



REPUBLIC OF KENYA



Old Mutual Life Assurance Company Limited v Khan (Civil Miscellaneous Application E179 of 2023) [2024] KEHC 5156 (KLR) (16 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5156 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL MISCELLANEOUS APPLICATION E179 OF 2023
SM MOHOCHI, J
MAY 16, 2024**

BETWEEN

OLD MUTUAL LIFE ASSURANCE COMPANY LIMITED APPLICANT

AND

MOHAMMED SADIQUE KHAN RESPONDENT

(Being an Application for Stay of Execution and Proceedings pending the hearing and determination of an intended appeal of the judgement and Orders of the Chief Magistrates Court (Honourable B. Mararo, Magistrate) delivered on 17th October, 2018 in CMCC No. 2900 of 2003 Mohamed Sadiq Khan vs Old Mutual Life Assurance Company Limited)

RULING

1. Before this Court for determination is the Notice of Motion Application by the Appellant/Applicant dated 30th May, 2023 brought under Sections 1A, 1B and 3A of the [Civil Procedure Act](#), Order 42 (6) and Order 51 of the [Civil Procedure Rules](#) seeking:-
 - i. Spent
 - ii. Spent
 - iii. That the Applicant herein be granted leave to file to file an appeal against the judgement and Orders of Honourable B. Mararo issued on 17th October, 2018.
 - iv. Pending the hearing and determination of the Applicant's intended appeal there be a stay of execution of the judgment and order of the Honourable Magistrate B. Mararo issued on 17th October, 2018 and further that there be a stay of proceedings in CMCC No. 2900 of 2003 Mohamed Sadiq Khan vs Old Mutual Life Assurance Company Limited.
 - v. That costs of this Application be provided for.



2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Robert Irungu Senior Legal Counsel at the Applicant's Company. He deponed that the Respondent vide Amended Plaint dated 7th July, 2005 sued the Applicant in the Subordinate Court, the matter was heard and judgment was slated for delivery on 20th June, 2018. That on the said date, the Court advised that it was not ready and issued another date for the 25th of July, 2018 which again was pushed to the 15th of August 2018 where the Court then directed that the judgment would be issued on notice. He argues that on 18th October, 2018 the Applicant's counsel received a judgement notice via EMS Courier and learned that the judgement was delivered on 17th October, 2018.
3. He contends that the Applicant had sought copies of judgement through letters to Court dated 25th October, 2018, 20th November, 2018 and 30th May, 2019 and 25th September, 2019 in order to exercise its right of appeal to which there was no response not until a Notice to Show Cause dated 6th December, 2021 for hearing slated for 19th January, 2022 was served. They never attended the hearing. That another Notice to Show Cause was issued dated 18th October, 2022 for hearing on 2nd November, 2022.
4. He added that on 2nd November, 2023 counsel for the Applicant sought for the file to be availed at the registry to confirm whether a copy of judgment and decree was in the file and that on 16th November when the Applicant's clerk visited the registry, he confirmed that the judgement and decree had been availed. That in response to the Notice to Show Cause, the Applicant sought for the Court to certify the period between 17th October, 2018 and 16th November, 2022 as the preparation period. The application was not granted which prompted filing of HCCA No. 93 of 2023.
5. The Applicant contends that, it was not at fault in the process of extraction of the judgement and that it would be fair that the orders sought are issued.
6. The Application was vehemently opposed by the Respondent in the Replying Affidavit sworn on 30th August, 2023 by himself. He stated that, the application is frivolous, bad in law and a waste of judicial time since the Applicant has confirmed that, it was aware of delivery of Judgement and further on 26th June, 2020, the Applicant was served with a copy of the decree which they failed to honour necessitating the Notice to Show Cause. He added that the letter dated 25th October, 2018 was not copied to his advocates and further there is no evidence that the same was sent to or received by Court.
7. The Respondent also stated that, the Applicant moved Court more than 45 days after being notified of the delivery of judgment. He argues that the letters were never copied to his advocates, the letter dated 20th November was presented to Court on 27th November, 2018 with an unexplained delay of 7 days. He stated that the Applicant's argument of only securing the judgment is not reasonable and further that there is no correspondence between the Applicant and the Court in the period between 25th September, 2019 and 16th November, 2019.
8. According to the Respondent, the Applicant was not serious with prosecution of the appeal and the Notice to Show Cause did not interfere with the Applicant's right to appeal and that since it was an appeal from the lower court the Applicant had to first file a Memorandum of Appeal. That the Memorandum of Appeal raises no triable issues and that the issue of jurisdiction raised is an afterthought as the same was not raised in their amended defence.
9. The Court on 7th November, 2023 directed that the Application be heard and disposed by way of written submissions. The Applicant filed its submissions dated 9th January, 2024 on 11th January, 2024. The Respondent filed his submissions dated 23th January, 2024 on 24th January, 2024.



