



**Nairobi West Hospital v Kithinji & another (Miscellaneous Civil Application E266 of 2023) [2024] KEHC 3784 (KLR) (Civ) (4 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3784 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
MISCELLANEOUS CIVIL APPLICATION E266 OF 2023**

**CW MEOLI, J**

**APRIL 4, 2024**

**BETWEEN**

**NAIROBI WEST HOSPITAL ..... APPLICANT**

**AND**

**KELLY JOY MUTHONI KITHINJI ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH OCHIENG ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. For determination is the motion dated 04.05.2023 by The Nairobi West Hospital (hereafter the Applicant) seeking that the Applicant be granted leave to file out of time its intended appeal from the ruling delivered 10.06.2021; and stay of proceedings in MCCR Case No. E11057 of 2021 pending hearing and determination of the intended appeal. The motion is expressed to be brought under Article 159 (2)(d) of *the Constitution*, Section 1A & 1B of the *Civil Procedure Act* (CPA), Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules (CPR). The grounds on the face of the motion are amplified in the supporting affidavit sworn by Mareen Adunga, counsel on record for the Applicant.
2. The gist of her affidavit is that pursuant to a decision delivered on 10.06.2021 by the Disciplinary and Ethics Committee (hereafter the Committee) of Medical Practitioners and Dentist Council (hereafter the Council), the Applicant was found negligent and vicariously liable for the acts of Dr. Joseph Ochieng (hereafter the 2<sup>nd</sup> Respondent). That being grossly dissatisfied with the decision therein, the Applicant opted to first lodge an application for review against the said decision. She goes on to depose that the Committee rendered its decision asserting lack of jurisdiction to entertain the application for review, some 19 months later on 03.02.2023.
3. Subsequently, the Applicant instructed her firm to lodge an appeal out of time, but the file was allocated to counsel at the firm who subsequently left the firm on 01.03.2023 without implementing



the instructions. She further states that the said counsel had inadvertently omitted the matter from his handing over status report to the firm, which omission only came to the attention of the firm on 27.04.2023 when the Applicant called to inquire on the status of the matter.

4. The deponent asserts that upon being seized of the conduct of the matter, she moved expeditiously to lodge the present motion; and that the delay between delivery of the impugned decision and filing of the instant motion was due to unintentional oversight ; and the counsel's omission ought not be visited on the Applicant. That the Applicant's intended appeal is arguable and that it is in the interest of justice that the motion is granted as Kelly Joy Muthoni Kithinji (hereafter the 1<sup>st</sup> Respondent) is pressing for payment of the sum of Kshs. 18,000,000/- which payment could paralyze the operations of the Applicant.
5. She states that the Applicant craves an opportunity to defend itself on appeal in light of the resultant suit for damages in MCCR Case No. E11057 of 2021. In conclusion, she deposes that the 1<sup>st</sup> Respondent will not be prejudiced by the granting of the motion and can be compensated by way of costs or damages should the intended appeal fail.
6. The 1<sup>st</sup> Respondent opposes the motion through a replying affidavit dated 23.05.2023. Asserting to be the Plaintiff in MCCR Case No. E11057 of 2021, she asserts that the Applicant and 2<sup>nd</sup> Respondent as parties to the suit are inseparable because both owed her a duty of care. That Section 20 (9) of the Medical Practitioners and Dentist Council Act provides that a person aggrieved by the decision of the Council should appeal to the High Court within thirty (30) days. Hence the Applicant ought not to have applied for review but rather lodged an appeal to this court.
7. Further, she takes issue with Applicant's counsel explanation that the file was allocated to another colleague in the firm, stating that the same counsel herein has been appearing for the Applicant in MCCR Case No. E11057 of 2021. Additionally stating that the internal affairs of the Applicant's advocate firm ought not affect her claim. She views the motion as an afterthought, having been filed on the eve of the hearing of MCCR Case No. E11057 of 2021. In her view, the Applicant has not satisfactorily explained the inordinate delay in filing the appeal and moreover, the intended appeal has no reasonable chances of success. She asserts that the Applicant has not demonstrated the likelihood of substantial loss should the orders sought be denied. In summation, the court was urged to dismiss the motion with costs.
8. In rejoinder by way of a further affidavit, counsel for the Applicant stated that no advocate in her firm deals with specific clients on their own as matters belonging to respective clients are normally spread across the firm's advocates. Hence it was not unusual that the matter relating to the Applicant's intended appeal was allocated to a different advocate from the one dealing with MCCR Case No. E11057 of 2021. Further, that even though the delay herein arises from the internal workings of the firm, no system is perfect, and the facts deposed represent an example of imperfection which was not deliberate. She concludes by deposing that the grounds raised in the intended appeal are arguable and that it would defeat logic to simultaneously proceed with MCCR Case No. E11057 of 2021 and the appeal touching on liability arising from the same claim.
9. The motion was canvassed by way of written submissions. Counsel for the Applicant restated the grounds in the intended memorandum of appeal to submit that in view of the clear and substantial legal issues emerging therein, this court ought to accord the Applicant an opportunity to ventilate its grievance through the appeal. Reliance was thus placed on the decisions in Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR and Civil Appeal (Application) No. Nai. E012 of 2023, Cultural Center v Dr. Edwin Gichangi. On whether the court ought to grant stay of proceedings in MCCR Case No. E11057 of 2021, it was argued that to allow the latter proceedings to continue would



