



REPUBLIC OF KENYA



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**Equity Bank (K) Limited v Ong’wenya (Miscellaneous Civil Case
E023 of 2024) [2024] KEHC 12737 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12737 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
MISCELLANEOUS CIVIL CASE E023 OF 2024
WA OKWANY, J
OCTOBER 17, 2024**

BETWEEN

EQUITY BANK (K) LIMITED APPLICANT

AND

JOHN KABINGA ONG’WENYA RESPONDENT

RULING

1. This ruling is in respect to the Application dated 22nd May 2024 wherein the Applicant seeks the following orders: -
 - a. Spent
 - b. That the Honourable Court be pleased to enlarge time and grant the Applicant/Intended Appellant leave to file its Memorandum of Appeal out of time against the Judgement of Honourable Chepseba C.M. delivered on the 27th February 2024 in Nyamira CMCC No. 74 of 2017.
 - c. Spent.
 - d. That there be a stay of execution of the Decree pending hearing and determination of this Appeal.
 - e. That the annexed Memorandum of Appeal annexed hereto be deemed as properly on record upon payment of the requisite fee.
 - f. That the Honourable Court be pleased to grant such further or other reliefs as it may be just in the circumstances.
 - g. That costs be in the cause.



2. The Application is brought under Section 79G, 95, Section 1A, 3,3A of the *Civil Procedure Act* and Order 42 Rule 6, Order 40, Order 45 Rules 1 &2, Order 50 Rule 6 and Order 50 Rule 1 of the *Civil Procedure Rules*. The Application is supported by the Affidavit of Applicant's Legal Officer, Ms. Beatrice Muraguri, and is based on the following grounds: -
 1. That Hon. Chepseba C.M. delivered a Judgement on 27th February 2024 in Nyamira Civil Suit 74 of 2017 and the Applicant/Intended Appellant was granted leave within which to Appeal.
 2. That indeed the filing of the Memorandum of Appeal is time-bound and the intended Appellant's Advocate was pursuing mandatory instructions on the Appeal, which instructions materialized on 20th May 2024.
 3. That the Intended Appellant reliably advises me that the delay in filing of the Memorandum of Appeal was occasioned by extensive post-judgment negotiations between the parties herein which negotiations have since stalled.
 4. That it is in the interests of justice that the Applicant/Intended Appellant be allowed to file the Memorandum of Appeal out of time, the delay not being inordinate.
 5. That this Honourable Court being the only recourse available to the Applicant/Intended Appellant has power to enlarge time within which any action is undertaken in the absence of which the Applicant/Intended Appellant's claim will be effectively extinguished.
 6. That the intended Appeal has merit and high chances of success.
 7. That the Respondent will not be prejudiced in any way if the said leave is granted.
3. The Respondent opposed the Application the Respondent through his Replying affidavit sworn on 5th June 2024 wherein he avers that the parties did not engage in any post-judgment negotiations and that such negotiations were a delaying tactic aimed at stalling the execution of the judgment.
4. background of this Application was that Judgment was delivered by the trial court on 27th February 2024. The trial court granted 30 days' stay of execution. The Applicant then filed a Memorandum of Appeal dated 21st May 2024.
5. The Application was canvassed by written submissions which I have considered. The main issue for determination is whether the Applicant has made out a case for the granting of the orders sought.
6. Section 79G of the *Civil Procedure Act* provides that: -

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.
7. The above proviso presupposed that there are circumstances where an appeal may be admitted out of time. In other words, the issue of enlargement of time is a matter that is determined based on the court's discretion.
8. In the present case, I note that judgment was delivered by the trial court on 27th February 2024 after which the said court granted a period of 30 days for stay of execution which lapsed on 27th March 2024.



The instant application was filed on or about 22nd May 2024, which is outside the 30-days' grace period granted by the trial court.

