



REPUBLIC OF KENYA



**Jajuha Civil Contractors & Engineering Ltd v ABM Holdings Limited (Civil Case 41 of 2019) [2024] KEHC 11194 (KLR) (23 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11194 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL CASE 41 OF 2019  
HM NYAGA, J  
SEPTEMBER 23, 2024**

**BETWEEN**

**JAJUHA CIVIL CONTRACTORS & ENGINEERING LTD ..... PLAINTIFF**

**AND**

**ABM HOLDINGS LIMITED ..... DEFENDANT**

**RULING**

1. Before me is the Notice of Motion dated 7<sup>th</sup> May, 2024 which seeks the following orders;
  - a. Spent
  - b. Spent
  - c. Stay of execution of the decree emanating from the Judgment of Hon. Hillary K. Chemitei delivered on 15<sup>th</sup> February, 2024 pending the hearing and determination of the appeal.
  - d. Extension of time within which a Notice of Appeal would have been filed.
  - e. Leave to file its appeal out of time.
  - f. Costs of the application be in the cause.
2. The Application is premised upon the grounds set out on the face of it and is supported by the Affidavit of James Rimui.
3. In a nutshell, the Applicant states that it is aggrieved by the Judgment herein, which entered judgment for the Respondent against it and dismissed its counter claim against the Respondent.
4. It is further averred that the Judgment was delivered in Nairobi in the absence of the parties and without prior notice to them. That concurrently on the same date there were mention proceedings going on at Nakuru High Court to confirm delivery of the very same judgment. That the court at



Nakuru indicated to the parties that the judgment was not ready and a further mention was fixed for 11<sup>th</sup> April 2024. That come that day, the court at Nakuru did not sit and a further date of 15<sup>th</sup> April 2024 was set. Again no judgment was delivered on the latter date.

5. The Applicant further avers that on 26<sup>th</sup> April 2024, the Plaintiff/Respondent served it with a draft decree for the sum of Kshs. 44,202,694/= making reference to a judgment delivered on 15<sup>th</sup> February 2024. That they managed to obtain a copy of the judgment on 30<sup>th</sup> April 2024, over 75 days after it was delivered.
6. The Applicant further avers that the delay in filing the Notice of Appeal was not due to oversight or negligence on their part but due to lack of communication and the parallel proceedings referred to hereinabove.
7. The Applicant further states that the intended appeal raises cogent triable issues and it is only fair and just that they be given a chance to ventilate it.
8. The Plaintiff/Respondent opposed the Application through a Replying Affidavit sworn by Amahdeep Jajuha.
9. The Respondent states that the parties were aware that the matter was awaiting judgment before Hon. H. K. Chemitei, Judge who was on transfer from Nakuru High Court.
10. The Respondent concedes that there was a mention date scheduled for 11<sup>th</sup> April 2024 and 15<sup>th</sup> April 2024, although they did not attend court. That they followed up the matter and learnt that judgment had been delivered on 15<sup>th</sup> February 2024.
11. The Respondent further states that the Applicant ought to have exercised due diligence and that their mistake should not visit upon the Respondent.
12. The parties filed their respective submissions, which I will not rehash. It suffices to state that I have considered the same and will incorporate the arguments herein.

### **Analysis and Determination**

13. The issues for determination are;
  - a. Whether the Applicant ought to be granted leave to file its Notice of Appeal out of time.
  - b. Whether the court should grant stay of execution pending the determination of the intended appeal.
14. By law, the Applicant was supposed to file its Notice of Appeal within 14 days of delivery of the judgment. Obviously this did not happen hence the current application. It was correctly submitted by the Applicant that failure to lodge a Notice of Appeal within time renders the Court of Appeal incapable of hearing the intended appeal. As was stated in *University of Eldoret and Another vs Hosea Sitienei and 3 Others* [2020] eKLR and *Apungu Arthur Kipon vs IEBC and 2 Others* [2018] eKLR, cited by the Applicant, it is the Notice of Appeal that bequeaths jurisdiction to the appellate court to hear the hearing intended appeal.
15. Section 7 of the *Appellate Jurisdiction Act* provides as follows;

“7. Power of High Court to extend time

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to



appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence."

16. It is thus clear that this court has the jurisdiction to extend time for the filing of the Notice of Appeal to a judgment or order from it.
17. It has been stated over time that the power to extend time is discretionary. As with any discretion, it is meant to avoid injustice to the parties. The factors to be considered were succinctly stated by the Supreme Court in *Nicholas Kiptoo Arap Korir Salant v IEBC and 7 Others* [2014] eKLR as follows;
  - “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;
  - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
  - iii. Whether the court should exercise the discretion to extend time is a consideration to be made on a case-to-case basis;
  - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
  - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
  - vi. Whether the application has been brought without undue delay; and
  - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
18. The facts around the matter are not really in dispute. The matter was heard by my brother, Justice H. K. Chemitei. The last time the parties appeared before the Judge was on 11<sup>th</sup> July 2023 when parties were given additional time to file their Submissions. A mention date of 5<sup>th</sup> October 2023. As at that date, the said Judge had left Nakuru High Court on transfer. The parties thus appeared before my sister Justice H. Ongundi for directions on 23<sup>rd</sup> November 2023. The Judge gave the following directions;
  - a. Matter having been conclusively handled by Hon. Justice Chemitei the same is submitted to him for writing of the Judgment.
  - b. Mention on 15<sup>th</sup> February 2024 for an update.
  - c. The parties will however be notified in the event the judgment is ready before then.
19. The court record shows that on 15/2/2024, the matter was mentioned, on a skeleton file, before Justice Ongudi who indicated that judgment was yet to be delivered. A further mention of 11<sup>th</sup> April 2024 was set.
20. Interestingly, on the same day, on the original court file, Judgment was delivered by Justice Chemitei, who directed the Deputy Registrar to notify the parties. There is no record of any communication to the parties of the delivery of the judgment. The CTS shows an outcome of judgment delivered, entered on 4<sup>th</sup> April, 2024 by one Fiona Migiro. This was already over one and a half months after the date that the judgment was actually delivered.



