



Kenya Women Micro-Finance Bank PLC v Gitonga & another (Miscellaneous Civil Application E452 of 2023) [2024] KEHC 4870 (KLR) (Commercial & Admiralty) (12 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4870 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
MISCELLANEOUS CIVIL APPLICATION E452 OF 2023**

MN MWANGI, J

APRIL 12, 2024

BETWEEN

KENYA WOMEN MICRO-FINANCE BANK PLC APPLICANT

AND

ROSEMARY KARIMI GITONGA 1ST RESPONDENT

MOSES GITONGA M'IKIARA 2ND RESPONDENT

RULING

1. The applicant on or about the 22nd April, 2014 advanced to the respondents a loan of Kshs.5,000,000/= which was to be repaid at an interest rate of 11.2% per annum (p.a.). The issue in dispute was the repayment period, which the applicant argues was to be within 60 months, whereas the respondents aver that the loan was to be repaid within 36 months as per the offer letter. According to the respondents, they had fully cleared the loan facility and required the security deposited with the applicant to be discharged. On the other hand, the applicant avers that the respondents are in arrears of Kshs.1,866,487.00
2. The respondents filed a suit by a plaint dated 23rd March, 2018 in Milimani CMCC No. 3047 of 2018 seeking temporary restraining orders against the applicant from repossessing the security of motor vehicle Registration No. KAZ 711A and Trailer ZC 6604. In the lower Court, the respondents also prayed for the Court to make a declaration that the loan facility had been cleared in full.
3. After hearing the parties, the Trial Court delivered judgment on 28th April, 2023 and found in favour of the respondents as against the applicant as per the prayers sought in the plaint.
4. Aggrieved by the said judgment, the applicant filed the instant Notice of Motion application dated 7th June, 2023 brought under Sections 3A, 1A, 1B, 63 and 65 of the Civil Procedure Act, Order 50 Rule 6,



Order 42 Rules 6(1) & (2), Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. The applicant seeks the following orders-

- i. Spent;
 - ii. That there be an order for stay of execution of the judgment delivered by this Honourable Court (sic) on 28th April, 2023 and all subsequent orders, pending the hearing and determination of this application;
 - iii. That the time limited for the applicant to file and serve the respondents with the Memorandum of Appeal be enlarged and/or extended to allow the filing and serving of the same within such time as the Court shall deem fit; and
 - iv. That the costs of the application be provided for.
5. The application is supported by the grounds on the face of the Motion and the annexed affidavits of Ms Marion Wasike and Mr. Geoffrey G. Mahinda. The applicant avers that it is aggrieved by the judgment of Hon B.M. Cheloti, Principal Magistrate, in Milimani CMCC No. 3047 of 2018 and wishes to appeal on the same but the requisite 30 days for filing the Memorandum of Appeal have lapsed and it now seeks an extension of time for filing a Memorandum of Appeal. It was stated that the instant application has been brought timely, and if the orders sought are not granted, the appeal will be rendered nugatory as the respondents will proceed to execute the judgment and the applicant will not be in a position to recover the security from the respondents.
 6. According to Mr. Geoffrey G. Mahinda, learned Counsel for the applicant, the reason for not filing an appeal on time is that his Assistant failed to bring the file to his attention and inadvertently filed away the file at their Office Registry as the matter had been concluded. He urged this Court not to revisit the said inadvertent mistake and/or omission upon the applicant. Counsel pleaded with this Court to grant the applicant an opportunity to file the intended appeal.
 7. In opposing the application, Ms Rosemary Karimi Gitonga, the 1st respondent, filed a replying Affidavit sworn on 26th June, 2023 wherein she avers that the applicant is guilty of inordinate delay in prosecuting the appeal, and that the instant application is an afterthought. She deposes that the applicant is undeserving of the orders sought and that the delay is inexcusable as no plausible excuse has been advanced for the delay. She avers that no security has been deposited by the applicant and urges this Court to dismiss the application as it is aimed at preventing the respondents from benefitting from the fruits of their judgment, in contravention of the principles of natural justice.
 8. The application was canvassed by way of written submissions. The applicant filed submissions dated 4th October, 2023, whereas the respondents filed submissions dated 16th August, 2023.
 9. In submitting on the issue of what amounts to inordinate delay, Mr. Mahinda, learned Counsel for the applicant relied on the case of Mwangi S. Kimenyi v Attorney General & another [2014] eKLR, where the Court held that inordinate delay will differ from case to case depending on the circumstances of each case, the subject matter of the case, the nature of the case, the explanation given for the delay.
 10. In regard to the error attributable on the part of their part (Advocates) by not filing the Memorandum of Appeal on time, Counsel cited the case of Gideon Mose Onchwati v Kenya Oil Company Ltd & another [2017] eKLR, referred to in the case of Shah v Mbogo (1968) EA 93, where the Court held that a litigant ought not to bear the consequences of the Advocates default unless the litigant is privy to the default or the default results from failure, on the part of the litigant, to give the Advocate instructions.