render the intended appeal nugatory because the lower court proceedings relate to quantum whereas the Applicant intends to challenge liability in the intended appeal. That if the motion were to be granted and the intended appeal subsequently fails, the 1<sup>st</sup> Respondent would still be able to proceed with her suit before the lower court.

10. Concerning delay in filing the instant motion, counsel reiterated explanations in the supporting and supplementary affidavits and asserted that the delay by the Committee in the delivery of its decision on the application for review violated the Applicant's right to expeditious resolution of the dispute. The Court of Appeal decisions in *Multichoice (Kenya) Ltd v Wanainchi Group (Kenya) Ltd & 2 Others* [2020] eKLR and *Julius Ochieng Oloo & Another v Lillian Wanjiku Gitonga* [2019] eKLR were cited in the that regard. Revisiting the alleged departure of erstwhile counsel from the firm before filing the appeal, counsel pleaded that his mistakes ought not to be visited upon the client. Counsel here cited the decisions in *Hamam Singh & Others v Mistri* [1971] EA 122 and *Sokoro Savings and Credit Co-operative Society Ltd v Mwamburi (Civil Application E032 of 2022)* [2023] KECA 381 (KLR) (Ruling).
11. Addressing the question whether the motion has been brought in good faith and likely prejudice to the 1<sup>st</sup> Respondent if the same is allowed, counsel placed reliance on the provisions of Article 48 & 50 (1) of *the Constitution* and the decision in *Stecol Corporation Limited v Susan Awour Mudemb* [2021] eKLR. Regarding the court's discretion, counsel relied on a raft of decisions among them being *First American Bank of Kenya Ltd v Gulab P. Shah & Others*, HCCC 2255 of 2000 (2002) 1 EA 65, *Leo Sila Mutiso v Rose Hellen Wangeri Mwangi*, Civil Appeal 255 of 1997, *Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR, *Stecol Corporation Limited (supra)* and *Kamlesh Mansukhalal Damki Patni v Director of Public Prosecution & 3 Others* [2015] eKLR. In reiterating that the court has unfettered discretion to enlarge time to appeal and should be hesitant to close out deserving litigants from the seat of justice.
12. Finally, on the question whether the Applicant could still pursue the intended appeal despite its review application being dismissed, counsel asserted that the right of appeal is not lost when a review application is dismissed. The decision in *Kenya Oil Ltd v Mohammed & Another* (2003) 2 EA 524 and *Stephen Ndungu Kimani v Devkesh General Stores Ltd* (2001) eKLR were called to aid on that score. Further, citing the provisions of Section 27 of the CPA and the case of *Levben Products v Alexander Films (SA)(PTY) Ltd* 1957 (4) SA 225 (SR) at 227 as cited with approval in *Party of Independent Candidates of Kenya & Another v Mutula Kilonzo & 2 Others* [2013] eKLR, counsel urged the court to allow the motion and exercise discretion on the award on costs.
13. On the part of the 1<sup>st</sup> Respondent, counsel underscored the inordinate and inexcusable delay in filing the motion, stating that the explanation given by the Applicant was unreasonable and inimical to the interests of the 1<sup>st</sup> Respondent. Rehashing contents of the replying affidavit, counsel faulted the Applicant's counsel for options taken in the matter, resulting in delay of over two (2) years. The decision in *Naomi Wangari Mwangi v Kenya Medical Practitioners & Dentist Council & Another* [2021] eKLR was called to aid. In conclusion, it was argued that the Applicant had waived the right of appeal upon filing the application for review before the committee. Moreover, that the intended appeal has no merit and is an afterthought consequently the court ought to dismiss the instant motion with costs.
14. The 2<sup>nd</sup> Respondent did not participate in the motion by filing a response or submissions to the motion.
15. The Court has considered the rival affidavit material and submissions in respect of the motion. However, a preliminary issue that warrants the Court's prior consideration has been raised. The 1<sup>st</sup>



