



REPUBLIC OF KENYA



**Githau v Kagiri & another (Civil Appeal 314 of 2023)
[2024] KEHC 6320 (KLR) (6 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6320 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 314 OF 2023
FN MUCHEMI, J
JUNE 6, 2024**

BETWEEN

HEZRON MUIRURI GITHAU APPLICANT

AND

JAMES WAIHARO KAGIRI 1ST RESPONDENT

VINCENT MICHEAL KATUTA 2ND RESPONDENT

RULING

Brief Facts

1. The application dated 29th June 2023 is seeking for orders of leave to file an appeal out of time against the judgment in Thika CMCC Case No. E353 of 2016 delivered on 17th May 2023. The applicant further seek for orders of stay of execution in respect of the said judgment delivered on 17th May 2023 pending the hearing and determination of the appeal.
2. In opposition to the application, the respondent filed Grounds of Opposition dated 3rd October 2023.

Applicant's Case

3. The applicant states that judgment in Thika CMCC Case No. E353 of 2016 was delivered on 17th May 2023. Being aggrieved with the said judgment, the applicant is desirous to lodge an appeal against the said judgment but the statutory period within which to file appeal already lapsed. The applicant contends that he was unable to file an appeal within the requisite time due to financial constraints.
4. The applicant argues that he has an arguable appeal with high chances of success and the same ought to be heard on merit. The applicant further states that the respondent does not stand to suffer any prejudice upon grant of the orders sought.



The Respondents' Case

5. The respondents oppose the application on the premise that it is misconceived, vexatious, an afterthought and an abuse of the court process.
6. The respondents state that the intended appeal has the sole purpose of delaying execution proceedings. Furthermore, the applicant has not given any good or sufficient cause for the delay.

The Applicant's Submissions

7. The applicant relies on Order 42 rule 6 of the [Civil Procedure Rules](#) and submits that he has met the threshold for grant of stay of execution pending appeal. The applicant is apprehensive that the respondents will execute the decree and he will suffer substantial loss.
8. The applicant submits that the application was filed without unreasonable delay as he filed it 42 days after the delivery of the judgment.
9. The applicant states that he is ready and willing to offer security for the performance of the decree. Furthermore, the applicant contends that the intended appeal will be rendered nugatory in the event that orders for stay are not granted.
10. The applicant attributes his failure to file his appeal within time to financial constraints that he was facing. The applicant relies on Article 48 of the [Constitution](#) and submits that he should not be denied access to justice because he was financially constrained. As such, the applicant contends that the delay in filing the appeal is regrettable but it is not inordinate.
11. The applicant submits that the respondent will not be prejudiced and in any event, they shall be compensated by way of costs. Furthermore, the applicant submits that the intended appeal has a high probability of success as the issues raised are arguable.

The Respondents' Submissions

12. The respondents submit that the application is defective and an abuse of the court process as it has been brought under Section 79A of the [Civil Procedure Act](#) instead of Section 79G of the [Act](#). The respondents rely on Section 79G of the [Civil Procedure Act](#) and the cases of [Mombasa County Government vs Kenya Ferry Services & Another](#) (2019) eKLR and [Thuita Mwangi vs Kenya Airways Ltd](#) [2003] eKLR and submit that the applicant has not met the threshold for filing an appeal out of time. The respondent contends that the judgment in the trial court was delivered on 17th May 2023 while the instant application is dated 29th June 2023 and heard *ex parte* on 30th June 2023, approximately 15 days after the lapse of the statutory period allowed to file an appeal. The respondent further states that the applicant has attributed his delay in filing the appeal to financial constraints however, he has not produced any evidence to support the same nor has he provided any details on the same.
13. The respondents contend that if indeed the applicant was financially incapacitated to file an appeal he ought to have filed it as a pauper pursuant to Order 44 of the [Civil Procedure Rules](#).
14. The respondents rely on the case of [Olivia Wamubu Kinyanjui vs Margaret Njeri Ndirangu](#) [2015] eKLR and submit that the applicant does not deserve to have the discretion exercised in his favour as he has not sufficiently explained the delay in filing the appeal.
15. The respondents further rely on the cases of [Esther Wambui Mahia vs Geoffrey Njogu Kimani](#) Nairobi HCCC Misc. App. 412 of 2003 and [Muchanga Investments Ltd vs Safaris Unlimited \(Africa\) Ltd &](#)