9. In the case of *Mombasa County Government v Kenya Ferry Services & Anor.* [2019] eKLR, at paragraph 25, the Supreme Court outlined the principles governing the granting of orders to enlarge the time for filing pleadings thus: -

“ [25] Concerning extension of time, this Court has already set the guiding principles in the *Nick Salat Case* as follows:

“ ... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

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 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. whether there will be any prejudice suffered by the respondents, if extension is granted;
6. whether the application has been brought without undue delay; and
7. whether in certain cases, like election petitions, public interest should be a consideration for extending time”

10. Similarly, in *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR, the Court of Appeal outlined the same parameters thus: -

- “i) The period of delay;
- ii) The reason for the delay;
- iii) The arguability of the appeal;
- iv) The degree of prejudice which could be suffered by the if Respondent the extension is granted;
- v) The importance of compliance with time limits to the particular litigation or issue; and



- vi) The effect if any on the administration of justice or public interest if any is involved.”
11. In the instant case, the reason advanced by the Applicant for the delay in filing the Appeal is that were engaged in post-judgment negotiations which did not yield any fruits thus resulting in the formal instruction issued to the Applicant’s advocates to file the application.
12. On his part, the Respondent denied any involvement in the alleged post-judgment negotiations and faulted the Applicant for failing to provide any proof of such negotiations.
13. A perusal of the court file reveals that the Respondent extracted a copy of the decree on 17th May 2024. To my mind, this means that the Respondent (Plaintiff) only sought to execute the decree in May 2024 after the collapse of their post-judgment talks. I find that the reasons furnished by the Applicant for the delay in filing the instant application are plausible and further find that the delay in filing the Application is not inordinate.
14. Turning to the prayer for stay of execution, Order 42 Rule 6 of the Civil Procedure Rules stipulates as follows: -
6. 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 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.
15. The above principles require the court to exercise its discretion in determining whether or not to grant an order for stay of execution pending appeal. In Butt v. Rent Restriction Tribunal [1982] KLR 417 the Court of Appeal held that:-
- “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. 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 that appeal court reverse the judge’s discretion.
3. 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.
4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. 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 for costs as ordered will cause the order for stay of execution to lapse.”



16. It is trite that the issue of substantial loss forms the cornerstone of an application for stay of execution. In *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, it was held 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.”

17. In this case, I note that the subject matter of the appeal is the decretal sum of Kshs. 5,000,000/=. I am of the view that the said amount is quite substantial and that the Respondent did not address this court on the issue of whether he will be able to refund the said amount to the Applicant should the intended appeal be successful. While this Court appreciates that the Respondent has a right to enjoy the fruits of its judgment, it must also balance this right against the Applicant’s right to file an appeal.

18. I have further considered the grounds of appeal listed on the draft Memorandum of Appeal and I find that they are arguable. It would therefore be in the interests of justice to preserve the subject matter of the suit pending appeal so as not to render the appeal nugatory.

19. I find that the Applicant has satisfied the requirements of Order 42 Rule 6 save for the issue of security for the due performance of the decree. In the final analysis, I find that the Application has merit and I therefore allow it in the following terms: -

- i. The Applicant is granted leave to file an appeal out of time against the Judgement of Honourable Chepseba C.M. delivered on the 27th February 2024 in Nyamira CMCC No. 74 of 2017.
- ii. The said appeal shall be filed within 14 days from the date of this ruling.
- iii. There shall be a stay of execution of the Decree pending the hearing and determination of the Appeal, but on condition that the Applicant pays one third (1/3) of the decretal to the Respondent and deposits the remaining two thirds (2/3) in court within 45 days from the date of this ruling.
- iv. In the event of failure to comply with the order in (iii) above, the stay order granted herein shall lapse or stand vacated, in which case, the Respondent shall be at liberty to proceed with the execution of the decree.
- v. The costs of the Application shall abide the outcome of the Appeal.

20. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 17TH DAY OF OCTOBER 2024.

W. A. OKWANY

JUDGE