Respondent has contended that the Applicant waived its right of appeal after it filed an application for review before the Committee of the Council. Which suggests that the intended appeal would be incompetent for all intents and purposes. In this regard, Sections 65(1)(b) and 80 of the CPA, and Order 45 Rule 1 CPR respectively, come to play. The former provides that;-

- “(1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court—
  - (a) .....
  - (b) from any original decree or part of a decree of a subordinate court, other than a magistrate’s court of the third class, on a question of law or fact;
  - (c) ....

16. Whereas the latter provision provides that;-

- “Any person who considers himself aggrieved—
  - (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
  - (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

17. Article 165(6) as read with Article 169 of the Constitution grants to the High Court “supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court “. Section 20(9) of the Medical Practitioners and Dentist Council Act provides that;-

A person aggrieved by a decision of the Council made under subsection (6) may, within thirty days from the date of the decision of the Council, appeal to the High Court.

18. At the heart of the instant motion is the decision delivered by the Committee of the Council on 10.06.2021 (Annexure MA-1). It seems that upon delivery of the decision, the Applicant lodged a request for review of the said decision before the same Committee through a letter dated 29.06.2021 (Annexure MA-2). The response of the Committee to the letter came via its letter dated 03.02.2023 (Annexure MA-3). Therein, the Committee stated in part that “We regret to inform you that we are unable to grant your request for review as we lack the jurisdiction to review this matter.” Hence the 1<sup>st</sup> Respondent’s contestation that the Applicant having initially pursued review, cannot subsequently seek leave to appeal out of time.

19. Evidently, pursuant to Section 20(9) of the Medical Practitioners and Dentist Council Act, the Committee of the Council lacked the requisite jurisdiction to entertain a request for the review of its decision as rightly noted in its letter dated 03.02.2023. Secondly, the review application by the Applicant was a non-starter and was never heard and determined on its merits.

20. Consequently, the review application, if it be so called, having been rejected in limine, cannot be a bar to the Applicant pursuing an appeal. This question was addressed by the Court of Appeal in its



decision in *Chairman Board of Governors Highway Secondary School v William Mmosi Moi* [2007] eKIR. The court observed that:-

An aggrieved party under Order XLIV of the Civil Procedure Rules can only apply for the review of a decree or order either where “no appeal has been preferred” or where “no appeal is allowed”. An appeal is allowed on orders made under Order 9A r 2 Civil Procedure Rules, as in this case, and indeed the Board filed a notice of appeal under rule 74 of the rules to challenge the orders. A notice of appeal is however only a formal notification of an intention to appeal, and it cannot be said that the aggrieved party had “preferred” an appeal at that stage and was thus precluded from exercising the option of review. The issue as to whether a respondent, having filed a notice of appeal which had not been withdrawn had a right to apply for review was answered in the affirmative by this Court in *Yani Haryanto v E. D & F. MAN (SUGAR) Ltd.* Civil appeal No. 122/92 (ur). In that case the application for review under order 44 of the Civil Procedure Rules was filed two years after the filing of the notice of appeal. After examining the relevant provisions of the law, the court stated:-

“The Court of Appeal for Eastern Africa in the case of *Motel Schwetser v Thomas Cunningham & Another* (1955) 22 EACA 252, held that an appeal is not instituted in the Court of Appeal until the record of appeal is lodged in its registry, fees paid, and security lodged as provided in rule 58 of the East African Court of appeal Rules, 1954. Rule 81 of the Court of Appeal Rules, in addition, requires the inclusion of a memorandum of appeal. This statement of the law regarding the status of a notice of appeal was subsequently approved by the Court of appeal for Eastern Africa in the case of *Ujaga Singh v Runda Coffee Estates Ltd* [1966] E.A 263. So, quite clearly, the Judge had jurisdiction to entertain the application for review.....”

