



Crown Petroleum (K) Limited v Awale Enterprises Limited (Miscellaneous Civil Application E063 of 2024) [2024] KEHC 9112 (KLR) (23 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9112 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION E063 OF 2024
JK NG'ARNG'AR, J
JULY 23, 2024**

BETWEEN

CROWN PETROLEUM (K) LIMITED APPLICANT

AND

AWALE ENTERPRISES LIMITED RESPONDENT

RULING

1. The Applicant filed the Notice of Motion application dated 18th April 2024 under Certificate of Urgency pursuant to Sections 1A, 1B, 3A, and 79G of the *Civil Procedure Act*, Order 42 Rule 6 and Order 50 Rule 6 of the *Civil Procedure Rules* 2010 and any other relevant provisions of law.
2. The Applicant prays for leave to file the appeal out of time against the judgment of Hon. Gatheru (PM) on 29th February 2024 in Mombasa CMCC No. 1462 of 2019, Awale Enterprises Limited v Crown Petroleum (K) Limited. The Applicant also prays for stay of execution in the trial court matter pending the hearing and determination of the application herein and the intended appeal, and for costs of the application.
3. The application is premised on the grounds therein and the Supporting Affidavit of Caren Manyonge, the Legal Officer of Geminia Insurance Company Limited which is the insurer of the motor vehicle owned by the Applicant.
4. The Applicant contended that the judgment arises from a road traffic accident on 2nd February 2018 involving the Applicant's motor vehicle registration number KAV 312D/7773 and Respondent's motor vehicle registration number KBA 969 Z Mercedes Benz. That judgment was delivered and the advocates advised their instructing client on the judgment. That upon being advised of the entry of judgment by oversight, the office file was mixed up and carried away to the general claims department instead of the legal department. That there was need for reconstruction of the file for the legal department to consider the judgment and give further instructions to the advocates. That by the time



advocates were instructed to lodge an appeal against liability and quantum, the time within which an appeal ought to have been filed had lapsed. The Applicant argues that the proposed memorandum of appeal raises strong grounds of appeal and Geminia Insurance Company Limited is willing to deposit half of the decretal sum in an interest earning account as security.

5. The Respondent opposed the application through a Replying Affidavit sworn by Abdi Jama Awale, the director of the Respondent on 9th May 2024 that it remains unclear if the intended appeal is being lodged by the Applicant or Geminia Insurance Company Limited whose representatives have sworn the affidavit annexed to the applicant's application dated 18.4.2024. That after delivery of the judgment in the trial court, the Applicant was granted 45 days stay of execution but they neither lodged a memorandum of appeal nor expressed any intention to appeal. That the letter seeking certified copies of the proceedings was never served upon the Respondent's counsel.
6. According to the Respondent, the Applicant was aware of its obligation to satisfy the decretal sum but they deliberately ignored to fulfil the same and that a file mix-up does not prevent the Applicant from filing a memorandum of appeal in good time since the Applicant admits that it was advised in good time. The Respondent also averred that the draft memorandum of appeal does not raise any significant grounds as the same are premised on vague inferences.
7. Parties were ordered to file submissions which they complied.
8. The Applicant in their submissions outlined the issues for determination to include whether the application for extension of time is merited and whether stay of execution pending determination of the intended appeal is warranted. On the former, the Applicant submitted that the power of the court to admit an appeal out of time is set out in Section 79G of the *Civil Procedure Act* and that such powers are discretionary in nature as was held in the case of *Charles N. Ngugi v ASL Credit Limited* (2002) eKLR which cited with authority the case of *Thuta Mwangi v Kenya Airways Ltd* (2003) eKLR where the principles to be applied in the exercise of such discretion were set out to include the period of delay, the reason for the delay, arguability of the appeal, the degree of prejudice likely to be suffered by the respondent, the importance of compliance with time limits, and the effect if any on the administration of justice or on public interest.
9. The Applicant submitted on arguability of the appeal by relying on the case of *Athuman Nusura Juma v Afwa Mohamed Ramadhan* (2016) eKLR. The Applicant contended that they intend to challenge the trial court decision for making a finding on liability based on extraneous issues and/or hearsay evidence failing to analyse and weigh the evidence against the rules of evidence. That the trial court in the judgment acknowledged that PWIV and DWI who are respective drivers at the time of the accident gave competing narratives on how the accident occurred and relied heavily on the evidence of PWIII who was the traffic officer and who gave evidence that no investigations were carried out by them as the owner of the defendant's motor vehicle admitted liability and alleged to repair the plaintiff's motor vehicle.
10. On whether stay of execution pending determination of the intended appeal is warranted, the Applicant submitted that Order 42 Rule 6 of the *Civil Procedure Rules* invokes discretionary powers of the court which must be exercised judiciously. The Applicant argued that the court is guided by the principles set out in the case of *Halai & Another v Thornton & Turpin* (1963) Ltd (1990) KLR that: -

“... Firstly, the applicant must establish a sufficient cause, secondly, the court must be satisfied that substantial loss would ensue from a refusal to grant a stay, and thirdly, the applicant must furnish security. The application must of course be made without unreasonable delay.”



