



**Wij Holdings Limited & another v Karunya (Miscellaneous Civil Application
E035 of 2024) [2024] KEHC 5845 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5845 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS CIVIL APPLICATION E035 OF 2024
EM MURIITHI, J
MAY 23, 2024**

BETWEEN

WIJ HOLDINGS LIMITED 1ST APPLICANT

DAVID NDIBUI WAITHAKA 2ND APPLICANT

AND

NATHAN MURIIRA KARUNYA RESPONDENT

RULING

1. By a Notice of Motion under certificate of urgency dated 26th February 2024, brought under Articles 159 and 50 of the Constitution, Order 42 Rule 6 and Order 22 Rule 22 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 79G of the Civil Procedure Act and all other enabling provisions of the law, the Applicants seek:
 1. Spent
 2. Spent
 3. That this Honourable Court be pleased to grant stay of execution orders of the Judgment and Decree of the Lower Court pending the hearing and determination of this application.
 4. That this Honourable court be pleased to grant the applicants leave to appeal out of time against the judgement delivered by Hon. M. A Odhiambo on 27th October 2023.
 5. That this Honourable Court be pleased to grant stay of execution orders of the Judgment and Decree of the Lower Court pending the hearing and determination of the intended appeal.
 6. That the costs of this application be in the cause.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Peter Ngola Makau, the corporate legal officer of Britam General Insurance



Company, the Applicants' insurer sworn on even date. He avers that the insurer instructed the firm of Gitau & Kaburu Advocates LLP to handle this claim on behalf of the Applicants, where the trial court entered judgment in favour of the Respondent. He reviewed the trial court's decision and it was apparent that it was erroneous and irregular. He advised the company to appeal against the decision of the trial court, which advisory was subjected to internal approvals in line with the company's decision making policy. The management Committee of the Company approved his recommendation to lodge the appeal after the lapse of the statutory 30 days' period within which the Applicants were required to lodge the appeal. He has instructed their advocates to appeal against the said judgment and the appeal is weighty with high chances of success. The delay in lodging the appeal was caused by bureaucracies in the decision making process in the company, noting that all decisions made by the company require ratification by their management committee. He is equally advised that their advocates on record applied for copies of the proceedings to enable them compile the record of appeal which are yet to be supplied. He verily believes that the stay of execution orders issued by the lower court lapsed on 26/11/2023, and if the decree is executed, the intended appeal will be rendered nugatory and the Applicants, who are insured, will suffer injustice and prejudice, as they will have to pay the decretal sum. The Respondent may be financially unable to refund the decretal sum of Ksh.756,750 if the appeal succeeds and this will cause the Applicants loss of their money. The insurer is not only willing to offer security for costs but is also ready to satisfy the judgment of the court after the appeal is heard and determined. The Respondent will not be prejudiced because he will have security of the decretal sum in the case the Applicants' appeal is unsuccessful and he will enjoy the fruit of the judgment as the money will accrue interest.

3. The Respondent, Nathan Muriira Karunya opposed the application through his replying affidavit sworn on 14/3/2024. He avers that the Applicants were fully aware of every stage of the case and were present in court through their appointed advocates. He faults the Applicants for failing to attach any evidence to prove that the delay was due to delay in internal approvals in line with the insurer's internal policies. It is thus clear that this application is made in bad faith, is an abuse of the court process and an afterthought which is only meant to delay attachment of the Applicants' property in execution of the decree. The memorandum of Appeal does not raise any sufficient grounds of appeal and is a nullity ab initio. The Applicants have not demonstrated what substantial loss they will suffer if the orders sought are denied, as they have inordinately denied in bringing this application, and he urges the court to dismiss the application with costs.
4. The application was urged in court and a ruling reserved.

Analysis and Determination

5. The issues for determination are whether leave to appeal out of time and stay should be issued.

Leave to appeal out of time

6. The principles for consideration on an application for extension of time to appeal out of time are that, the power is discretionary but the applicants must prove to the satisfaction of the court that the delay is not inordinate, reasons for delay are plausible, that the appeal is arguable and not frivolous and that the respondent will not be unduly prejudiced by the order being made. See *Nicholas Kiptoo Korir Arap Salt v Independent Electoral & Boundaries Commission & 7 others* (2014) eKLR.
7. The application was filed on 1/3/2024 and the judgment sought to be appealed against was made on 27/10/2023. This court finds that delay of about 2 months cannot be termed as inordinate and unreasonable.



8. On the arguability or otherwise of the intended appeal, the grounds raised in the annexed memorandum of appeal fault the trial court for inter alia apportioning liability at 100% against the weight of the evidence, failing to consider the defence and awarding inordinately high general damages.
9. This court finds that the intended appeal is indeed arguable, which is not one which must necessarily succeed and neither is it for the court to go into the merits of the intended appeal.
10. From the Respondent's response to the application, no prejudice has been disclosed.
11. For the reasons set out above, this court deems it fit to enlarge time to lodge the appeal out of time.

Stay of Execution

12. Order 42 Rule 6 of the *Civil Procedure Rules* empowers a court to stay execution, either of its judgment or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided under Rule 6 (2) as follows:

“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.”
13. The delay in filing the appeal in time has been attributed to the insurance company's bureaucracies, which explanation this court finds plausible and satisfactory.
14. The Applicants' real apprehension of loss of their money in the event of a successful appeal, to the Respondent, whose financial capability has not been established, cannot be trivialized. That is what substantial loss entails.
15. The Court notes the Applicants' willingness to offer security for the due performance of the decree.

Orders

16. Accordingly, for the reasons set out above, this court will allow the application dated 26/2/2024 on the following terms:-
 1. The Applicants are granted leave to appeal out of time against the judgment delivered by Hon. A.M Odhiambo on 27/10/2023.
 2. Stay of execution of the judgment and decree of the lower court is hereby granted pending the hearing and determination of the intended appeal.
 3. The Applicants shall within 30 days from the date hereof pay to the Respondent Ksh. 250,000 and deposit the balance of the decretal sum of Ksh. 506,750 into an escrow account in the joint names of the advocates for the parties.
 4. The Record of Appeal to be filed within sixty (60) days from the date hereof.
 5. In the event of default of any of the aforementioned conditions, the stay hereby granted shall lapse and be of no effect.
 6. In terms of Order 50 rule 6 of the *Civil Procedure Rules*, the costs of this application for extension of time shall be paid by the appellant to the Respondent.



Order accordingly.

DATED AND DELIVERED THIS 23RD DAY OF MAY, 2024.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Mr. Olunga for M/S Samuel Gitonga & Associates for the Applicant.

Miss Kiema for M/S Nkunja & Co. Advocates for the Respondent.