So that, the Board was at liberty to pursue the option of review of the orders made on 26<sup>th</sup> September, 2003 despite the filing of a notice of appeal to challenge the same orders. We have no hesitation however in stating that upon the exercise of that option and pursuit thereof until its conclusion, there would be no further jurisdiction exercisable by an appellate court on the same orders of the court. The record here shows that the Board filed an application for review dated 24<sup>th</sup> February, 2004, on 4<sup>th</sup> March, 2004. That application was determined by the superior court on 7<sup>th</sup> December, 2004 when it was dismissed for whatever reason. No further action appears to have been taken by the Board after that dismissal. In our view that was the end of the matter and the notice of appeal was rendered purposeless. Both options in our judgment cannot be pursued concurrently or one after the other.” (sic)

21. Accordingly, having regard to the above dicta, the 1<sup>st</sup> Respondent’s preliminary objection is not well taken in this circumstance. The Applicant could potentially pursue an appeal despite the failed supposed review application to the Committee.
22. Moving on to the substratum of the motion, alongside the prayer to file the intended appeal from the ruling of 10.06.2021 out of time, the Applicant has sought “an order do issue directing stay of proceedings in MCCR Case No. E11057 of 2021 pending hearing and determination ...of the intended appeal”. The Applicant failed to cite the requisite provisions of statute in respect of this latter prayer. Nevertheless, it is settled that the court is duty bound to administer justice without undue regard to procedural technicalities.



23. Having said so, it is evident on a plain reading of Order 42 Rule 6(1) of the CPR, that an order to stay proceedings pending hearing and determination of an appeal or intended appeal presupposes the existence of an appeal. The filing of an appeal is a condition precedent to the exercise of this court's appellate jurisdiction under Order 42 Rule 6 (1) of the CPR. Although the provision does not expressly say so, this can be inferred from the rule. Further, an analogy can be drawn from Order 42 Rule 6 (4) of the CPR which states that an appeal is deemed filed in the Court of Appeal when the notice of appeal has been given.
24. Equally, Order 42 Rule 6 (6) of the CPR states:
- “Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.” (Emphasis added).
25. It would seem therefore that the invocation of the jurisdiction of this court under Order 42 Rule 6 (1) or 6 (6) of the CPR must be preceded by the filing of an appeal, or compliance with the procedure for filing an appeal, in this case a memorandum of appeal (See Order 42 Rule 1 of the CPR). Thus, where a party specifically seeks stay of proceedings pending hearing and determination of an appeal not yet filed, the court may be acting in vacuo by considering the Applicant's prayer for stay of proceedings pending a non-existent appeal.
26. The Court of Appeal in *Abubaker Mohamed Al-Amin v Firdaus Siwa Somo* [2018] eKLR while citing with approval the decision of the High Court in *Rosalindi Wanjiku Macharia vs. James Kiingati Kimani (Suing as the Legal Representative of the Estate of Martin Muiruri (Deceased))* [2017] eKLR concurred and adopted the reasoning that stay of execution pending appeal must be preceded by a filed appeal. It is the court's reasoned opinion that this dictum applies mutatis mutandis where the prayer for consideration is stay of proceedings pending appeal. See also *Equity Bank -Vs- Westlink MBO Limited* [2013] eKLR and *Balozi Housing Co-operative Society Limited -Vs- Captain Francis E. K. Hinga* [2012] eKLR
27. In this case, an appeal is yet to be filed and therefore, there is no basis upon which this court could exercise its appellate jurisdiction under Order 42 Rule 6 CPR in a miscellaneous matter. If the Applicant desired to seek an order to stay proceedings alongside the prayer for the late admission of their appeal, they ought to have first filed the memorandum of appeal in a proper appeal and the relevant application. The foregoing notwithstanding, it is not lost on the court that pursuant to Section 3A of the CPA, the court in exercise of its inherent power may stay proceedings in deserving situations or where the ends of justice so require. The court will address itself on the issue regarding stay of proceedings later in this ruling.
28. Turning now to the Applicant's prayer seeking to file its intended appeal from the ruling of 10.06.2021 out of time, under Section 20(9) of the Medical Practitioners and Dentist Council Act, the Applicant was required to lodge its appeal before the High Court within thirty days from the date of the decision on the Council. Nonetheless, the power of the court to enlarge time for filing an appeal out of time is expressly donated by Section 79G, as well as generally, by Section 95 of the CPA. Section 79G of the CPA 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.”

