



REPUBLIC OF KENYA



**Nyende v Mzee & another (Civil Appeal E361 of 2023)
[2024] KEHC 9754 (KLR) (22 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9754 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E361 OF 2023
DKN MAGARE, J
JULY 22, 2024**

BETWEEN

ROSELINE PAMELA NYENDE APPELLANT

AND

AMON MWANGO MZEE 1ST RESPONDENT

ALEX MWENDA 2ND RESPONDENT

RULING

1. This is a ruling on an applications dated 7/3/2024. The application seeks the following orders:
 - i. There be stay of execution of the Decree and Judgment delivered in Mombasa CMCC No. E819 of 2022 and consequential orders pending the hearing and determination of the appeal.
 - ii. The Honourable court be pleased to order a stay of execution of the Judgment of the Honourable Chief Magistrate's Court at Mombasa CMCC 854 of 2020 delivered on 17th November, 2023 by the Honourable D.O. Mbeja, Principal Magistrate pending the hearing and determination of the intended Cross Appeal.
 - iii. This Honourable Court be pleased to grant the Applicant leave to file a Cross Appeal out of time.
 - iv. That as a condition for stay of execution pending the hearing and determination of this Cross Appeal/intended cross appeal, this Honourable court be pleased to direct that the Applicant/Appellant be and is hereby ordered to provide/issue security for the entire decretal sum/amount in the form of a Bank Guarantee to be issued by Family Bank Limited.
 - v. That the Honourable court be pleased to give directions on the cross appeal.
 - vi. That the costs of this application abide the outcome of the Cross Appeal.



2. The application is supported by the Affidavit of Amon Mwangi Mzee premised on the grounds stated inter alia as follows:
 - a. The Applicant has a meritorious appeal.
 - b. The appeal will be rendered nugatory.
 - c. The Respondent will suffer no prejudice.
3. The Respondents opposed the application materially on the ground that the Applicant had not satisfied the conditions for grant of stay of execution.
4. It was also deposed that the Applicant was indolent in failing to file the cross appeal and the delay was inordinate and not explained.

Submissions

5. The Applicant filed submissions dated 4/5/2024 in support of the application. It was submitted the Applicant had satisfied the conditions for the grant of the stay of execution.
6. Reliance was placed on Order 42 of the *Civil Procedure Rules* as follows:
 - (1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.
 - (2) Where the property or person of the judgment-debtor has been seized under an execution, the court which issued the execution may order the restitution of such property or the discharge of such person pending the results of the application.
 - (3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor the court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.
7. Further, Order 42 Rule 6 of the *Civil Procedure Rules* was cited as follows:
 - (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 order set aside.
 - (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.

8. It was submitted that the Applicant had lodged an application to review the impugned Judgment and would not benefit from the application for stay of appeal. They also relied on *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR where the court (Omolo O’Kubasu & Githinji, JJA.) as follows:

“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 — see for example section 112 of the *Evidence Act*, Chapter 80 Laws of Kenya.

9. On the enlargement of time for the purpose of the cross appeal, it was submitted that the Applicant had filed the application timely and has a meritorious cross appeal.
10. The Respondent reiterated the Replying Affidavit and submitted that the Appellant had not satisfied the conditions for granting stay of execution. Further, that the Appellant was indolent and the intended cross appeal was an afterthought.

Analysis

11. The issues are:
- i. Whether the stay of execution should be granted.
 - ii. Whether leave to file cross appeal should be allowed.
12. As to whether the Appellant has satisfied the conditions for the grant of stay of execution pending Appeal; the principles guiding the grant of a stay of execution pending appeal 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 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.
13. Further to the grounds on substantial loss and security, I understand that stay may only be granted for sufficient cause and that the court in deciding whether or not to grant the stay underscores the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*. The court is thus enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions.
14. Section 1A(2) of the *Civil Procedure Act* provides that “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding



objective” while under section 1B some of the aims of the said objectives are; “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”

15. Therefore, an Applicant seeking stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See *Antoine Ndiaye v African Virtual University* [2015] eKLR.
16. I have to ascertain whether the Applicant has demonstrated loss that it stands to suffer if the order of stay is not granted. From the affidavit in support of the Application, it is deposed that should the order be declined, the Applicant stands to suffer substantial damage after execution takes place. The Respondent on the other hand strongly argues that the Applicant has not demonstrated substantial loss to warrant the grant of stay.
17. Substantial loss for purposes of Order 42 rule 6 of the *Civil Procedure Rules* was discussed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that:

“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.”
18. Having considered the Application vis-à-vis the response thereto, I am of the considered view that the Applicant has demonstrated that it will suffer substantial loss in the event that the appeal succeeds. There is no assurance that the decretal sum will be intact. In the case of *G. N. Muema p/a(sic) Mt View Maternity & Nursing Home vs Miriam Maalim Bisbar & Another* [2018] eKLR, the court held as follows:-

“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”
19. This application was filed timeously. However, I also have to consider whether security for the decretal sum should be furnished. In the instant application, the Applicant is willing to settle the decretal sum though by installments as submitted. I am inclined to find that security for the due performance of the decree herein is essential to protect the rights of the successful Respondent pending the determination of the appeal.



