



Mbugua v Mutua (Civil Appeal 359 of 2023) [2024] KEHC 8670 (KLR) (11 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8670 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 359 OF 2023
FN MUCHEMI, J
JULY 11, 2024**

BETWEEN

KENNETH KIMANI MBUGUA APPLICANT

AND

MUOVA MUTUA RESPONDENT

RULING

1. The application dated 29th September 2023 seeks for orders of leave to file an appeal out of time against the judgment in Thika CMCC Case No. 655 of 2021 delivered on 24th August 2023. The applicant further seeks for orders of stay of execution in respect of the said judgment pending the hearing and determination of the appeal.
2. The respondent opposed the application through Grounds of Opposition dated 23rd October 2023.

Applicant's Case

3. The applicant states that the court in Thika CMCC No. 655 of 2021 delivered the judgment on 24th August 2023 whereby the respondent was awarded general damages for pain suffering and loss of amenities at Kshs.1,000,000 and special damages at Kshs. 37,895/- together with costs and interest. Being dissatisfied with the judgment, the applicant lodged his appeal (formerly Kiambu HCCA No. E381 of 2023) on 29th September 2023. Upon delivery of the judgment, the applicant argues that his advocates sought to obtain a copy of the judgment but their efforts were defeated as the learned trial magistrate retained the file in chambers since 24th August 2023.
4. The applicant further states that the said judgment was never released to them until 21st September 2023. The applicant adds that stay of execution granted in the matter lapsed and thus the applicant argues that unless stay of execution is granted, the intended appeal shall be rendered nugatory and he shall suffer irreparable loss and damage. The applicant is apprehensive that the respondent shall execute against the said judgment which will render the application nugatory and intended appeal useless.



5. The applicant avers that the appeal is arguable and meritorious has overwhelming chances of success as it raises pertinent points of law and fact.
6. The applicant states that the application has been brought promptly and without unreasonable delay and that his insurance company, Directline Assurance Limited is willing and able to furnish the court with a bank guarantee from Family Bank Limited as security for performance of the decree.

The Respondent's Case

7. The respondent opposes the application on the premise that it is an afterthought, frivolous, incurably defective, bad in law, vexatious and a total abuse of the court process. The respondent states that the appeal is a mere tactic devised to delay enjoyment of the fruits of his judgment for it does not have any merit. The respondent further states that judgment in the matter was delivered on 24th August 2023 which is over one month before his application was filed. As such, the application has been brought with inordinate delay and should not be allowed.
8. The respondent states that the applicant has not offered any meaningful security for costs and urges the court to order that the applicant do pay half the decretal sum to him and deposit the other half in court within 14 days to demonstrate their seriousness in the intended appeal.
9. Directions were issued that the application be canvassed by way of written submissions and the record shows that only the respondent complied by filing his submissions on 6th June 2024.

The Respondent's Submissions

10. The respondent objects to security in the form of a bank guarantee as proposed by the applicant as it does not ensure that the interests of both parties are protected. The respondent humbly requests the court to order that half of the decretal sum being Kshs. 518,948/- be released to him and the other half to be deposited in court within 14 days from the date of the court's ruling. In the alternative, the respondent submits that the application is an abuse of the court process and urges the court to dismiss it. The respondent relies on the case of *Jimna Kaloki Muthusi & Another v Gladys Ndanu Ndinda* [2021] eKLR to support his submissions.

The Law

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

11. 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.

12. 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*



v 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.

13. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat v 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.

14. Similarly in the case of *Paul Musili Wambua v 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.”

15. The applicant faults the trial court for the delay in filing his appeal because since the delivery of the judgment on 24th August 2023, the file remained in the trial magistrate’s chambers thereafter the until 21st September 2023 that the applicant received a copy of the judgment. The issue of delay of typed proceedings and judgment is familiar in our courts due to human and courts have extended resource challenges as well as others. Courts have held that such delay cannot be blamed on the parties for it is sometimes caused by factors beyond their reach. This was stipulated by the Supreme Court in the case of *Hassan Nyanje Charo v Khatib Mwashetani & 3 Others* [2014] eKLR where the court stated:-

Counsel for the applicant has stated that he has exercised all due diligence to get the proceedings from the Court of Appeal, but to no avail.....

