
 27. That, the delay herein is excusable since it was unforeseeable and beyond the control of the Appellant.
 28. The Appellant herein has the decretal amount in his possession, and he is more than willing to deposit the same amount in Court or in a joint interest earning account whichever the Court directs within thirty days.
 29. Furthermore, the Respondent submits that, the Respondent has not proven to this Court how he will suffer prejudice by this Court allowing this Application. The Applicant's conduct indicates that they are more than willing to comply with any orders this Court may give in regard to the depositing of the decretal amount so as to be granted a stay pending appeal and safeguard the substratum of the Appeal.
 30. Further, the Appellant has since filed the record of appeal and is ready to argue the Appeal on a priority basis.
 31. It is the Appellant's submission that, the extension for depositing of the decretal amount in a joint interest account be granted or in the alternative, this Court be pleased to issue an order to deposit the decretal amount in Court so as to grant the Appellant a stay pending Appeal.
 32. It is the Appellant humble prayer that, this Honourable Court should grant the orders sought in the application dated 21st of November 2023.



Respondents Case

33. The Respondent opposed the said application as incompetent, out of time and an abuse of the court process as the Appellant has come seeking for the court's protection with unclean hands.
34. That, Judgment was entered in his favour by Hon. E.M. OBOGE in Nakuru Small Claims Commercial Cause No. E189 of 2023 on 16th August, 2023.
35. That, upon delivery of the Judgment, the Respondent sought and was granted a thirty-day stay of execution for purposes of acquiring proceedings and compiling a record of appeal.
36. That, on 14th September, 2023, the Respondent filed the Memorandum of Appeal dated 12th September, 2023 in this Court.
37. That, later on 15th September, 2023, the Respondent filed an application seeking stay of execution pending appeal and a ruling with orders was issued ex-parte on the same day.
38. That, the orders were served upon his Advocates on 19th September, 2023 and were clear that the Respondent was to deposit the decretal sum in a joint interest earning account in the names of the Advocates within 21 days and file a record of appeal within 30 days from the date of the ruling.
39. That, 13 days later being the 2nd of October, 2023, the Respondent's Advocates wrote an email to his Advocates seeking particulars for opening the joint interest earning account as directed by the Court and his advocates sent the said details on 3rd October, 2023.
40. That, on 6th October, 2023 his Advocate the Respondent's Advocates shared Account opening forms to his advocate which he filled, scanned & sent back immediately. He also requested that the Respondent's Advocate notifies him once the Account is opened and the money deposited which they undertook to do.
41. That the Appellant has not complied with any of the orders granted by the court and therefore has lost the right to be entertained by the court for lack of compliance with court orders.
42. That, as a successful party, he is entitled to the fruits of the judgment and no proof of request of proceedings has ever been supplied to his advocate.
43. That the Appellant has been asleep for now for over 97 days and has not taken any steps to prosecute the appeal nor comply with the court orders.
44. That the Respondent has an application on record dated the 24th day of October 2023 seeking to have the appeal struck out for failure to comply with the timelines granted by the court and therefore urge the court to hear the said application.
45. That, the Appellant/ applicants have just been awoken by his advocate's auctioneers who have now moved to execute the judgment as the orders of stay lapsed a long time ago.
46. That no application has been made to reinstate the orders and therefore the application herein lacks merit and ought to be dismissed.



Analysis and Determination

47. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* {2014} eKLR set out the considerations to guide the court in exercising its discretion in cases of this nature. It stated:
- i. 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;
 - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
 - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
 - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - vi. Whether the application has been brought without undue delay; and
 - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."
48. The reason for the delay advanced is that; the delay was caused by the delay by the Bank in processing the account opening forms, no evidence was availed to ventilate this assertion and in any case if this was an administrative hitch then parties ought to have moved court in unison and other time sought to be extended would have been granted on consent.
49. This Court is thus unpersuaded to exercise the discretion in favor of the Applicant.
50. Section 95 of the Civil Procedure Act provides for the enlargement of time;
- “Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”
51. I have read the entire impugned judgment and perused the Memorandum of Appeal dated 12th September 2023. Some of the issues raised are issues of fact. This Court has no jurisdiction to raise issues of fact. Indeed, for Small Claims Court, even raising issues on the Evidence Act, is futile as the court is not bound by rules of evidence. Section 32 of the Small Claims Court Act provides as doth:
- “ 32. The Court shall not be bound wholly by the Exclusion of strict Rules of evidence.
- (1) Rules of evidence. Without prejudice to the generality of subsection (1), the Court may admit as evidence in any proceedings before it, any oral or written testimony, record or other material that the Court considers credible or trustworthy even though the testimony, record or other material is not admissible as evidence in any other Court under the law of evidence.
 - (2) Without prejudice to the generality of subsection (1), the Court may admit as evidence in any proceedings before it, any oral or written testimony, record or other material that



the Court considers credible or trustworthy even though the testimony, record or other material is not admissible as evidence in any other Court under the law of evidence.