Applicant's Submissions

10. The Applicant submitted that, this Court has judicial discretion to extend time under Section 95 of the *Civil Procedure Act*. The Applicant contends that it was diligent in his quest to institute the appeal and by the manner in which it followed up in the quest to get a copy of the judgement Counsel argues that the appeal has high chances of succeeding as it challenges the Trial Court's jurisdiction.
11. It was also submitted that, the Applicant has satisfied the Court that the Court should exercise its discretion under Section 79G and declare the period between 17th October, 2018 and 16th November, 2023 as being the period for preparation and delivery of a copy of the judgement.
12. Counsel draws the attention of the Court to Miscellaneous Civil Application No. 98 of 2004 *Vincent Sunday Yier v Foam Mattress Limited* [2004] eKLR. where the Court held that that an appeal is a right and that the Court is empowered to enlarge time that an appeal does not need to be filed out of time before it is admitted. That it would be just that the intended appeal be heard.
13. It was also the Applicant's submission that the decree dated 19th December, 2019 was not properly extracted and as such should not be considered. According to the Applicant extraction of the decree without its involvement amounted to an ambush and therefore unprocedural. Reliance was placed in Civil appeal 107 of 2016 *Translakes Limited v Mellech Engineering & Construction Limited & Another* [2016] eKLR. to emphasize that the extraction was not in conformity with Order 21 Rule 8 of the Civil Procedure Rules and thus the decree should be set aside.

Respondent's Submissions

14. The Respondent on the other hand submitted that there was no plausible explanation for the delay which according to him was unreasonable. The Court's attention is drawn to the case of *Jaber Mohsen Ali & Another v Pricillah Boit & Another* on what qualifies as unreasonable delay.
15. The Respondent submits on the second issue that the Applicant's ground of appeal on jurisdiction was not raised in the Applicant's defence neither did the Applicant file a preliminary objection but chose to raise those issues in the submissions which amounted to trial by ambush. Reliance was placed in *Robert Ngande Kathathi v Francis Kivuva Kitonde* [2020] eKLR where the Court held that submissions do not count as evidence. Similarly, in *Niti Distributors Limited v Occidental Insurance Company Limited* [2019] eKLR. The Respondent maintains that the grounds raised in appeal were never raised in the pleadings.
16. On the third issue, the Respondent maintains that the intended appeal is an afterthought, the Respondent is likely to suffer prejudice and the fact that sufficient reasons have not been advanced explaining the delay, the application should be dismissed.
17. On the issue of prayer for stay of execution, the Respondent submitted that the Applicant has fell short of the provisions of Order 42 Rule 6 in that the delay was unreasonable and unexplained, that the Applicant has not offered security and the person to suffer substantial loss was the Respondent. He relied on the case of *M.O.M Amin Transporters Limited & Another v Alexander Ndung'u Mbugua & 2 Others* [2017] eKLR to reiterate the conditions necessary for a grant of stay of execution. Further on the issue of stay of proceedings, while relying on *Kenya Wildlife Service vs James Mutemberi* [2019] eKLR and *Global Tours & Travel Limited, Nairobi HC Winding Up Cause No. 43 of 2020* the Respondent contends that the Application came after execution proceedings had commenced and is aimed at occasioning prejudice and is an act of mischief.