21. In my view, the Applicant cannot be said to have been indolent or negligent. It was asked to await communication from the court and even though judgment was being delivered on 25<sup>th</sup> February 2024, it was before the judge at Nakuru awaiting directions. The confusion cannot be out of their fault.
22. On the above finding, I find that the explanation given by the Applicant to be plausible and I accept it.
23. The Applicant states that it only learnt of the delivery of the judgment when, vide a letter dated 26<sup>th</sup> April 2024 which came from the Respondent's advocate, sending a decree for approval. It is further stated that they only obtained the copy of the judgment on 30/04/2024. That averment is not rebutted. The Applicant moved the court on 7<sup>th</sup> May 2024. I find that the Applicant moved with reasonable speed, without undue delay.
24. Having considered the matter, I am inclined to grant the Applicant leave to file its Notice of Appeal out of time. I will give further directions shortly.
25. The Applicant had also sought a stay of execution of the decree herein pending hearing and determination of the intended appeal.
26. Order 42 Rule 6(2) of the Civil Procedure Rules provides that;
  - “6(2) No order for stay of execution shall be made under sub rule (1) unless—
    - (a) 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) 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.”
27. In *Butt v Rent Restriction Tribunal* [1979] eKLR, the Court of Appeal held as follows in regards to the power to the court to grant stay of execution pending appeal;
  - “The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
  - Secondly, 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 the appeal court reverse the judge's discretion.
  - Thirdly, 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.
  - Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. 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 of costs as ordered will cause the order for stay of execution to lapse.”
28. From the thread of authorities it is discernible that in order to issue a stay of execution, the court must be satisfied that the Applicant has demonstrated that;-
  - a. Substantial loss will result to the Applicant unless such order is made.



- b. The Appeal/Intended Appeal is merited with a chance of success.
  - c. The Applicant has offered security for the due performance of the decree issued against it.
  - d. The Application has been made without unreasonable delay.
29. The Applicant submits that it has met all the requirements in that;
- a. The intended appeal raises pertinent questions of fact and law including the interpretation of the terms of the contract between the parties.
  - b. That the Respondent has moved to commence the execution of the decree as evidenced by the draft decree sent for approval.
  - c. That the application was made without undue delay upon discovery of judgment's delivery.
  - d. That the circumstances of the case justify the grant of stay without the need for actual security as a demand for the same would stifle its right to appeal.
30. For the Respondent, it was submitted that the Applicant has not demonstrated what substantial loss it would suffer. That it is not sufficient to merely allege that the amount is colossal (see *Kenya Shell Ltd. v Benjamin Karuga Kibiru & Another* [1986] eKLR).
31. It is also submitted that no financial records were provided by the Applicant to show that execution would cripple its operations.
32. It was further submitted that the intended appeal is on its face frivolous with no chance of success.
33. On the question of security, the Respondent states that the fact that the Applicant has not offered security, then it has failed to meet the mandatory threshold for grant of stay pending appeal. It was argued that it is only fair that the Applicant be ordered to offer security equivalent to the entire decretal sum.
34. I have considered the 2<sup>nd</sup> limb of the Application and the authorities cited by the parties.
35. As to whether the intended appeal raises triable issues, I would not want to really delve into the merits or lack thereof as this court would be attempting to sit on an appeal over its own judgment. It suffices to state that the draft Memorandum of Appeal, on the face of it, raises triable issues.
36. On substantial loss, it is not in dispute that the Respondent has already sent a draft decree for approval, a pre-requisite to execution. I am satisfied that substantial loss would accrue if stay is not granted.
37. On the question of security, the Applicant has sought to rely on *Westment Holdings SDNBHD v Central Bank of Kenya* [2023] KESC 11, where the Supreme Court weighed in on the issue of security for costs.
38. This matter is not about security for costs but for the decree passed against it. I think that it was important for the Applicant to answer that question in the affirmative. Even though that did not happen, this court can still give orders to that effect.
39. Considering all factors, I direct that the Applicant provides security for a half, the decretal sum, less costs. This can be done by way of actual payment or provision of other adequate security by the Applicant like a bankers guarantee, title deed, or by a surety/guarantor, to be approved by the court. I believe that this will contain any of the fears that the Respondent expressed as to recovery of the decretal sum. This should be done in the next 45 days.



40. On the last issue of delay, I have already found that the Applicant moved the court promptly after hearing of the judgment.
41. In conclusion, I allow the Application dated 7<sup>th</sup> May 2024 on the following terms;
- a. Leave is granted to the Applicant to file its Notice of Appeal within the next 14 days. If already filed, the Notice of Appeal shall be deemed as properly filed.
  - b. The Applicant to furnish security for half the decretal sum as outlined above within the next 45 days and in default execution to issue.
  - c. Costs of the Application shall abide by the outcome of the appeal and if no appeal is filed then they shall be borne by the appellant/ applicant.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 23RD DAY OF SEPTEMBER, 2024.**

**H. M. NYAGA,**

**JUDGE.**

**In the presence of;**

Court Assistant Jennifer

Ms Kimuga for Plaintiff/Respondent

Mr. Munene for Defendant/Applicant

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