29. This court has held on many occasions that the words that “an appeal may be admitted out of time” in Section 79G, appears to admit both retrospective and prospective application. So that leave under the Section may be sought before or after a memorandum of appeal is filed. The principles governing leave to appeal out of time are settled. The successful applicant must demonstrate “good and sufficient cause” for not filing the appeal in time. In *Thuita Mwangi v Kenya Airways* [2003] e KLR, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in pari materia with Section 79G of the *Civil Procedure Act*, reiterated its decision in *Mutiso v Mwangi* [1997] KLR 630 as follows:

“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 general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

30. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court’s discretion in his favor. The Supreme Court in the case of *Nicholas Kiptoo Korir Arap Salat* (supra) enunciated the principles applicable in an application for leave to appeal out of time. The Court stated inter alia that:

“The underlying principles a court should consider in exercise of such discretion include;

1. Extension of time is not a right of any 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 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 Respondent if the extension is granted;
6. Whether the application has been brought without undue delay.
7. ....”

See also *County Executive of Kisumu v County Government of Kisumu & 8 Others* [2017] eKLR.

31. There is no dispute that the impugned decision of the Committee of the Council was delivered on 10.06.2021. The Applicant’s explanation on delay in lodging the appeal appears to be two (2) pronged. Firstly, the right of appeal could not be pursued simultaneously with the review request upon which



a decision was given by the Committee some nineteen (19) months later (Annexure MA-2 & MA-3); and secondly, mistake by erstwhile counsel in failing to timeously execute instructions to lodge an appeal out of time upon receipt of instructions, and non-disclosure of the fact at his departure. The 1<sup>st</sup> Respondent faults the course taken by the Applicant while dismissing the Applicant's explanation for the delay in filing the appeal.

32. The chronology of pertinent key events is well documented. Included in the supporting documents in the Applicant's affidavit material is the impugned ruling of the Committee, which was delivered on 10.06.2021 (Annexure MA-1). Subsequent to the decision the Applicant requested review before the Committee vide a letter dated 29.06.2021 (Annexure MA-2). The decision by the Committee in respect of the foregoing was rendered to the Applicant vide a letter dated 03.02.2023 (Annexure MA-3). Therefore, as aptly deposed by the Applicant it took some nineteen (19) months after the initial review request for communication to be made by the Committee. Concerning mistake of counsel, the Applicant has relied on a letter from erstwhile counsel dated 14.02.2023 (Annexure MA-4) and a status report by the erstwhile advocate and email correspondence thereon (Annexures MA-1 to MA-3 in the further affidavit).
33. Evidently, whether the action was right or wrong, the Applicant moved with haste to challenge the initial decision of the Committee, by lodging a request for review. The Committee's delay in relaying its decision thereto cannot be blamed on the Applicant and is sufficient explanation for the delay of 19 months. Concerning the delay between 03.02.2023 and the filing of the instant motion, the Applicant blames the mistake of erstwhile counsel, allegedly only discovered on 27.04.2023, prompting the filing the motion on 04.05.2023.
34. It is settled that the period of delay as well as explanation thereof are key considerations in an application of this nature. A party seeking extension of time must not be seen to presume on the Court's discretion. While a court ought not to entertain an indolent or dilatory litigant, it will not ordinarily visit the mistake of counsel on the innocent litigant. Here, the Applicant's seemingly misguided option of seeking review rather than appeal and delay by the Committee, compounded by failure of erstwhile counsel having conduct of the matter to promptly lodge the instant motion appear to be reasonable explanations for the delay in lodging the appeal.
35. Apaloo, J.A. (as he then was) famously stated in Phillip Kiptoo Chemwolo and & Anor. v Augustine Kubede (1986) eKLR:-

“I think a distinguished equity judge has said:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merit.”

I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of parties and not for the purpose of imposing discipline....”



12. In its later decision the Court of Appeal in *Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others*, [2015] eKLR no doubt advertent to the overriding objective in section 1A and 1B of the *Civil Procedure Act* made the following remarks:

“From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel’s duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side...”

36. Reviewing the facts before the Court, the court is of the view that it would be a travesty of justice for the court to drive the Applicant from the seat of justice for the demonstrated missteps of its own counsel and the apparent tardiness of the Committee. Besides, it does not seem that the 1<sup>st</sup> Respondent stands to suffer prejudice that cannot be compensated through costs if the motion is allowed.