Determination

18. I have considered the application, the grounds, supporting affidavit, replying affidavit and the rival submissions for and against the application as well as authorities relied on. In the Court's view, the main issue for determination is whether the Application has any merit and as such can the orders sought issue.
19. On whether the Court can enlarge time within which the Applicant can file the Appeal, Section 79G of the [Civil Procedure Act](#) answers that question. Section 79G 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.”
20. Further Section 95 of the [Civil Procedure Act](#) provides thus: -
- “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.”
21. The Court of Appeal in [Thuita Mwangi v Kenya Airways Ltd](#) [2003] eKLR highlighted factors for consideration before a Court could exercise its discretion and allow an application such as the present one. These are:-
- i. The period of delay;
 - ii. The reason for the delay;
 - iii. The arguability of the appeal;
 - iv. The degree of prejudice which could be suffered by the if Respondent the extension is granted;
22. The judgement subject of the intended appeal was delivered on 17th October, 2018. The statutory period for filing the appeal lapsed on or about 17th November, 2018. The Applicant moved Court to seek leave through the instant Application on 30th May, 2023. The period of delay therefore is about 4 years and 7 months. The Court in the case of [Almas Hauliers Ltd v Abdulnasir Abukar Hassan](#) [2017] eKLR a delay of four months was found not to be inordinate what of a delay of 4 years? The delay in the instant case is quite inordinate.
23. The reasons advanced by the Applicant for the delay is that despite insistent efforts from the Applicant to obtain the copies of judgement and decree the same were not availed by Court therefore the delay was not occasioned by the Applicant. The Court has had an opportunity to peruse the file and consider the evidence from the Applicant suggesting that it was not indolent in its quest for its right of appeal. There are letters attached dated 25th October, 2018, 20th November, 2018, 30th May, 2019 and 25th September, 2019 to Court where he sought copies of the judgement and in each letter it is stated how the Applicant intends to file an appeal.
24. It is however noteworthy that the letter from the Applicant dated 25th October, 2018 to the Deputy Registrar does not bear a Court stamp to show that it was received by Court. On 26th June, 2020



Applicant was served with a letter forwarding the decree dated 19th December, 2019 but the Applicant did not engage the counsel for the Respondent to enquire on whether they had a copy of the judgement. Even so having being served with the copy of decree the Applicant ought to have been jolted to action. The Applicant has also not explained why it did not attend Court for the Notice to Show Cause hearing slated for 19th January, 2022. Finally, from 16th November 2016 when the Applicant finally got a hold of a copy of the judgement, it took the Applicant approximately 5 months to move Court through the instant Application seeking enlargement of time. There are significant lapses in commitment to the appeal.

25. In *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR. the Court stated that there was no minimum or maximum time for anyone one seeking this equitable relief in law, however the person seeking the relief has to give sufficient and plausible reasons for the delay. The delay has been inordinate. The Applicant made attempts to engage Court and in the letters addressed to Court there were indications of the intention to file an appeal, it cannot be said that the intended appeal was an afterthought. However, the manner in which the Applicant pursued the appeal was lukewarm.
26. On whether the appeal is arguable. The judgment intended to be challenged concerns a contract. The Court is careful not to delve on the merits of the case at this stage. On a perusal of the Draft Memorandum of Appeal, one of the issues the Applicant intends to raise is on jurisdiction. The Respondent has admitted that indeed the issue of jurisdiction was raised in the Trial Court through the submissions but submitted that the issue of jurisdiction can only be raised through pleadings.
27. Briefly on this issue, the Court is guided by the recent decision in *National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others (Civil Appeal 656 of 2022)* [2023] KECA 80 (KLR) where the Court opined that;

“We start our determination by stressing that jurisdiction is a threshold matter which goes to the competence of the court to hear and determine a suit. Jurisdiction can be raised at any stage of the proceedings in the High Court, on appeal and even in the Supreme Court for the first time. It can be raised by any of the parties or by the court, and once raised the court would do well to examine it and render a considered ruling on it.”

