



REPUBLIC OF KENYA



**Kariuki v EMO (Suing as the mother and next friend of John Nyaribo) (Miscellaneous Civil Application 390 of 2023) [2024] KEHC 6883 (KLR) (5 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6883 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS CIVIL APPLICATION 390 OF 2023**

**HM NYAGA, J**

**JUNE 5, 2024**

**BETWEEN**

**JULIUS KARIUKI ..... APPLICANT**

**AND**

**EMO (SUING AS THE MOTHER AND NEXT FRIEND OF JOHN NYARIBO) ..... RESPONDENT**

**RULING**

1. By a Notice of Motion dated 30<sup>th</sup> November, 2023 brought under Sections 1A, 1B, 3A, 79G and 95 of the *Civil Procedure Act*, Order 42 Rule 6(1)(2) and (7) and Order 51 Rule 1 of the *Civil Procedure Rules, 2010*, the Applicant seeks for orders that:-
  1. Spent
  2. This Honourable Court be pleased to grant the Applicant leave to appeal out of time in respect to the judgment/decree delivered in Nakuru CMCC No 1322 of 2021 by Hon. Prisca Nyotah.
  3. Spent
  4. This Honourable Court be pleased to grant an order of stay of execution of the judgment and/or the decree delivered on 2<sup>nd</sup> August, 2023 and all consequential orders arising therefrom pending the hearing and determination of the intended Appeal herein.
  5. This Honourable Court be pleased to issue an Order for provisions of a Bank Guarantee of the entire future medical expenses and costs pending hearing and determination of the Intended Appeal herein.
  6. This Honourable Court be pleased to issue any other Order as it may deem just, appropriate and expedient in the interest of justice.



7. Costs of this Application be provided for.
2. The Application is predicated on grounds on its face and supported by an affidavit of the Applicant's Counsel, Cynthia Kemunto, sworn on the even date.
3. It is her deposition that after delivery of the Judgment they informed the instructing client Direct Line Assurance Ltd. the terms of the Judgment but unfortunately the instructing client's claims officer who received the terms left the employment before issuing further instructions, and by the time they received instructions to appeal the 30 days period within which to appeal had lapsed.
4. She believes the intended appeal has very high chances of success and states that the Applicant is apprehensive the respondent will commence execution proceedings against him as there is no stay of execution in force thereby rendering the intended appeal nugatory.
5. She asserts that the Respondent's means is unknown and the applicant is thus reasonably apprehensive that if the decretal sum is paid to her she may not be in a position to refund the same in the event the Intended Appeal Succeeds.
6. She states that the Applicant is ready and willing to furnish bank guarantee for the entire decretal sum pending the hearing and determination of the intended appeal.
7. She prayed that the Application be allowed in the interests of justice.
8. In response to the Application, the respondent's Counsel Nancy Njoroge swore a Replying Affidavit on 19<sup>th</sup> December, 2023 wherein she avers that the applicant's decision to appeal against the judgment of the trial court is made in bad faith considering the ship has already sailed in this matter following full payment of money owing to the respondent by her counsel in the wake of non-existence of a pending appeal.
9. She believes the Application is a clear abuse of the court process and ripe for dismissal.
10. The Application was canvassed through written submissions. Only the Respondent's submissions are on record.

### **Respondent's Submissions**

11. The Respondent submitted that the parties recorded consent on 21<sup>st</sup> December, 2023 whereby the Applicant undertook to offset the outstanding balance of Kshs 165, 101/= within 21 days hence making the consent a judgment of the court.
12. The respondent referred this court to the case of *Brooke Bond Liebig Ltd v Mallya* [1975] EA 266 on the principles of setting aside of a consent order and the case of *Flora N. Wasike v Jestimo Wamboko* [1988] eKLR for the proposition that any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and those claiming under them.
13. The Respondent therefore submitted that this application is an abuse of the court process, incompetent and urged this court to dismiss the same with costs.

### **Analysis & determination**

14. The issues that arises for determination are:-
  1. Whether the Application is an abuse of the court process.
  2. Whether the application seeking leave to appeal out of time is merited.



