



**Mwananchi Credit Limited v Kagiri (Miscellaneous Application
E642 of 2023) [2024] KEHC 7431 (KLR) (Civ) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7431 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

MISCELLANEOUS APPLICATION E642 OF 2023

JN MULWA, J

JUNE 20, 2024

BETWEEN

MWANANCHI CREDIT LIMITED APPLICANT

AND

VIDESIOUS MURAGE KAGIRI RESPONDENT

RULING

1. The Applicant Mwananchi Credit Limited in the Motion dated 4/08/2023 seeks leave to appeal out of time from the judgment and decree issued on 8/06/2023 at Milimani Small Claims Court claim no. E7826 of 2022 pending hearing and determination of the intended appeal as well as stay of execution of the decree.
2. In support one Daniel Wokabi Mathenge an advocate acting for the Applicant swore a Supporting Affidavit on even date attaching a draft Memorandum of Appeal and the impugned judgment and a further Affidavit sworn by Sylvia Wajiru Njoroge an employee of the Applicant on 18/01/2014.
3. In opposition to the Application, the Respondent Videsious Murage Kagiri filed a Replying Affidavit dated 12/10/2023, which also is in support of a motion to 12/09/2023.
4. Upon consideration of the above and oral submission by counsel, the issues I find for determination are: -
 1. Whether the Applicant should be granted leave to appeal out of time.
 2. Whether an order of stay of execution should be issued subject to order no. 1 being allowed.



Leave to Appeal Out of Time

5. The delay is stated to be one month due to inadvertence of the advocate who despite being instructed by the applicant did not file the appeal in time. The Respondent vehemently submits that mistake of counsel is not sufficient reason and further the Applicant has failed to offer security for due performance of the decree hence grant of the orders will prejudice the Respondent.
6. Section 79 G of the [Civil Procedure Act](#) provides for 30 days upon which an appeal from a subordinate court to the High Court may be filed. However, the proviso thereto grants the court power to admit an appeal out of time if the Applicant/Appellant satisfies the court that there is a good and sufficient cause for not filing the appeal within time.
7. Additionally, Section 95 of the [Act](#) grants the court discretion to enlarge time for doing any act prescribed under the Act even though the period originally fixed or granted may have expired.
8. In [Nicholas Kiptoo Korir Arap Salat v IEBC & 7 others](#) [2014] eKLR, the Supreme Court stated the parameters for consideration that: -
 1. “Extension of time is not a right of any party. It is an equitable remedy that is only available to deserving parties at the discretion of the court.
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
 3. Whether the court should exercise the discretion to extend time is a consideration to be made on a case to case basis.
 4. Whether there is a reasonable reason for the delay.
 5. Whether there will be any prejudice suffered by the respondent if extension is granted.
 6. Whether the application has been brought without undue delay.
9. The above principles had been set down in the case *Leo Silla Mutiso v Ross Hellen Wanderi Mwangi* in Civil Application number 255 of 1997 and have since been applied in matters related thereto.
10. I have considered the reasons put forth for the delay of one month, the nature of the case, and admitted mistake counsel as well prejudice that may be caused to the Respondent if the orders are granted.

An appeal is a right to a party. It must however be balanced against an equally weighty right of the decree holder who would be denied enjoyment of his judgment fruits as stated in [Mohammad Salim t/a Choice Butchery v Nasserpuria Memon Jamat](#) [2013] eKLR, [Kangi Wambugu Mwangi Anthony v Mary Kaari M'mbita](#) [2022] eKLR.
11. In *Nzoia Sugar Company Limited, Ibrahim Mohammed J* (as he then was) rendered that: -

“There is no set period of delay in law so long as the delay is explained.”

The applicant is indeed a deserving party, having given instructions to appeal to its advocates. It ought not be denied its right to appeal due to his Advocate’s mistake.
12. The reason for the delay having been explained in my view sufficiently and not to deny a deserving party its right to appeal, I am persuaded to allow the Applicant time to file the appeal in terms of the Draft Memorandum of Appeal with or without amendments within 10 days of this ruling failing which the order shall lapse automatically.



Stay of Execution Pending Appeal.

13. Upon the appeal being filed there would be a danger that if the orders are not granted, the Appeal may be rendered nugatory. However, a party seeking court's indulgence must comply with provisions of Order 42, rule 6 (2) of the *Civil Procedure Rules* by;
 - a. Demonstrating that substantial loss may be occasioned should the orders be denied and;
 - b. Provided security for the due performance of the decree.
14. The burden of proving substantial loss which is the cornerstone of an application for stay pending appeal, lies within the Applicant.

I have considered the grounds stated by the Applicant in its Supporting Affidavit. It states at paragraph 9 that the suit by the Respondent in the trial court sought an injunction against issuance of the logbook of the subject motor vehicle while the motor vehicle remained with the Respondent. It is therefore the deponents view that the logbook ought to be retained by the Applicant to avoid the loss of the vehicle pending proceedings of the intended appeal as failure would lead to enforcement of the decree which would then cause the Appeal to be nugatory.
15. The Applicant is a Microfinance duly registered to give credit facilities for purchase of motor vehicles among others to interested parties. The Subject Motor Vehicle KCW730W was purchased by the Respondent and the logbook retained as security by the Applicant pending full payment of the loan facility.
16. Without a doubt, should the logbook be released to the Respondent before the appeal is heard and determined, there is high risk and likelihood of the logbook being misused, which would render the appeal nugatory. The vehicle is and remains in possession of the Respondent. In my view, and for ends of justice to be met, it would be prudent to allow the Respondent to remain with the possession of the motor vehicle while the Log book remains with the Applicant until the appeal is heard and determined. In my view, such an order would take care of the conflicting interests of the parties and would cause no prejudice to either of the parties.
17. In the end I find the Application dated 4/08/2023 to be meritorious. It is allowed in terms of prayers no 2, 3 and 5 and terms appearing at paragraph 13 and 14 of this ruling.
18. The cost of the application shall be borne by the applicant.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF JUNE, 2024

JANET MULWA

JUDGE