37. Concerning the arguability of the intended appeal, the court, having perused the grounds in the draft memorandum of appeal Annexure MA-5, is satisfied that they raise issues worthy of consideration on appeal. That said, based on the language employed in *Mutiso* (supra) the requirement touching on the viability of the intended appeal, is neither mandatory nor stringently applied in an application of this nature. The Court of Appeal in *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited* [2020] eKLR stated that “an arguable appeal need not (be one that will) succeed so long as it raises a bona fide issue for determination by the Court.”

38. The Court went proceeded to emphasize the right of appeal in the following terms:

“Turning to the request to allow the applicant to exercise his now undoubted constitutionally underpinned right of appeal, the position is.... crystallized .... in the case of *Richard Ncharpi Leiyagu vs. IEBC & 2 Others* (supra); *Mbaki & Others vs. Macharia & Another* [2005] 2EA 206; and the Tanzanian case of *Abbas Sherally & Another vs. Abdul Fazaiboy*, Civil Application No. 33 of 2003; for the holding inter alia that:

- (i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;
- (ii) the right to be heard is a valued right; and
- (iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice;...”

39. In the circumstances of this case, the court is persuaded that to facilitate the Applicant’s undisputed right of appeal, leave ought to be granted to the Applicant to file its appeal out of time. The court therefore grants leave to the Applicant as sought in the motion.

40. Revisiting the prayer for stay of proceedings in the lower court pending the intended appeal, as already observed, it is more prudent for a party seeking the enlargement of time for appealing, to have first filed the memorandum of appeal. However, in deserving situations, the court may invoke its inherent



power under Section 3A of the Civil Procedure Rules to meet the ends of justice and or to avert abuse of the court process.

41. Ringera, J (as he then was) in *Re Global Tours & Travel Ltd Nairobi HCCC No. 43 of 2000 (UR)* spelt out the applicable considerations in determining an application for stay of proceedings as follows: -

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice...the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

42. Thus, meeting the ends of justice and the need to avoid unnecessary proliferation of proceedings, which needlessly dissipate the court’s limited time resource, are key considerations in an application of this nature. The Applicant asserts, and this appears reasonable, that the objects of the appeal may be defeated if the suit in the lower court is allowed to proceed during the pendency of the intended appeal. In so saying, the court is well alive to the words of the Court of Appeal in *Raymond Ruto & 5 Others v Stephen Kibowen [2021] eKLR* in exhorting that: -

“We acknowledge at the outset, that a court will sparingly and only in exceptional circumstances will it grant an order to stay of proceedings which essentially is an interruption of the other parties right to conduct their hearing....

“The learned authors of; *Halsbury’s Law of England*, 4th Edition. Vol. 37 page 330 and 332, have also given some principles to bring to bear while considering whether or not a court should stay proceedings as follows: -

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases...”

43. Any prejudice to the 1<sup>st</sup> Respondent through delay of her suit can be mitigated through appropriate directions regarding the appeal, in addition to an award of costs. As held in *Osho Chemicals Ltd v Tabitha Wanjiru Mwaniki [2018] eKLR* the court bears the duty imposed by Section 1B & 1A of the [Civil Procedure Act](#), to further the overriding objective in Section 1 of the [Civil Procedure Act](#) which states:

“ 1A

- (1) the overriding objective of this Act and the rules made hereunder is to facilitate, the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act;



- (2) The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in sub-section (1);
- (3) A party to civil proceedings or an Advocate for such a party is under a duty to assist the court to further the overriding objective of the Act, and to that effect, to participate in the process of the court and to comply with the directions and orders of the court.”

44. In view of all the considerations above and bearing in mind the status of proceedings in MCCR Case No. E11057 of 2021 as stated by the 1<sup>st</sup> Respondent, the court feels assured that this is a proper case to invoke its inherent power in favour of the Applicant by granting the prayer for stay of proceedings in the lower court, pending the determination of the intended appeal. The stay of proceedings is granted subject to the condition that the appeal filed pursuant to leave granted herein, in this case within 14 days of this ruling, shall be fully prosecuted within 9 (nine) months of the date of the filing. Failing which the stay order shall automatically lapse and the 1<sup>st</sup> Respondent shall be at liberty to proceed with the suit in the lower court. The costs of the motion are awarded to the 1<sup>st</sup> Respondent in any event.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 4<sup>TH</sup> DAY OF APRIL 2024.**

**C.MEOLI**

**JUDGE**

**In the presence of:**

For the Applicant: Ms Adunga

For the 1<sup>st</sup> Respondent: Ms Mwikali

For the 2<sup>nd</sup> Respondent: Ms Maina

C/A: Erick