- 2 Others [2009] eKLR and submit that the applicant has not properly moved the court in seeking stay of execution orders as the legal provisions under which the application is brought do not support the granting of the orders of stay making the application defective and an abuse of the court process.
16. The respondents further rely on Order 42 Rule 6 of the Civil Procedure Code and the cases of RWW vs EKW (2019) eKLR and Visbram Ravji Halai vs Thornton & Turpin [1990] KLR 365 and submit that the applicant has not met the threshold for stay of execution pending appeal.
 17. The respondents contend that the grounds raised in the memorandum of appeal are not arguable. The respondents argue that the upshot of the judgment was that the applicant's claim as well as the respondents' claim were dismissed and thus it cannot be said that the judgment was in favour of the respondents. On the issue of the application being filed without undue delay, the respondents contend that the applicant's reasons for delay are not sufficient. Further, if the applicant was financially handicapped, Order 44 of the Civil Procedure Rules provides for an outlet for such party and provides under Rule 1 that such a person may apply to be allowed to appeal as a pauper.
 18. The respondents rely on the cases of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR and Absalom Dova vs Tarbo Transporters [2013] eKLR and submit that if the court were to grant the applicant the order for stay of execution, it would place them at a more prejudicial position than the applicant. The respondents further state that it would be unfortunate that they would have to wait for long to enjoy the fruits of their judgment, in terms of half of the costs awarded to them by the trial court.
 19. The respondents are apprehensive that the applicant may not be able to repay them should the appeal go in their favour as the applicant has neither rebutted nor demonstrated that he has the means and capacity to pay the costs awarded to them.
 20. Relying on the case of Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR, the respondents submit that the applicant has not offered to furnish any security. The respondents urge the court to order the applicant to pay half of the costs as ordered by the trial court as security for the performance of the judgment debt.
 21. The respondents rely on Section 27 of the Civil Procedure Act and submit that they are entitled to costs as the appeal application lacks merit.

Issues for determination

22. The two main issues for determination herein are:-
 - a. Whether the court should exercise its discretion to grant the applicant leave to file his appeal out of time;
 - b. Whether the applicant has met the prerequisite for grant of stay of execution pending appeal;

The Law

Whether the court should exercise its discretion to grant the applicant leave to file his appeal out of time;

23. Section 79G of the Civil Procedure Act states:-

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 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.

24. It is clear from the wording of section 79G of the *Civil Procedure Act* that before the court considers extension of time, the applicants must satisfy the court that they have good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of *Diplack Kenya Limited vs William Muthama Kitonyi* [2018]eKLR an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.

25. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others* [2014] eKLR 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 should include:-

- a. 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;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
- f. Whether the application has been brought without undue delay.

26. Similarly in the case of *Paul Musili Wambua vs Attorney General & 2 Others* [2015]eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-

“.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

27. Applying the above principles to the present case, the judgment herein was delivered on 17th May 2023 and the applicant filed the current application on 30th June 2023. This is about thirteen (13) days outside the time limited for filing an appeal. The applicant has attributed the delay in filing his appeal to financial constraints. The applicant did not give any particulars of his financial constraints. It is trite law that financial constraints is not a valid reason for delay in filing an appeal. In the case of



George Mwenda Muthuri vs Mama Day Nursery and Primary School Nyeri CA No. Nyr No. 4 of 2014 (UR2/14) a request for leave to extend time was declined because of inability to raise legal fees was not per se a reason. Similarly in Willis Oneko Opiata vs Fredric Omondi Wera [2021] eKLR where the Court of Appeal dismissed an application for stay pending appeal where the applicant attributed the cause of delay to financial constraints. The court stated:- “There was also mention of financial constraints whose details or proof were not also given. Finances were allegedly intended to hire an advocate to represent him in the intended appellate process. No mention was made as to why no attempts were made by him to initiate the appellate process in person in the manner the application under consideration was initiated.”

