



**Ena Investment Limited v Abanja (Miscellaneous Civil Appeal  
344 of 2024) [2024] KEHC 12418 (KLR) (15 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12418 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
MISCELLANEOUS CIVIL APPEAL 344 OF 2024  
MS SHARIFF, J  
OCTOBER 15, 2024**

**BETWEEN**

**ENA INVESTMENT LIMITED ..... APPLICANT**

**AND**

**MARY JOSEPH OLOO ABANJA ..... RESPONDENT**

**RULING**

1. The Applicant herein has moved this court by way of a notice of motion dated 30.9.2024, supported by the affidavit of Joan Turgutt advocate sworn on even date and it seeks the following:-
  1. Spent
  2. Spent
  3. Spent
  4. That this court be pleased to grant stay of execution of the judgment and/or decree delivered on 13/6/2024 for Kshs.200,000/= plus costs of Kshs.43,400/= and interest in Kisumu SCCC No. E160 of 2024 pending hearing and determination of the intended appeal.
  5. That the Honourable Court be pleased to grant leave to the Applicant to file an appeal out of time from the judgment and decree of the Honourable trial court delivered on 13/06/2024 together with costs and interest in Kisumu SCCC No. E160 of 2024.
  6. That the costs of this application be provided for.



**Applicant's case:**

2. Miss Joan Turgutt has deposed that on 13/06/2024 judgment was delivered in Kisumu SCCC No. E0160/2024 wherein the Respondent was held liable at 20% and was awarded quantum of damages of Kshs.200,000 plus costs which were taxed at Kshs.43,400 and were not subjected to the apportionment of liability.
3. It is further deposed that whereas the Applicant's advocates had written to their instructing client Messrs Directline on time informing them of the judgment, the client did not respond on time largely due to internal wrangles that culminated in litigation that stopped temporarily the operations of the Messrs Directline Assurance Company Ltd. When instructions were finally given the time for lodging an appeal had lapsed wherefore the Applicant's advocates were instructed to seek leave to file an appeal out of time. The Applicant posits that the reason for the delay is thus duly explained and excusable.
4. The Applicant has maintained that it has good chances of success on its intended appeal as exhibited in the draft memorandum of appeal.
5. The Applicant posits that its insurer will suffer substantial and irrecoverable loss if an order of stay of execution is not granted as the stay order initially granted had already lapsed thus exposing the Applicant to the risk of execution as his motor vehicles registration Nos KCZ 203A, KDK 037U, KDZ 680Y and KDN 087Y were already under attachment from 10.9.2024 as evident from the warrants of attachment and proclamation made by Messrs Kimwaya Auctioneers.
6. The Applicant states that it is willing through Messrs Directline Assurance Co. Ltd to deposit a bank guarantee of the entire judgment sum plus costs as security for its prayer for stay of execution pending the intended appeal and that the Respondent will stand to suffer no prejudice thereby.

**The Respondent's response:**

7. The Respondent file grounds of opposition dated 2.10.24 and the gist thereof is that the Applicant approached this court with unclean hands as it failed to make material disclosure of a subsisting conditional order of stay of execution granted by the trial court for a period of 14 days from 19.9.2024; the same was granted on condition that the Applicant settles the decretal sum within 14 days. It is posited that the said stay orders were to lapse on 2/10/2024 and were thus in force when this court granted the Applicant stay orders on 1/10/2024.
8. The Respondent state that the Applicant had failed to settle the decretal sum and was thus in contempt of the court order made on 19.9.2024. Further that the entire application is misconceived, bad in law and an abuse of court process.

**Submissions:**

9. This application was canvassed by way of oral submissions. The rival submissions of the parties regurgitated their cases as set forth in the supporting affidavit and the grounds of opposition and this court has duly considered the same.

**Analysis and determination:**

10. I will first consider the prayer for leave to file an appeal out of time. The impugned judgment was delivered on 13/6/2024. The Applicant has been economical with the truth as to the date that it moved the trial court for orders of stay of execution save that the Respondent has disclosed that stay orders



conditional on settlement of judgement sum within 14 days were made on 19.9.2024. The Applicant has not disputed this fact.

11. The Applicant has attributed its delay on the internal wrangles of Messrs Directline Assurance Company that led to its temporary cessation of business sometimes in the mid of this year. This position has been proved by way of copy of an order of Justice Mabeya in Milimani High Court Commercial Misc. E470/2024: Insurance Regulatory Authority -vs- Directline Assurance Co. Ltd & Samuel Kamau Macharia & Others. This court takes judicial notice of these facts as they are matters within the public domain.
12. Save for stating that this application is bad in law, misconceived and an abuse of court process, the Respondent has not put forth any substantive opposition to this prayer for extension of time. As for whether the Applicant is in contempt of orders of the trial court, that is not a matter within my preview as I am bound by the pleadings of parties herein and so far save for the grounds of opposition, the Respondent has not filed any affidavit in reply. In any event the Respondent is well represented by advocates who can pursue the issue of contempt in appropriate proceedings.
13. This court finds that the reason advanced for the delay is plausible and persuasive. The question that now arises is whether the grant of leave to file the appeal will prejudice the Respondent. In answer to this question I will take into account the fact that the Applicant's Counsel has submitted that the Applicant is ready and willing to deposit the judgment sum in an interest earning joint account of parties advocates if leave and stay orders are granted. The Respondent's interest will thus be covered.
14. The subject matter herein is not an election petition which has strict timelines and I will thus tamper justice with mercy and allow this limb of the application.
15. In regard to the prayer for grant of an order of stay of execution it is trite that the Respondent had commenced the execution process and had made a proclamation through Messrs Ikimwaya Auctioneers on 10.9.2024. Subsequently the Applicant was granted an order of conditional stay of execution by the trial court for a period of 14 days to enable it settle the judgment sum. Save for saying that stay orders issued by the trial court had lapsed, no disclosure was made of the lifespan of the said orders. I therefore agree with the Respondent that the Applicant is guilty of material non disclosure and that it approached the court with dirty hands; this non disclosure led to the grant of stay orders on 1.10.2024 yet the orders made in the lower court were still in force. The Applicant was thus welding two concurrent orders of stay from the two courts. This conduct indeed epitomizes abuse of court process this court severely reprimands the Applicant for such conduct.
16. Given that the Applicant has annexed a draft memorandum of appeal which I cannot say is frivolous and has offered to deposit the judgment sum in a joint interest earning account of parties, I will also allow the prayer for orders of stay of execution. On the balance I make the following orders:-
  1. The Applicant is granted leave to file and serve an appeal out of time within 3 days from the date hereof and record of appeal in the intended appeal within 14 days from the date hereof and in the event of default, the leave liberty hereby granted shall lapse on the 14<sup>th</sup> day from the date hereof.
  2. An order of stay of execution is granted pending hearing and determination of the intended appeal on the following conditions:-
    - a) The Applicant do pay a sum of Kshs.100,000 to the Respondent's advocates within 30 days from the date hereof.



- b) The Applicant to deposit a sum of Kshs.143,000 in a joint interest earning account of parties advocates in a reputable bank within 45 days from the date hereof.
  - c) In the event of default in compliance with orders 2(a) and (b) hereinabove, the Respondent be at liberty to execute.
3. The Respondent is awarded costs of this application assessed at Kshs.12,000.
  4. This file is marked as closed.

**DATED, SIGNED AND DELIVERED THIS 15<sup>TH</sup> DAY OF OCTOBER, 2024**

**M. S. SHARIFF**

**JUDGE**