20. The court, in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.

21. The decree is a monetary decree and I also understand the Applicant is willing to deposit the security for the appeal and cannot be said to be acting in bad faith.

22. As to extension of time for lodging a cross appeal, Waki, JA in *Seventh Day Adventist Church East Africa Ltd. & Another vs. M/S Masosa Construction Company Civil Application No. Nai. 349 of 2005* held that:

“As the discretion to extend time is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant; the period of delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with the time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors...In an application for extension of time, each case must be decided on its own peculiar facts and circumstances and it is neither feasible nor reasonable to lay down a rigid yardstick for measuring periods of delay as explanations for such delays are as many and varied as the cases themselves...The ruling striking out the appeal is not only necessary for exhibiting to the application for extension of time but also for consultations between the applicant’s counsel and their clients and the fact that the ruling was returned to Nairobi for corrections is a reasonable explanation for the delay... Where the Respondent has already recovered all the decretal sum and costs attendant to the litigation, the right of appeal being a strong right which is rivalled only to the right to enjoy the fruits of judgement, no prejudice would be caused to the respondent who has enjoyed his rights in full if an opportunity is given to the applicants to enjoy theirs too, even if it is on a matter of principle.”

23. It is imperative to note the Supreme Court of Kenya decision (M.K. Ibrahim & S.C. Wanjala SCJJ) in *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR where the learned Judges held as follows:-

- “(1) 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.
- (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 reasonable reason for the delay. The delay should be explained to the satisfaction of the court.

25. In *Dilpack Kenya Limited v William Muthama Kitonyi* [2018] eKLR Odunga J. observed that:-

“In an application for extension of time, where the Court is being asked to exercise discretion, there must be some material before the Court to enable its discretion to be so exercised. Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the court why the discretion should nevertheless be exercised in his favour and the rule is that where there is no explanation, there shall be no indulgence. See *Ratman vs. Cumarasamy* [1964] 3 All ER 933; *Savill vs. Southend Health Authority* [1995] 1 WLR 1254 at 1259.

26. It follows therefore that the Applicant’s explanation for the delay is key in guiding the court’s exercise of discretion on the issue of leave to appeal out of time.

27. However, I note that this Application ought to have been filed after 30 days of filing the record of appeal. Notwithstanding, the Applicant was under duty to show the reasons for delay. However short the period of delay, it must be explained. In *Alfred Iduvagwa Savatia vs Nandi Tea Estate & another* [2018] eKLR J. Mohammed JA. cited Aganyanya, JA in *Monica Malel & Another V. R, Eldoret* Civil Application No. Nai 246 of 2008 where the Learned Judge stated;-

“When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show the applicants are not quite sure of why the delay in filing the notice of appeal within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay.”

28. Section 79 G of the *Civil Procedure Act* provides as doth: -

“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.”

29. The Appellant stated the reason for failure to file an appeal in time to be due to delay in obtaining a copy of judgment as well as instructions to appeal. That efforts to obtain a copy of judgment and file an appeal within the 30 days proved futile and they only obtained the judgment after the 30 days had elapsed prompting them to file the application herein for leave to appeal out of time. The Record of Appeal ought to have however been filed 30 days after service of the Record of Appeal.

30. It is my considered opinion that the reason given is genuine and has been explained. I note that the Court in Asike-Makhandia J in *Gerald Kitbu Muchanje v Catherine Muthoni Ngare & another* [2020] eKLR stated that:-

“There is no maximum or minimum period of delay set out in law. However, a prolonged and inordinate delay is more likely than not to disentitle the applicant of such leave. Likewise, the reason or reasons for the delay must be reasonable and plausible. In *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR this Court stated:-



“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

31. The application is therefore merited.

Determination

32. The upshot of the foregoing is that I allow the Notice of Motion dated 7/3/2024 as follows:

- a. There be stay of execution of the Judgment and Decree in Mombasa CMCC No. E864 of 2020 pending the hearing and determination of the cross appeal.
- b. The Applicant shall deposit a bank guarantee for the decretal sum within 30 days.
- c. Leave be and is hereby granted to the Applicant to file and serve the Cross Appeal within 14 days.
- d. Costs shall abide the outcome of the appeal.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 22ND DAY OF JULY, 2024.

RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Ndolo for the 2nd Respondent/Applicant

No appearance for the Respondents/Appellant

No appearance for the 1st Respondent (unrepresented)

Court Assistant – Jedidah