- (3) Evidence tendered to the Court by or on behalf of a party to any proceedings may not be given on oath but that Court may, at any stage of the proceedings, require that such evidence or any part thereof be given on oath whether orally or in writing.
 - (4) The Court may, on its own initiative, seek and receive such other evidence and make such other investigations and inquiries as it may require.
 - (5) All evidence and information received and ascertained by the Court under subsection (3) shall be disclosed to every party.
 - (6) For the purposes of subsection (2), an Adjudicator is empowered to administer an oath.
 - (7) An Adjudicator may require any written evidence given in the proceedings before the Court to be verified by statutory declaration.”
52. The effect of the foregoing is that, unless there is gross breach of rules of natural justice, an appeal over evidence is an appeal on fact. The only two issues were raised herein. This being an appeal from that Court, this Court has jurisdiction to hear and determine the matter from small claims on points of law. This is equivalent to the Court of Appeal’s duty as a second Appellate Court. In *Charles Kipkoeh Leting v Express (K) Ltd & another* [2018] eKLR, the Court of Appeal stated as follows: -
- “This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See *Maina versus Mugiria* [1983] KLR 78, *Kenya Breweries Ltd versus Godfrey Odongo*, Civil Appeal No. 127 of 2007, and *Stanley N. Muriithi & Another versus Bernard Munene Ithiga* [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See also the English case of *Martin versus Glywed Distributors Ltd (t/a MBS Fastenings)* 1983 ICR 511 where in, it was held inter alia that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.”
53. The long title of the Small Claims Court, No. 2 of 2016 is said to be: -
- “An Act of Parliament to establish a Small Claims Court; to provide for the jurisdiction and procedures of the Court and for connected purposes.”
54. Section 32 (4) of the Small Claims Act provides that;
- “The Court may, on its own initiative, seek and receive such other evidence and make such other investigations and inquiries as it may require”



55. The guiding principles objective of the Act under in Section 3 of the Act provides;
- “(1) In exercise of its jurisdiction under this Act, the Court shall be guided by the principles of judicial authority prescribed under Article 159(2) of the Constitution.
 - (2) The parties and their duly authorized representatives, as the case may be, shall assist the Court to facilitate the observance of the guiding principles set out in this section, to that effect, to participate in the proceedings of the Court and to comply with directions and orders of that Court.
 - (3) Without prejudice to the generality of subsection (1) the Court shall adopt such procedures as the Court deems appropriate to ensure—
 - (a) the timely disposal of all proceedings before the Court using the least expensive method;
 - (b) equal opportunity to access judicial services under this Act;
 - (c) fairness of process; and
 - (d) simplicity of procedure.”
56. The Civil Procedure Act provides the Court with the procedure to summarily dismiss or reject an Appeal under Section 79B of the Civil Procedure Act, which states that: -
- “Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding section 79C, reject the appeal summarily”.
57. From the reading of Section 79B of the Civil Procedure Act, the decision to summarily reject an Appeal from the subordinate court is a discretion that is vested with this Court.
58. In the Court of Appeal case of Michael, A O Mashere –vs- Rotas Makokha Walusala [1987] eKLR, the Court held: -
- “... But the essence of the observations is that the power to summarily reject appeals must be sparingly used and only in the clearest cases. A sparing use can indeed only refer to rejection in the clearest cases of fact or law. So the spectrum is narrow. In this case, during an interlocutory ruling, this court said that the power to reject is a power which should be sparingly exercised. That then is the basis on which this court has already approached this problem, and it would be invidious now to depart from that standard...”
59. Further, under Section 79B of the Civil Procedure Act, this Court can only summarily reject an Appeal after the judge has perused it and finds that there are no ample reasons to interfere with the decision of the subordinate court.
60. I have read the entire impugned judgment and perused the Memorandum of Appeal dated 12th September 2023 grounds (1), (2), (3) and (5) of Appeal raises matters of evidence running afoul to Section 32 of the Small Claims Act while grounds (4) and (6) are issues of fact.



61. I do find that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding Section 79C, reject the appeal summarily.

62. I award costs to the Respondent

It is so ordered

DATED, SIGNED AND DELIVERED AT NAKURU ON THIS 14TH DAY OF MARCH, 2024.

MOHOCHI S.M.

JUDGE