Would it be in the interests of justice then to turn away an applicant who has prima facie, exercised all due diligence in pursuit of his cause, but is impeded by the slow turning wheels of the court’s administrative machinery? We think not.



16. The Supreme Court further expounded in the case of *County Executive of Kisumu v County Government of Kisumu & 8 Others* [2017] eKLR and held:-

However, we hasten to add that a ground of delay of getting typed proceedings is not a prima facie panacea for a case of delay whenever it is pleaded. Each case has to be determined on its own merit and all relevant circumstances considered. It is worth reiterating that in considering whether or not to extend time, the whole period of delay should be stated and explained to the satisfaction of the court.

17. In the present case, the trial court delivered its judgment on 24th August 2023 in the presence of counsel for the applicant. The trial court then granted 30 days stay of execution. The applicant filed this application on 29th September 2023 which is approximately 5 days after the requisite period prescribed for lodging an appeal.
18. Furthermore, although the applicant has faulted the court registry for the delay in lodging the appeal though he has not annexed any evidence to show the date he applied for a copy of the judgment. No correspondence addressed to the court to that effect were produced. Neither has the applicant attached a copy of a certificate of delay to show that the registry took long to avail a copy of the typed judgment and proceedings. The applicant has stated that he received a copy of the typed judgment on 21st September 2023 but he filed his memorandum of appeal on 29th September 2023. Evidently, the applicant received a copy of the judgment within statutory time to file his appeal but he failed to take the necessary action immediately for reasons not explained. That notwithstanding Mr. Kinuthia was present holding brief for Mr. Njuguna for the applicant and therefore the applicant having been aware of the judgment ought to have filed his appeal without delay and later pursue the supply of certified proceedings and judgment.
19. Although the applicant has not given any plausible explanation on the reasons for delay, I take into account that delay of five days is neither inordinate nor inexcusable. As such, this court will exercise its discretion for extension of time to file his appeal.

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.

20. 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 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.
21. 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.
22. Substantial loss was clearly explained in the case of [James Wangalwa & Another v 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.
23. The applicant in his affidavit contends that he is apprehensive that the respondent shall execute his judgment at any given moment. 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 that execution shall irreparably affect him or will alter the status quo to its detriment therefore rendering the appeal nugatory. It is therefore my considered view that the applicant has not demonstrated substantial loss he stands to suffer.

Has the application has been made without unreasonable delay

24. Judgment was delivered on 24th August 2023 and the applicant filed the instant application on 29th September 2023. As such, the application was filed timeously.

Security of costs

25. The purpose of security was explained in the case of [Arun C. Sharma v 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.



26. Evidently, the issue of security is discretionary and it is upon the court to determine the same. The applicant has stated that his insurer Directline Assurance Company Limited is ready and willing to furnish the court with a bank guarantee from Family Bank as security. I have perused the bank guarantee as annexed by the applicant and noted that the bank guarantee is dated 6th July 2023 and is for a period of one year with an option to renew. Furthermore, the bank guarantee is between Family Bank and the insurer, nowhere does it mention the applicant.
27. Additionally, 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 v 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.”
28. The court in granting stay has to carry out a balancing act between the rights of the two parties. The issue that arises is whether there is just cause for depriving the respondent his right of enjoying his judgment. On a close look at the grounds of appeal, it is my considered view that they do not raise any arguable points of law.
29. From the foregoing, the applicant has not met the threshold of granting stay of execution pending appeal and the said prayer is declined.
30. As for extension of time to appeal, the applicant is granted fourteen (14) days to file his intended appeal and in default, these orders shall be vacated.
31. This application is only partly successful.
32. It is hereby so ordered.

RULING DELIVERED, DATED AND SIGNED AT THIKA THIS 11TH DAY OF JULY 2024.

F. MUCHEMI

JUDGE