3. Whether stay orders sought should be granted
15. I will address the above issues seriatim.
16. Black Law Dictionary, Sixth Edition Black, Henry Campbell, Black Law Dictionary Sixth Edition, Continental Edition 1891- 1991 P 990 P 10-11 defines abuse as;

“Everything which is contrary to good order established by usage that is a complete departure from reasonable use. Abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use”
17. The Court of Appeal in Meme v Republic & another (2004) eKLR discussed abuse of the court process thus: -

“An abuse of the court's process would, in general, arise where the court is being used for improper purpose, as a means of vexation and oppression, or for ulterior purposes, that is to say, court process is being misused.”
18. In the Nigerian case of Amaefule & other v The State, Oputa JSC stated that an abuse of process can also mean abuse of legal procedure or improper use of the legal process
19. It is generally accepted that the court is entitled to protect itself from abuse. There is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it. (See the case of Stephen Somek Takweny & another v David Mbutia Githare & 2 others Nairobi (Milimani HCC No 363 of 2009)
20. In the instant case the respondent believes the application is an abuse of the court process in view of the fact that the decretal sum has already been fully paid and that there is a consent judgment that arose from the parties and recorded on 21<sup>st</sup> December, 2023 whereby the Applicant undertook to offset the outstanding balance of Kshs 165,101/= within 21 days. The Respondent therefore posited that the Applicant has not met the principles for setting aside the consent order.
21. It is my position that full payment of the decretal sum is not a bar from preferring an appeal. On this, I'm guided by a similar holding in Luke Nzwii v Alex Musau Muindi [2018] eKLR where it was stated thus:-

“Even though the Respondent is of the view that the Appeal should not be entertained since the decretal sum has already been paid, the rights of the Applicant should not be shut out and washed away. The Memorandum of Appeal appears to raise triable issues and is not in my considered view a frivolous one. The payment of the decretal sums by the Applicants to the Respondent is not a bar to him from being allowed to ventilate his Appeal. It is possible that the payment of the decretal sums might have been made by the Applicants to ward off auctioneers from seizing his property at the time and further the payment could have been made on a “without prejudice” basis.”
22. The arguments advanced by the Respondent in regards to the aforementioned consent cannot hold as the said consent was only in respect of payment of the balance due. The consent itself was silent on the issue of whether the matter was marked as settled. In addition the consent in question does not appear to have been adopted as order of the court. It is trite law that a Consent only becomes binding on parties and attains legal character once it is adopted as an order or judgment of the Court. In Church



Road Development Co. Ltd v Barclays Bank of Kenya & another HCCC No 296 of 2006 Hon Justice Onyancha (as he then was) held as follows:-

“I wish to point out that my examination of the file records, as earlier pointed out, confirms that the “consent orders” were received in court. They were stamped and filed in this file. BUT they were not recorded in the file by the Deputy Registrar. I hold the opinion that no such consents by the parties or their counsel in a suit, become part of the court proceedings or judicial proceedings until they are so recorded and duly signed by the Deputy Registrar. The act of recording the consent and signing it, is not merely administrative in my view. It is judicial and holds judicial or legal consequences.”

23. Further in the case of Simon Ayiemba v Kenya Industrial Estates Ltd Busia Civil Appeal No 5 of 2001 Hon. Justice Serگون held:-

“There are only two ways in which a Consent can be legally accepted by the Court; the first instance is when the parties file in Court a fully executed written contract which becomes a Court Order the moment it is domesticated and approved by Court and the second instance is when one of the parties orally addresses the Court on the contents of the proposed Consent thereafter the adversary as called upon to confirm the contents. The names of the parties orally addressing the Court must be recorded and the Court receiving the Consent must then approve and subsequently adopt the terms of the Consent as an Order...”

24. Finally the Supreme Court of Kenya rendered itself on this issue in the case of Geoffrey M. Asanyo & others v The Attorney General [2018] eKLR where their Lordships held:-

“Adoption of consent by a Court is a process, in the course of which a Court discharges the duty of evaluating the clarity of the consent placed before it by parties, and giving directions on the manner of adoption. This circumvents the risk of an unlawful Order, and validates the mode of adoption and compliance. Thus, a consent by parties becomes an Order of the Court only once it has been formally adopted by the Court. It is only from that stage, that the Court becomes functus officio...”

