



REPUBLIC OF KENYA



**Mega Wholesalers Limited v Nabende (Miscellaneous Civil Application
E128 of 2023) [2024] KEHC 8842 (KLR) (19 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8842 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CIVIL APPLICATION E128 OF 2023**

JRA WANANDA, J

JULY 19, 2024

BETWEEN

MEGA WHOLESALERS LIMITED APPLICANT

AND

ROSE NALIKA NABENDE RESPONDENT

RULING

1. The Application before Court is the Applicant's Notice of Motion dated 21/06/2023 filed through Messrs Mahida & Maina Co. Advocates. It seeks orders as follows:
 - i. That this Application be certified urgent and service thereof be dispensed with in the first instance.
 - ii. That there be a stay of execution of the Judgment/Decree in the lower Court file in Eldoret CMCC No. E006 of 2021 delivered on the 17th May 2023 granted ex parte in the first instance pending inter partes hearing and determination of the in instant Application.
 - iii. That this Honourable Court be pleased to grant leave to the Applicants to file an Appeal out of time in the High Court against the whole Judgment in the lower Court file Eldoret CMCC E006 of 2021 delivered on 17th May 2023 and deem the Memorandum of Appeal annexed herein as duly filed in the Court record
 - iv. That costs of this Application be in the Cause.
2. The Application is premised on the grounds stated on the face thereof and supported by the Affidavit sworn by one Vanessa N. Kinyanjui, an Advocate in the said law firm.
3. In the Affidavit, the deponent stated that the Applicant's insurer, Mayfair Insurance Co. Ltd which had instructed the law firm to defend the suit, delayed in providing the law firm with formal instructions to appeal due to the insurer's own internal processes and bureaucracy, that the suit in the



lower Court suit, Eldoret CMCC No. E006 of 2021, was filed on 6/01/2021, concluded and Judgment delivered on 17/05/2023 and that the law firm has received instructions to appeal on quantum, that a period of 1 month had lapsed since the Judgment was delivered and since then the Respondent has initiated the execution of the Decree against the Applicant and the Applicant is likely to suffer substantial loss.

4. She deponed further that the Applicant is ready and willing to abide by any reasonable conditions that the Court may impose including depositing the entire decretal sum in a joint fixed deposit interest earning account, that she has lodged an Appeal and which has appreciable chances of success and that if execution is not stayed, the Appeal will be rendered nugatory, that the Respondent has extracted warrants of attachment and proclamation is therefore imminent. She added that the decretal sum of Kshs 367,352.59 and should the Respondent execute, the Applicant is apprehensive that the Respondent may not be in a position to refund the sum which is substantial and the Respondent has no known assets or at all, that the Respondent will not suffer any prejudice if the Application is allowed.

Replying Affidavit

5. In opposing the Application, the Respondent, through Messrs Okara & Co. Advocates swore the Replying Affidavit filed on 10/07/2023. She deponed that the Applicant has been aware of the subordinate Court's Judgment since immediately the Judgment was delivered, the Applicant's Advocates engaged her with a view to agreeing on costs of the suit so that the Judgment amount could be settled, that as a result, she wrote a letter attaching Bill of Costs which letter was received by the Applicant's Advocates on 22/05/2023, that the parties engaged in negotiations but did not agree and the Respondent then intimated her desire to commence execution, that it is glaringly clear that the Applicant has not approached the Court with clean hands.
6. She deponed that the Applicant has not demonstrated evidence of the substantial loss that it would suffer, that there is need to strike a balance so that it is not only the tortfeasor who benefits from an order of stay of execution, that an appeal cannot be rendered nugatory in a monetary decree if payment is made and it is not just to deny a successful party the benefit of Judgment just because he is poor and the financial ability of a decree holder solely is not a reason for allowing stay, that it is not sufficient to merely state that the decretal sum is substantial, that the Applicant has failed to demonstrate that there exists an arguable appeal with chances of success.

Hearing of the Application & Submissions

7. The Application was canvassed by way of written Submissions. Pursuant thereto, the Applicant filed its Submissions on 13/12/2023 and the Respondent filed on 19/01/2024.
8. The respective Submissions merely reiterated the matters already set out in their respective Submissions and set out the well-known principles applicable in considering Applications for leave to appeal out of time and for stay of execution pending Appeal and the usual authorities thereon. In the circumstances, I see no reason to recite the Submissions.