28. Considering thirteen (13) days cannot be termed as an inordinate delay, however the reasons for the delay have not been satisfactorily explained to the court as required by the law. Financial constraints is not a good reason for delay as was held in the foregoing authorities. The applicant ought to have filed the appeal by himself which would have been cost effective. In my view, the applicant has not given any plausible reasons for the delay in filing the appeal.
29. I have perused the intended Memorandum of Appeal and the judgment of the trial court and noted that the appeal does not raise pertinent issues of law. As such, the appeal cannot be said to be arguable.

Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

30. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-
 1. “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.
 2. 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 1st 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.
31. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:
 1. Substantial loss may result to him/her unless the order is made;
 2. That the application has been made without unreasonable delay; and
 3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.



32. Substantial loss was clearly explained in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR:-

“No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the 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...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

33. The applicant is silent in his affidavit on how he stands to suffer substantial loss. It is only in his submissions that he contends that he stands to suffer irreparably if the respondents levy execution against him.
34. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show the manner in which execution will irreparably affect him or will alter the status quo to his detriment therefore rendering the appeal nugatory. The appellant has failed to demonstrate substantial loss in my considered view.
35. I have further perused the court record and noted that the judgment dated 17th May 2023 dismissed the applicant’s suit and the respondent’s counterclaim. Notably, the court cannot grant stay of the impugned judgment dated 17th May 2023 as it dismissed the entire suit which in essence is a negative order and incapable of execution. This principle was enunciated by the Court of Appeal in *Co-operative Bank of Kenya Limited vs Banking Insurance & Finance Union (Kenya)* [2015] eKLR where the court held as follows:-

An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay – called a positive order – either an order that has not been complied with or has partly been complied with.

36. Similarly in *Kenya Commercial Bank Limited vs Tamarind Meadows Limited & 7 Others* [2016] eKLR the Court of Appeal expounded on stay of execution stating:-

In *Kanwal Sarjit Singh Dhiman vs Keshavji Juvraj Shah* [2008] eKLR the Court of Appeal while dealing with a similar application for stay of a negative order, held as follows:-

The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December 2006. The order of 18th December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only.



The same reasoning was applied in the case of *Raymond M. Omboga vs Austine Pyan Maranga (supra)* that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:-

The order dismissing the application is in the nature of a negative order and is incapable of stay of execution, save perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is incapable of execution, there can be no stay of execution of such an order....The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise....

37. In light of the above, the order being a negative order which did not order any of the parties to do anything or restrain from doing anything is incapable of execution and thus the court cannot order stay of execution of that negative order.

Has the application has been made without unreasonable delay.

38. Judgment was delivered on 17th May 2023 and the applicant filed the instant application on 30th June 2023. It has taken the applicant one month and thirteen (13) days between the date of judgment delivered in the trial court and the time when he filed the instant application. It is therefore my considered view that a delay of one month and 13 days is not inordinate and inexcusable provided it is explained to the satisfaction of the court.

Security of costs.

39. The purpose of security was explained in the case of *Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* [2014] eKLR the court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.

40. Evidently, the issue of security is discretionary and it is upon the court to determine it and set its terms. The applicant has not offered any security for the performance of the decree.
41. It is imperative that the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Samvir Trustee Limited vs Guardian Bank Limited* [2007] eKLR the court stated:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is



a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”

42. The court in granting stay has to carry out a balancing act between the rights of the parties. The issue that arises is whether there is a just cause for depriving the respondents their right of enjoying their judgment. Upon perusal of the grounds of appeal and without going into the merits of the appeal noted that they do not raise any arguable points of law.
43. Having found that the applicant has not satisfied the requirements of extension of time to appeal and that he has failed to meet the threshold for grant of stay pending appeal, I reach the conclusion that this applicant must fail.
44. Accordingly, it is my considered view that the application dated 29th June 2023 lacks merit and is hereby dismissed with costs.
45. It is hereby so ordered.

RULING DELIVERED, DATED AND SIGNED AT THIKA THIS 6TH DAY OF JUNE 2024.

F. MUCHEMI

JUDGE

