



**Bwana v Bakar (Civil Appeal E002 of 2024)
[2024] KEHC 12620 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12620 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CIVIL APPEAL E002 OF 2024
SM GITHINJI, J
OCTOBER 17, 2024**

BETWEEN

BWANA MOHAMED BWANA APPELLANT

AND

ABUBAKAR OMAR BAKAR RESPONDENT

*(Being an Appeal from Judgment of the Principal Magistrate's Court by Hon M.M.Wachira
– Principal Magistrate delivered on 19th April, 2024 in Lamu Civil Case No.E017 of 2023)*

RULING

1. For determination is the Notice of Motion dated 19th June 2024 seeking the following orders;
 1. Spent.
 2. This honourable court be pleased to grant the Applicant leave to appeal out of time against the judgment delivered by Hon. M.M Wachira (PM) at Lamu on 19th April 2024.
 3. This honourable court be pleased to deem the proposed and annexed petition of appeal against the judgment of Hon. M.M Wachira (PM) sitting at Lamu delivered on 19th April 2024 as properly filed.
 4. This honourable court be pleased to stay the execution of the judgment dated 19th April 2024 pending the hearing and determination of the appeal.
 5. Costs of this appeal be provided for.
2. The Application is founded on the grounds on its face and the supporting affidavit of Bwana Mohamed Bwana the Applicant who deponed that the trial court held that he was in breach of contract and was ordered to pay the sum of Kshs. 2,750,000 plus costs and interests. That he instructed his advocates



to file an appeal and a memorandum of appeal was prepared but were unable to file the same within time due to a glitch in the e-filing system.

3. The respondent filed grounds of opposition stating that the application is an attempt to have the court rewrite the terms of the contract between the parties. That the applicant has not given any plausible or sufficient reason to allow him file his appeal out of time.

Disposition

4. The Application was canvassed by way of written submissions. I have taken into account the submissions by the parties as well the authorities relied upon. The issue for determination is whether the orders sought for leave to file the appeal out of time and stay of execution are merited.

5. 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.”

6. In addition, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay, and in light of the overriding objective stipulated in sections 1A and 1B of the [Civil Procedure Act](#), the Court is no longer limited to the foregoing provisions. The courts are now 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.

7. 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.”

8. Therefore, an applicant for 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.

9. As to what substantial loss is, it was observed 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.”

10. The Appellant contends that the addendum to the loan repayment was clear as to the mode of the loan repayment. Further that the Respondent to date holds a title deed as a security. In light of this, I am contended that the title deed is sufficient for security of cost and worth of granting the stay of execution.
11. On the issue of leave to file the appeal out of time, the applicable provision is Section 79G of the *Civil Procedure Act* which expresses that appeals must be filed within a period of 30 days from the date of the decree or order from which the appeal lies. The proviso to the said section, however, allows for extension of time to appeal where good and sufficient cause has been shown. As such, extension of time within which to file an appeal is a matter of judicial discretion.
12. The applicants’ request for leave to file appeal out of time may only be accepted if it satisfies the court that it had good and sufficient cause for not filing the appeal in good time. The Supreme Court of Kenya sitting at Kisumu in the case of County Executive of Kisumu v County Government of Kisumu & others [2017] eKLR while relying to its decision in the case of Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others Application No. 16 of 2014 [2014] eKLR the Hon. Judges reiterated the considerations to be made in such a case to be as follows:
 - a. 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;
 - 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 to 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 respondents if the extension is granted;
 - f. Whether the application has been brought without undue delay; and
 - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
13. I have perused the grounds on the face of the application as well as the supporting affidavit. The appellant has explained that the delay was due to system glitch on the e-filing portal and a screenshot of the same was attached. In my view this is sufficient reason to warrant leave. Thus, I grant the prayer for extension of time to file the appeal within a strict timeline of 30 days from the date hereof failure to which the orders granted herein shall lapse. The Notice of Motion dated 19th June 2024 therefore succeeds. Costs shall abide by the outcome of the Appeal.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 17TH DAY OF OCTOBER, 2024.

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S.M. GITHINJI



JUDGE

In the Absence of; -

1. Mr Muteithia for the Applicant
2. Mr Abdul for the Respondent

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S.M. GITHINJI

JUDGE

17/10/2024