11. The Applicant claimed that the Respondent commenced execution by proclaiming the Applicant's movable goods putting the Applicant at risk of suffering substantial loss if the stay of execution is not granted noting that the sum awarded by court is a colossal amount. That the intended appeal shall be rendered nugatory in the event stay of execution is not granted. The Applicant relied on the holding in the case of *Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints* (2016) eKLR in seeking for extension of time to file appeal and for stay pending determination of the intended appeal.
12. The Respondent in their submissions argued that the Applicant has not provided any convincing and/or significant grounds for the court to have discretion in its favour. On whether or not leave can be granted for the Applicant to file its appeal out of time, the Respondent relied on the holding in *Mombasa County Government v Kenya Ferry Services & Anor* (2019) eKLR which was cited in *Charles N. Ngugi v ASL Credit Limited* (2022) eKLR where guiding principles were set.
13. The Respondent further contended that the decision of whether or not to grant leave to appeal out of time is an exercise of discretion and some of the factors that aid the court in exercising the discretion were outlined by the Court of Appeal in *Thuita Mwangi v Kenya Airways Ltd* (2003) eKLR which was cited in *Charles N. Ngugi v ASL Credit Limited* (2022) eKLR to include the period of delay, the reason for the delay, arguability of the appeal, the degree of prejudice likely to be suffered by the respondent, the importance of compliance with time limits, and the effect if any on the administration of justice or on public interest.
14. The Respondent submitted on stay of execution pending the hearing and determination of the intended appeal that court has the discretion to grant leave to file appeal out of time and that without prejudice to the foregoing, they urged the court to grant conditions to that effect to avoid abuse of the same by the Applicant.
15. After considering the application, the response there to and submissions by both parties, the issues for determination are whether the prayer for leave to file appeal out of time is justified, whether stay of execution pending appeal is merited and the orders as to costs.
16. On whether the prayer for leave to file appeal out of time is justified, this court notes that judgment in the lower court was delivered on 29th February 2024 and the Memorandum of Appeal was filed on 18th April 2024. According to Section 79G of the *Civil Procedure Act*, the appeal ought to have been filed within a period of thirty days from the date of the decree or order appealed against. Therefore, the period of delay should have started running after the 30 days. After computation of the number of days, it is established the Applicant delayed by 18 days. This according to this court is not inordinate delay. The Applicant has also explained the circumstances that led to delay in filing the appeal. That there was a mix up of files and by the time advocates were instructed to lodge an appeal against liability and quantum, the time within which an appeal ought to have been filed had lapsed.
17. On whether stay of execution pending appeal is merited, this court cites Order 42 Rule 6(2) of the *Civil Procedure Rules*, which sets out the parameters for grant of stay of execution pending appeal as:
 - 6(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 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.



18. Additionally, on the discretion of the court in granting stay, the Court of Appeal in *Butt v Rent Restriction Tribunal* (1982) KLR 417 gave the following guidance: -

- “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. On stay of execution pending appeal, the court in exercising its powers under Order XLI rule 4(2)(b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

19. The Applicant has demonstrated that they stand to suffer irreparable harm if the prayer of stay of execution is not granted. This court has established that there is evidence on record to show that Respondent commenced execution by proclaiming the Applicant’s movable goods putting the Applicant at risk of suffering substantial loss. Additionally, execution of the Applicant’s movable property would amount to disposing off the substratum of the appeal which will render the appeal nugatory.

20. On the issue of costs, the House of Lords in *Reid, Hewitt & Co v Joseph*, AIR 1918 Cal 717 and *Myres v Defries* (1880) 5 Ex D 180 held that: -

“The expression ‘costs shall follow the event’ means that the party, who, on the whole, succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it.”

21. The court however has the ultimate discretion in the award of costs and in exercising this discretion, the court must look at the outcome as well as the circumstances of the case.

22. In conclusion and in the interest of justice, this court makes the following orders: -

- a. The Applicant is granted leave to file and serve the memorandum of appeal within 14 days from the date herein.
- b. Upon filing the appeal, there will be a stay of execution of the lower court judgment and decree challenged until appeal is heard and determined.



- c. The applicant to deposit the decretal sum within 30 days from today's date in a joint interest earning account in the names of the advocates of the parties herein as security until the appeal is heard and determined failure of which execution to issue.
- d. Costs to be in the cause.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23RD DAY OF JULY, 2024.

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J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

Mogaka Omwenga & Mabeya Advocates for the Applicant - present

Yunis Ali & Co. Advocates for the Respondent (Mitei holding brief)

Court Assistant – Samuel Shitemi