28. Similarly, A.K. Ndungu J. stated in *Republic v Public Procurement Administrative Review Board Ex Parte Intertek International Limited; Accounting Officer, Kenya Bureau of Standards & 6 others* [2022] eKLR:-

“A point of law touching on jurisdiction can, like any other, be raised at any stage and indeed even on appeal. The court of appeal addressing this point in *Kenya Ports Authority v Modern Holdings* (E.A) LTD [2017]Eklr stated;

“Generally speaking, and on the authority of the Supreme Court decision in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others*, a court can only exercise that jurisdiction that has been donated to it by either *the Constitution* or legislation or both. Therefore, it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Jurisdiction is in the end everything since it goes to the very heart of a dispute. Without it, the court cannot entertain any proceedings and must down its tools. See *The Owners of the Motor Vessel Lilian ‘S’ v Caltex Kenya Limited* [1989] KLR 1.”

29. Accordingly, on this issue the Court holds a similar view that an issue of jurisdiction can be raised at any time as it goes to the power of the Court to entertain the dispute in the first instance. It has been



held that an arguable appeal is not one that must succeed but on that should be argued on merit. The intended appeal in the Courts's considered view has been shown to be arguable.

30. What prejudice is the Respondent likely to suffer? The claim was for an unliquidated amount, the Respondent is nevertheless a successful litigant. The Court is of the view that in balancing the interests of the Respondent and those of the Applicant no prejudice will be caused to the Respondent that cannot be compensated by an award of costs.
31. As regards prayer No. 4, the same is twofold. The Applicant implores on this Court to exercise its discretion to stay the execution of the judgment/decre of trial Court as well staying the proceedings of the trial Court. On the first limb on the issue of stay of execution pending appeal, Order 42 Rule 6(2) of the Civil Procedure Rules 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 orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
32. The Applicant has not addressed Court on this issue despite seeking an order for stay of execution. Nevertheless, the Court has already established there was unreasonable delay. Secondly, substantial loss must be specific and detailed. To that extent, the Applicant has not demonstrated the substantial loss it is likely to suffer should the Court disallow stay of execution. Being an unliquidated decree security has been left to the discretion of the Court. There is procedure for granting of the orders sought. There are also conditions precedent that have to be met. The Court is of the opinion that the Applicant has not met the threshold for granting of stay of execution pending appeal.
33. The second limb of prayer No. 4 is on the issue of stay of proceedings. The principles in stay of proceedings are espoused in Re Global Tours and Travels Ltd (supra) as follows: -
- “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 interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests 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 the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, 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 timeously.”
34. Stay of proceedings being a matter of discretion, the discretion should be exercised in such a way as not to waste judicial time and also not deny a litigant a right acquired by law. The Court has not had the advantage of going through the proceedings in the Trial Court but has had cursory look at the attached draft Memorandum of Appeal which raised seven (7) grounds. Also, the Court has perused the Ruling



in Nakuru CMCC No. 2900 of 2013 dated 19th April, 2023 allowed the Respondent to proceed with the Notice to Show Cause which the Applicant now seeks to stay.

35. For the prayer for stay of proceedings to be granted, the Applicant ought to show that it has an arguable Appeal with high chances of success and further that if stay of proceedings is not granted the Appeal will be rendered nugatory. It is worth noting that there was failure by the Applicant to address the decree when he was served. There was also the failure to attend Court for the first Notice to Show Cause hearing, a failure which it has not been addressed. There were also periods whether the Applicant sat pretty and did to Fastrack the process or engage the Court. This only goes to show how unserious the Applicant was. This is a Court of equity and stay of proceedings greatly interferes with the rights of the Respondent and undermines the right of access to justice. The Court is not convinced that it would be in the interest of justice to order a stay of proceedings.
36. The upshot of the foregoing is that saying that the grounds in the draft memorandum of appeal are not arguable would be inaccurate. However, the Court in exercising its discretion considers that the suit was filed in 2003. The Respondent has waited 20 years to get the fruits of his judgment. Even then the Respondent is still being frustrated by the instant application. If in deed the Applicant was desirous with filing the Appeal, it had numerous opportunities to move Court to seek enlargement of time. As stated earlier, the conduct of the Applicant has been lukewarm.
37. Consequently, the Court finds that the Application lacks merit and is dismissed with costs to the Respondent.

Orders accordingly.

SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 16TH DAY OF MAY 2024

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MOHOCHI S.M

JUDGE