Determination

9. Ordinarily, in Applications of the nature herein, where an Applicant prays for leave to Appeal out of time, there would also be, as a routine consequence, a prayer for stay of execution pending Appeal as well. However, as is apparent from the prayers quoted verbatim hereinabove, the Applicant has only prayed for stay on "interim basis", namely, that stay be "granted ex parte in the first instance pending inter partes hearing and determination of the instant Application". There is no therefore prayer for stay pending appeal even if leave to appeal is granted.



10. However, in their Affidavits and in the Submissions, both parties have deponed and submitted extensively on whether or not if leave to appeal is granted, whether the Court should also grant stay pending Appeal. The Respondent has not therefore taken issue with the absence of a substantive prayer. In the circumstances, I will treat the omission to expressly include the prayer for stay pending Appeal as an inadvertent omission.
11. The issue for determination is therefore “whether the Applicant should be granted leave to appeal out of time and whether therefore, an order for stay of execution pending appeal should also issue”.
12. Section 79G of the Civil Procedure Act donates to this Court the power to allow a party to file an Appeal before it out of time. The Section provides as follows:

“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 a good and sufficient cause for not filing the appeal in time.” [Emphasis added].”

13. In the case of Edith Gichungu Koine v Stephen Njagi Thoithi [2014] eKLR, the Court of Appeal guided that in an application for extension of time, the Court ought to take into account several factors as observed by Odek JJA as follows:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

14. It is therefore the position that where the delay by a litigant is well explained and the matter sought to be heard out of time raises triable issues or arguable points, the Court will be reluctant to punish such litigant by declining to grant him enlargement of time. On this point, I am guided by the decision in Kamlesh Mansukhalal Damki Patni v Director of Public Prosecution & 3 Others [2015] eKLR, where the Court of Appeal, in declining to strike out a Notice of Appeal filed one day out of time, stated as follows:

“40. It must be realized that courts exist for the purpose of dispensing justice. Judicial officers derive their judicial power from the people, or as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of the Constitution which succinctly states that “judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.” Judicial officers are also state officers, and consequently, are enjoined by Article 10 of the Constitution to adhere to national values and principles of governance which require them whenever applying or interpreting the Constitution or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity, are upheld. For these reasons, decisions of the courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve. Such decisions may involve only parties inter se (and hence only parties’ interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the court in exercising its judicial authority to ensure



dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice.”

15. Similarly, in the case of *Charles Karanja Kiiru – versus- Charles Githinji Muigwa* [2017] eKLR, the Court of Appeal upheld the following statements made by the trial Judge (P.J. Otieno J) in the suit brought before it on appeal:

“It suffices to comment that a court of law should be hesitant at closing the door to the corridors of justice prior to a litigant being heard on his complaint

16. The question now is whether the Applicant’s delay to file the Appeal within the time stipulated has been well explained and whether there is an arguable appeal with chances of access. In explaining the delay, the Applicant’s Advocates have alleged that the client-insurer’s instructions to appeal was received late. Although the insurer has not sworn an Affidavit to confirm this explanation, the same has not been challenged and I have no reason to disbelieve it. The reason given cannot also not be said to be far-fetched or improbable.

17. Regarding length of the delay, I note that the Judgment was delivered on 17/05/2023 which means that the 30 days window to appeal ran out on or about 17/06/2023. The instant Application was then filed on 22/06/2023. The delay was therefore for only 5 days. I am prepared to find that the length of delay was therefore for a very short period and therefore excusable.

18. On whether the intended Appeal has chances of success, I have read the draft Memorandum of Appeal and note that it faults the trial Court’s findings on both liability and quantum. I however note that in its Supporting Affidavit, the Applicant states that it seeks to only challenge quantum. I will therefore go by the contents of the Affidavit. The question is therefore whether there is a weighty appeal? does it raise triable issues or arguable points? In other words, would it serve any purpose to allow the Appeal to be filed out of time?