25. Flowing from the above, it is my opinion that the instant application is not an abuse of the court process.

26. I will now deal with the second issue. Section 79G of the Civil Procedure Act 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.”

27. The Supreme Court of Kenya sitting at Kisumu in the case of County Executive of Kisumu v County Government of Kisumu & others [2017] eKLR while relying to its decision in the case of Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others Application No 16 of 2014 (supra) the Hon. Judges reiterated the considerations to be made in such a case to be as follows:

- a. Extension of time is not a right of a 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 to 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 respondents if the extension is granted;
  - f. Whether the application has been brought without undue delay; and
  - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
28. The discretion to extend time must be exercised within the principles of the law and factors to be considered when determining such an application. The principles were set out in the Court of Appeal case of *Omar Shurie v Marian Rasbe Yafar* (supra) where it was held:
- “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.”
29. It is not disputed that the judgment in the lower court was delivered on 2<sup>nd</sup> August, 2023. The Applicant therefore ought to have filed his appeal on or before 2<sup>nd</sup> September, 2023. That was not done. The reasons given for failure to lodge an appeal within the stipulated time is that there was a delay in receiving instructions to appeal as the claims officer of the Applicant’s insurer/instructing client who was aware of the judgment terms left employment before issuing further instructions. The Applicant did not attach a letter of resignation to substantiate this position. However, the court notes that the mistake was that of the insurer and given the nature of its operations such delays cannot be ruled out. I am prepared to give the applicant a chance to ventilate his appeal.
30. With regard to whether the intended appeal is arguable, I am alive to the fact that in deciding an application of this nature, the court must be careful not to delve into the merits of the case as that is under the purview of the appellate court after hearing the merits of the same. The court should therefore only be concerned with the question of whether or not the appeal will be rendered nugatory.
31. The essence of considering whether the appeal raises triable issues is to avoid the same being rendered nugatory should the decision of the appellate court overturn that of the trial court.
32. A cursory look at the Memorandum of Appeal shows that the same is essentially on the extent of the award of damages and failure to subject the same to the apportioned liability. I am of the view that the grounds raised therein are triable and/or arguable.
33. The other limb is whether the Respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the Applicant. The answer is in the affirmative. I find that no prejudice will be caused to the Respondent that cannot be compensated by an award of costs if the Application is allowed.



34. Considering that extension of time is an equitable remedy, I hold that the Applicant should not be denied a seat in the altar of justice.
35. With respect to third issue, 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.”
36. In the instant case the Applicant claims that he will suffer irreparable loss should execution proceedings commence against him as his appeal will be rendered nugatory and he may not be able to recover the decretal sum from the respondent as her means of income is unknown.
37. The record shows that subsequent to the filing of this application the applicant paid the entire decretal sum. As such his apprehension over execution has now been overtaken by events. The same now applies to the offer of security by way of a bank guarantee for due performance of the decree.
38. In view of the foregoing, I find that the question of execution has been overtaken by events upon payment of the full decretal sum. Thus no execution can lawfully take place.
39. In regards to whether this Application has been filed without unreasonable delay, I have already noted the Applicant did not satisfactorily explain the delay of 4 months in filing this application but I am willing to accommodate the applicant so as to ventilate his intended appeal.
40. In conclusion, I find that the prayers in the application dated 30<sup>th</sup> November, 2023, save for prayer No 2, have been overtaken by events. I find that said prayer to be merited and I allow it. I therefore order as follows;
1. The appellant/ applicant is allowed to file the appeal out of time within 21 days from the date hereof.
  2. In default of (1) above, the leave so granted shall be deemed to have lapsed automatically without further reference to the court.
  3. Costs of the subject application shall abide the appeal, and if none is filed, then they shall be borne by the applicant.

**DATED, SIGNED AND DELIVERED AT NAKURU 5<sup>TH</sup> DAY OF JUNE, 2024.**

.....

**H. M. NYAGA,**

**JUDGE.**

In the presence of;

Court Assistant Jeniffer

Ms Cherotich for Applicant



No appearance for Respondent

