



**Ochieng v BMT (Minor suing through next friend TMK) (Miscellaneous Application E115 of 2023) [2024] KEHC 5800 (KLR) (17 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5800 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
MISCELLANEOUS APPLICATION E115 OF 2023**

**M THANDE, J**

**MAY 17, 2024**

**BETWEEN**

**EVERLINE OCHIENG ..... APPLICANT**

**AND**

**BMT (MINOR SUING THROUGH NEXT FRIEND TMK) ..... RESPONDENT**

**RULING**

1. By a Notice of Motion dated 23.9.23, the Applicant seeks the following orders:
  1. Spent.
  2. Spent.
  3. That this Honourable Court be pleased to order a stay of execution of the Judgment of the Honourable Senior Principal Magistrate's Court at Kilifi in CMCC No.E007 of 2021 delivered on 21.8.2023 by the Honourable S. D. Sitati (SRM), Senior Resident Magistrate pending the hearing and determination of the intended Appeal.
  4. That this Honourable Court be pleased to grant the Applicant leave to file an Appeal out of time.
  5. That as a condition of stay of execution pending the hearing and determination of this Appeal/ intended appeal, this Honourable Court be pleased to direct that the Applicant/Appellant be and is hereby ordered to provide/issue security for the entire decretal sum/amount in the form of a Bank Guarantee to be issued by Family Bank Limited.
  6. That Honourable court be pleased to give directions on the appeal.
  7. That The costs of this Application abide the outcome of the Appeal.



2. The grounds upon which the Application is premised are that the Applicant is aggrieved that the trial court in its judgment of 21.8.23 found her to be 100% liable and Kshs. 253,200/= was as special damages, special damages, costs and interest of the suit. The Applicant thus intends to challenge the quantum on appeal. However, the time to do so has lapsed and the Respondent may proceed to execute at any time. The Applicant further stated that her advocate tried to follow up with the registry for a copy of the certified judgment but the file was unavailable. She stated that she instructed her advocate to appeal immediately she saw in the judgment that the quantum was excessively high. Unless stay of execution is granted, the Application as well as the intended appeal will be rendered nugatory, occasioning the applicant irreparable loss and damage.
3. The Respondent opposed the application vide a replying affidavit sworn on 4.10.23. He stated that judgment was delivered in the presence of the Applicant's counsel and was typed and available. He averred that the intended appeal being on quantum only, could have been filed even without the typed and certified proceedings. Further that the law has given strict timelines for lodging an appeal and any extension would prejudice him. Additionally, that extension must be based on good cogent reasons but that the Applicant has not availed any evidence requesting the judgment. He urged that the Application be dismissed with costs.
4. In a further affidavit sworn on 31.10.23, the Respondent averred that the Applicant has not complied with the Court's order of 25.9.23 to deposit the decretal amount in Court as a condition for stay of execution.
5. Parties filed their written submissions which I have duly considered.
6. The jurisdiction of the Court to grant stay of execution is set out in Order 42 Rule 6 of the Civil Procedure Rules. Sub-rule 2 provides:
  - (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 order for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
7. The general rule regarding an order for stay of execution is that first and foremost, it is discretionary. Where the Court is called upon, as in the present case, to exercise its discretion in any application, it must do so judicially, the overriding objective being to ensure that the ends of justice are met.
8. The Court of Appeal set out the factors to be considered in an application for stay of execution pending appeal in the Butt v Rent Restriction Tribunal [1982] KLR 417, as follows:
  1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
  2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
  3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
  4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special



circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the [Civil Procedure Rules](#), can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.
9. Flowing from the cited decision, it can be discerned that while considering an application for stay, the discretion of the Court must be exercised in a manner that will not prevent an appeal or render an appeal nugatory; the Court will consider whether there is any overwhelming hinderance for the grant of stay; whether good grounds have been advanced; existence of any special circumstances and unique requirements. Lastly the Court may order security for costs.
10. The law requires that an application for stay of execution be filed without unreasonable delay. The decision appealed against was made on 21.8.23, while the Application herein is dated 23.9.23 and filed on 25.9.23. I am satisfied that the Application was made without undue delay. On substantial loss and the appeal being rendered nugatory, the Applicant asserted that if payment is released to the Respondent, the same will be utilized and may not be recoverable should the appeal succeed. On security, the Applicant urged the Court to allow production of a bank guarantee from Family Bank for the decretal amount pending the hearing and determination of the Appeal.
11. The Court notes that it did on 25.9.23 make a very specific order that the Applicant deposits the decretal amount in Court. To date, this order has not been complied with. For the Applicant to now urge that the Court accepts a bank guarantee having failed to comply with the previous order, is demonstrative of a party that is unwilling to comply with court orders and seeks to do as it pleases. This court cannot countenance such abuse of its process.
12. I now turn to the prayer for leave to appeal out of time. The statutory period for filing an appeal in this Court from a subordinate Court is 30 days. This is stipulated in Section 79G of the [Civil Procedure Act](#) which provides:

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."
13. The proviso to Section 79G of the Act allows a party who gets caught up and is unable to file an appeal within the stipulated period, to seek extension of time. Such party must however satisfy the Court that there is good and sufficient reason for not filing the appeal on time.
14. An order for extension of the time to file an appeal is also discretionary. The factors to be considered in an application such as the one before Court were set out by the Court of Appeal in [Lufthansa Service Europa/Afrika GmBH & another v Eliab Muturi Mwangi \(Practicing in the name and style of Muturi Mwangi & Associates Advocates\)](#) [2019] eKLRas follows:

The principles that govern the exercise of discretion in an application for extension of time brought under rule 4 of our rules are well known. As was stated in the oft-cited case of *Leo Sila Mutiso vs. Rose*



*Hellen Wangare Mwangi* Civil Application No. NAI 255 of 1997 (ur) which was a decision of the court on a reference from a decision of a single judge:

“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 in general, the matters which this court takes into account in deciding whether to grant an extension of time are:

first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted”.

15. The present Application seeking leave to appeal out of time was filed on 25.9.23, a month and 4 days after the judgment was delivered and 4 days after the lapse of the statutory period for filing appeal. It is clear that a delay of 4 days cannot be said to be inordinate. The reasons proffered for the delay are that the judgment could not be obtained as the file went missing. No evidence by way of a letter requesting the judgment was placed before the Court. The Applicant did not also submit on the chances of the appeal succeeding. However in the wider interests of justice, I do consider that the Applicant ought to be given an opportunity to appeal the judgment.
16. In the end, I find that the Application herein partly succeeds and I allow the same on the following terms:
  - i. Leave to appeal out of time is hereby granted.
  - ii. The memorandum and record of appeal shall be filed and served within 21 days and in any event not later than 7.6.24. In default, the leave so granted shall lapse.
  - iii. The prayer for stay of execution is declined.
  - iv. The costs of this application shall abide the outcome of the intended appeal.

**DATED, SIGNED AND DELIVERED IN MALINDI THIS 17TH DAY OF MAY 2024**

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**M. THANDE**

**JUDGE**

