



REPUBLIC OF KENYA



KENYA LAW
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**Abdi v Ahmed (Civil Appeal E007 of 2024)
[2024] KEHC 11514 (KLR) (23 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11514 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CIVIL APPEAL E007 OF 2024
JN ONYIEGO, J
SEPTEMBER 23, 2024**

BETWEEN

MOHAMED GEDI ABDI APPLICANT

AND

HABIBA JAMA AHMED RESPONDENT

RULING

1. The matter for determination is the notice of motion dated 23.04.2024 filed by the applicant through the Firm of Upendo Allan Advocates seeking for orders that:
 - i. Spent.
 - ii. Stay of execution pending the hearing and determination of this application.
 - iii. The applicant be granted leave to file an appeal out of time from the judgement delivered on 14.02.2024 by Hon. Omwange Jackson.
 - iv. Costs be in the appeal.
2. The application is supported by the affidavit of the applicant who deponed that the impugned judgment was delivered on 14.02.2024 but there was a delay in obtaining a copy of the typed certified judgment from the registry. He further deponed that, there was need to read and comprehend the judgment before deciding on the next cause of action hence the delay was not deliberate. That it was in the interest of justice that the prayers herein be allowed to offer the applicant an avenue to ventilate his grievances as provided for under article 50 of *the constitution*.
3. The application herein is hinged on the claim that the appellant was in a breach of a tenancy agreement leading to non-payment of rent arrears in respect to plot number 375 Garissa. The trial court upon considering the pleadings and evidence on record, delivered the impugned judgment against the respondent for an amount of Kes. 440,000/- being the rent arrears, cost of the suit and interest from



the date of default. It is this determination that has brought the application herein as the respondent seeks to appeal against the trial court's finding.

4. It was urged that the application was made in good faith and that it was in the interest of justice that the applicant be given an opportunity to exercise his right of appeal. This court was therefore urged to allow the prayers sought.
5. The respondent via a replying affidavit sworn on 30.05.2024 deponed that the applicant was not deserving of the orders sought as he has been undesirous to prosecute the suit herein. That the applicant failed to annex the supposed requests for a typed and certified copy of judgment from the registry to enable this court verify the allegations cited by the applicant.
6. It was contended that the application herein was filed way after the provided period of filing an appeal thus there was unexplained delay as the same was filed two months after the judgment was delivered. That equity aids the vigilante and therefore, article 159 of *the constitution* as invoked by the applicant should not apply in hoodwinking this court to allow the orders sought. Additionally, that the draft memorandum of appeal doesn't exhibit a chance of the appeal being successful and as such, the application herein should be dismissed for want of merit.
7. The applicant filed a further affidavit sworn on 18.06.2024 reiterating his reasons for filing the application herein and the appeal out of time. That the application was made in good faith and the same was not intended to delay the respondent from realizing her fruits of the judgment. He urged that in as much as he had no means to raise the decretal sum in full, he desired to be heard by this court.
8. On submissions, the applicant in his submissions dated 18.06.2024 urged this court to invoke section 79 of the *Civil Procedure Act* which provides that this court has the discretion to admit an appeal filed out of time as long as there is a good cause for not filing the same in time. Further reliance was placed on the case of Mugo and Others vs Wanjiru & Another [1970] EA482 where the court held that despite a party filing an appeal out of the stipulated provisions, the same did not mean that the said appeal ought to be refused.
9. I have considered the application herein, the response thereof and the rival submissions by counsel. The only issues that crop up for determination are; whether the applicant has met the threshold for grant of stay of execution orders; secondly, whether the applicant has demonstrated sufficient ground for grant of leave to appeal out of time.
10. The principles guiding grant of a stay of execution order 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.
11. Further to the above, stay may only be granted for sufficient cause. It is trite that in deciding whether or not to grant a stay, a court must take into consideration the overriding objective stipulated under sections 1A and 1B of the *Civil Procedure Act*. Thus, a Court is not strictly limited to the traditional provisions for consideration in granting stay of execution orders.



12. Therefore, a litigant 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 vs African Virtual University [2015] eKLR].
13. As to what substantial loss is, it was observed in James Wangalwa & Another vs 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.”
14. In the instant case, the applicant avers that he stands to suffer substantial loss of over Kes. 440,000/- being the rent arrears, cost of the suit and interest from the date of default if stay of execution is not granted. On the part of the respondent, it has simply been urged that the applicant does not deserve the said orders as equity does not aid the indolent.
15. The court, in RWW vs 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.”
16. The applicant did not demonstrate that the respondent was not in a position to refund the decretal sum if paid and the appeal succeeds. I do not find any likelihood of the applicant suffering any substantial loss that cannot easily be compensated or recovered monetarily against the respondent who is a land lady.
17. In regards to whether the application was inordinately filed, the applicant urged that it took some time before he received a typed certified copy of the impugned judgment hence the cause of the delay. It was also urged that the applicant was desirous to exercise his right of appeal and be heard as provided for by *the constitution*. Given the circumstances herein, I am satisfied that there has been no inordinate delay in bringing the instant application/appeal as the judgment and decree being appealed against was delivered on 14.02.2024 and the memorandum of appeal filed on 23.04.2024 hence a delay of about two months. [See Phillip Chemwolo & Another v Augustine Kubende (1982-88) KAR 103 at 1040].



18. Whether the appeal will be rendered nugatory if the orders sought are not granted, the court is guided by Article 50(2) of *the constitution* on the right to fair hearing which includes the right to appeal. Unless the appeal is completely hopeless, a litigant should be facilitated and be allowed to exhaust his legal remedy on appeal to the highest level possible. In the circumstances of this case, the appeal will be rendered nugatory if leave to appeal is not granted and subsequently, stay of execution granted.
19. As to security of costs, nothing was submitted on the same. However, this court has the discretion to make appropriate orders to serve the interest of justice.
20. Taking all the above factors into account and in order not to render the intended appeal nugatory as well as to give effect to the overriding objective of the *Civil Procedure Act*, I find and hold that the applicant has fulfilled the requirements for grant of stay of execution pending appeal as stipulated under Order 42 Rule 6 of the Civil Procedure Rules. On the other hand, the respondent is entitled to the fruits of her judgment.
21. Accordingly, the applicant's/appellant's application is allowed on the following conditions:
 - i. That the applicant/ appellant shall deposit the entire decretal sum into an interest earning account in a reputable commercial Bank, to be held by both advocates for the parties to this appeal, within 30 days of this ruling;
 - ii. That leave to appeal out of time is hereby granted and the draft memorandum of appeal filed herein deemed as duly filed.
 - iii. That the appellant to file a record of appeal within thirty (30) days of delivery of this ruling;
 - iv. Should the applicant fail to abide by order(i) and (ii)above, then the appeal shall stand dismissed.
 - v. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 23RD DAY OF SEPTEMBER 2024

J. N. ONYIEGO

JUDGE