11. In submitting that the intended appeal is not a frivolous one, as the Trial Magistrate erred by finding that the respondents had paid the sum of Kshs.6,680,000/= in full towards payment of the loan facility, Mr. Mahinda claimed that the applicant is still owed Kshs.1,451,119.62. Counsel referred to the case of *Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi* [2014] eKLR, where it was held that an applicant must show that the appeal touches on the merit of the suit or rather, will affect the hearing of the suit, and in this case, being the appeal on its merits.
12. Mr. Gachie, the respondents' learned Counsel in his written submissions stated that 40 days had lapsed from 28th April, 2023 when the judgment was delivered to the date when the applicant applied for extension of time to file its Memorandum of Appeal, but it had not explained the delay to the satisfaction of the Court, so as to entitle this Court to exercise its discretion. The respondents' Counsel relied on the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission & 7 others* [2014] eKLR, where the Supreme Court stated that extension of time is not a right of a party but an equitable remedy that is only available to a deserving party at the discretion of the Court.
13. The respondents' Counsel submitted that the applicant must show by way of evidence that it would suffer irreparable loss if an order for stay execution is not granted. Mr. Gachie for the respondents stated that no steps had been taken to execute, and that the only viable execution is to demand for release of the log book and for costs.
14. He submitted that the applicant has not met the conditions set out under Order 42 Rule 6(2) of the *Civil Procedure Rules*, 2010, and urged this Court to dismiss the application.

Analysis And Determination

15. On consideration of the Notice of Motion, the respective affidavits as well as the submissions filed by the parties' Advocates, the following are the issues for determination
 - i. Whether this Court should grant an order for enlargement of time within which the applicant should file its Memorandum of Appeal; and
 - ii. Whether this Court should grant an order staying the execution of the judgment delivered on 28th April, 2023
16. The principles to be considered in an application for enlargement of time were well settled by the Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* (*supra*) as follows:

“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a Court should consider in the exercise of such discretion:

 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 the discretion to extend time, 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 respondents if the extension is granted;
 6. Whether the application has been brought without undue delay;
 7.”
17. Extension of time within which to file an appeal is pegged on judicial discretion. An applicant seeking enlargement of time to for the said purpose, must demonstrate to the Court that it has a good cause for seeking enlargement of time. In considering such an application, the Court ought to consider the length of the delay, the reasons for the delay and the probability of the appeal succeeding.
18. Section 79G of the *Civil Procedure Act* provides that an appeal from the Subordinate Court to the High Court ought to be brought within 30 days. The said Section stipulates 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 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.”
19. The explanation given for the delay in this instance is that the file in respect to the suit in the lower Court was filed away by the Office Assistant in the office of Gathara Mahinda & Co Advocates, before a Memorandum of Appeal was filed. The applicant further stated that he was prompted to act by an email from the applicant, Kenya Women Microfinance Bank, while inquiring on the status of the appeal.
20. In my considered view, the explanation given by the applicant’s Advocate is plausible and satisfactory to allow this Court to exercise its discretion and enlarge the time for filing of an appeal by the applicant. The instant application was filed on 7th June, 2023 while the judgment sought to be appealed from was delivered on 28th April, 2023. It is my finding that the delay in the filing of the Memorandum of Appeal was not inordinate, it is thus excusable.
21. The conditions to be met for grant of an order for stay of execution pending appeal are well settled. They are provided for under Order 42 Rule 6(2) of the *Civil Procedure Rules*, 2010, which states the following-
- “No order for stay of execution shall be made under sub-rule (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.”