19. What constitutes “an arguable appeal” has been explained in various authorities, including by the Supreme Court in the case of *Dande & 3 others v Director of Public Prosecutions & 2 others* (Petition 4 (E005) of 2022) [2022] KESC 23 (KLR) (19 May 2022) (Ruling) in the following terms:

“ 15. Remembering that an arguable appeal is not one that must necessarily succeed, but is simply one that is deserving of the court’s consideration; that what must be avoided is to render the success of the appeal, if successful, nugatory or an academic exercise; that the court, in exercising its discretion, balances between the lower and the higher risks of injustice; and that no definitive conclusions ought to be made as that can only be in the appeal and not in an application for stay, as noted in the persuasive decisions in *Reliance Bank Ltd v Norlake Investments Ltd* [2002] E A 227 and *Dennis Mogambi Mang’are v Attorney General & 3 others* Civil Application No Nai 265 of 2011 (UR 175/2011) [2012] eKLR; ...”

20. In the copy of the Judgment attached, the Applicant is stated to have suffered multiple soft tissue injuries and for which she was awarded Kshs 350,000/- in general damages. As guided in the cited authority, I have to be careful not to make comments that may appear to pre-judge the Appeal. However, in my view, I am persuaded that there may be grounds for challenging that amount. In the circumstances, I am satisfied that the Appeal has chances of success.



21. Regarding stay of execution pending Appeal, the principles applicable are well settled. These principles are provided for under Order 42 Rule 6(2) of the Civil Procedure Rules which provides:

“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.

22. “Substantial loss” was explained in the case of *James Wangalwa & Another v. Agnes Naliaka Cheseto* [2012] eKLR, by Gikonyo J in the following terms:

“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.”

23. The Applicant urged that it would be occasioned substantial loss if the order for stay is not granted and the appeal later succeeds as the Respondent’s financial strength is not known. On his part, the Respondent has argued that her financial strength or “poverty” should not be used as the sole reason for denying her the fruits of her judgment. This issue was addressed by the Court of Appeal in the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR where the following was expressed:

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge”

24. Although I agree with the Respondent that her “poverty” should not be used as the sole ground, I also agree that to maintain a balance between the interests of the parties, ability to make a refund is a crucial ground in Applications of this nature. The decretal sum of Kshs 367,352.59 cannot be said not to constitute a substantial figure. The Respondent has however not given the Court any other justifiable reason why the Court should not grant the stay even if the Court were to ignore the “poverty” line. In the circumstances, I find that the Respondent has done nothing further to lay to rest the Applicant’s fear or apprehension that it would be unable to recover the money should execution proceed. I am therefore satisfied that substantial loss may result to the applicant if the order of stay is not granted.



25. On the issue of delay, I have already made a finding above that the Application was filed without unreasonable delay. On security for due performance of such decree, the Applicant has stated its willingness to do so.

Final Orders

26. In light of the above, I find that the Application herein is merited. Accordingly, I order as follows:

- i. The Applicant's Notice of Motion dated 21/06/2023 is allowed in terms of prayer 3 thereof and consequently, leave is granted to the Applicant to file an appeal out of time challenging the Judgment delivered in Eldoret Chief Magistrate's Court Civil Case No. E006 of 2021 on 17/05/2023.
- ii. The Applicant shall file the Appeal within 14 days from the date hereof.
- iii. Stay of execution of the Judgment delivered in the said Eldoret Chief Magistrate's Court Civil Case No. E006 of 2021 on 17/05/2023 and the Decree arising therefrom is also granted pending the hearing and determination of the Appeal to be filed.
- iv. Orders (i), (ii) and (iii) above are granted on the condition that the Applicant shall, within a period 45 days from the date hereof, deposit the decretal sum of Kshs 367,352.59 in an interest earning bank account to be opened in the joint names of the law firms on record for the parties in this matter.
- v. In the event of default in complying with any of the conditions imposed hereinabove, within the timelines stipulated, the orders granted shall lapse and the Respondent shall be at liberty to execute the Decree.
- vi. Costs awarded to the Respondent.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 19TH DAY OF JULY 2024

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WANANDA J.R. ANURO

JUDGE

Delivered in the presence of:

Ms Kinyanjui for Applicant

Mr Okara for Respondent

Court Assistant – Brian Kimathi