22. An application for stay of execution must satisfy the above conditions, namely, substantial loss may result to the applicant if stay of execution is not granted, the application was made without unreasonable delay, and security has been provided in due performance of the decree.
23. The purpose of an application for stay of execution pending appeal is to maintain the status quo pending appeal. It is a discretionary remedy of the Court, as stated by the Court of Appeal in *RWW v EKW* [2019] eKLR where the Court stated thus-

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay, however, must balance the interests of the Appellant with those of the Respondent.”
24. In the affidavit in support of the instant application sworn by Mr. Geoffrey Mahinda, the applicant’s Advocate, he averred that it will be in the interest of justice for this Court to grant an order for stay of execution pending the hearing and determination of the application so as to preserve the securities in the motor vehicle/log book held by the applicant.
25. He was supported by the depositions made by Ms Marion Wasike, the Legal Manager of the applicant, who deposed that if the respondents are not barred from proceeding with the execution, the applicant will suffer great prejudice, loss and hardship which will also destroy the substratum of the applicant’s intended appeal and render it nugatory.
26. She deposed that no prejudice will be occasioned to the respondents if the orders sought are granted, in the interest of justice.
27. I have considered the depositions made by the applicant in juxtaposition to the respondent’s averments as contained in the replying affidavit of Ms Rosemary Karimi Gitonga. In regard to the issue of stay of execution, the said deponent states that the applicant has not deposited any security, yet it is a mandatory condition for being granted an order for stay of execution.
28. She urged this Court to dismiss the application as it is an attempt at preventing the respondents from benefitting from the fruits of their judgment in contravention with the principles of justice and equity. She contended that if this Court is to allow the application, the security held by the applicant should be released.
29. The averments by both the applicant and the respondents must be read in conjunction with the orders made by the Trial Court, which directed the applicant to discharge the securities held by it since the respondents have repaid the loan in full.
30. The applicant’s bone of contention in the intended appeal is that the loan facility has not been repaid in full and if the security which is the log book for motor vehicle Registration No. KAZ 711A Mercedes Benz Prime Mover and Bhacho Trailer Registration No. ZC 6604 is released to the respondent, then the substratum of the appeal will be lost.
31. In the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, the Court stated that in an application for stay of execution, the applicant must establish other factors which show that



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, as that is what substantial loss would entail.

32. I agree with the argument put forward by the applicant in urging this Court to protect the substratum of the appeal. If this Court does not issue orders for stay of execution, it means that the applicant will have no security at all in its custody and in the event that it emerges successful in the intended appeal, it will have nothing to fall back to if the respondents fail to satisfy any outstanding debt that may be adjudged against them. It is therefore evident that the applicant stands to suffer substantial loss if stay of execution is not granted.
33. In addition, a Prime Mover and Trailer are commodities that can easily change hands from the respondents to a third party by way of transfer of ownership at no cost whatsoever or by way of sale, if the log book is released to the respondents. Such action would frustrate any efforts to realize the security.
34. The respondents in their affidavit did not demonstrate that they are in a financial position that will enable them to pay the applicant the amount that is alleged to be still outstanding in the event the applicant is successful in the appeal. In the said circumstances, the log book for motor vehicle Registration No. KAZ 711A Mercedes Benz Prime Mover and Bhacho Trailer Registration No. ZC 6604 shall remain in the custody of the applicant pending the hearing and determination of the intended appeal.
35. It is evident that the applicant has not offered any security but that on its own cannot be a ground to decline granting an order for stay of execution in a deserving case, as the nature and amount of security to be deposited can be determined by a Court. In the case of *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR, it was stated that:

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security.”

36. In the end, this Court finds that the application dated 7th June, 2023 is merited. It is hereby allowed in the following terms-
 - i. The applicant is granted 14 days to file and serve its Memorandum of Appeal from the date of this ruling;
 - ii. Stay of execution of the judgment delivered on 28th April, 2023 in CMCC No. 3047 at Milimani Commercial Courts - Rosemary Karimi & another v Kenya Women Microfinance Bank Limited, is hereby granted pending the hearing and determination of the intended appeal subject to the applicant depositing the sum of Kshs.3,000,000/= in Court within forty five (45) days from today;
 - iii. The Record of Appeal will be filed within 45 days; and
 - iv. Costs shall abide the outcome of the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 12th day of April, 2024. Ruling delivered through Microsoft Teams Online Platform.



NJOKI MWANGI

JUDGE

In the presence of:

Mr. Mwaniki h/b for Mr. Mahinda for the applicant

No appearance for the respondents

Ms B. Wokabi – Court Assistant.

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