



**Gachanja v Nduiga & another (Miscellaneous Application E005 & E007 of 2024
(Consolidated)) [2024] KEHC 15122 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 15122 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
MISCELLANEOUS APPLICATION E005 & E007 OF 2024 (CONSOLIDATED)
AK NDUNG’U, J
OCTOBER 24, 2024**

BETWEEN

CHARLES GICHUHI GACHANJA APPLICANT

AND

GRACE GATHONI NDUIGA 1ST RESPONDENT

JOSEPH NJOROGE KIMOTHO 2ND RESPONDENT

RULING

1. By way of a Notice of Motion dated 16th April, 2024 the Applicant sought for orders that;
 - i. Spent
 - ii. Spent
 - iii. The honourable court be pleased to extend time and/or grant leave and/or permission to the Applicant to lodge an appeal out of time against the judgment and decree of the court rendered on the 5th October, 2023 vide Nyahururu CMCC No. 18 of 2016.
 - iv. Consequent to prayer (3) above being granted, the Applicant be at liberty to file the memorandum of appeal within 14 days and/or such shorter period as the honorable court may deem fit and/or expedient.
 - v. The honourable court be pleased to grant interim stay of execution of the judgment and decree rendered on the 5th October, 2023 vide Nyahururu CMCC No. 18 of 2016 together with all consequential orders therefrom and attendant thereto, pending the hearing and determination of the intended appeal.
 - vi. Costs of this application do abide the outcome of the intended appeal.
2. The Application is based on the following grounds reproduced verbatim;



- a. The 1st Respondent herein filed and/or lodged suit against the Applicant and 2nd Respondent for breach of agreement valued at Kshs.1,326,506/- with costs and interest of the suit.
 - b. Pursuant to and upon completion of trial, parties exchanged submissions and judgment was set to be delivered on 13th July, 2023.
 - c. On 17th August, 2023 when we appeared before the trial magistrate, we were advised that the judgment had been delivered on 13th July, 2023 which was confirmed by our representative from the judiciary kiosk.
 - d. We sought a copy of the said judgment on 21st August, 2023 in order to review and advise our client where we were advised that it was yet to be delivered.
 - e. After various follow up at the registry and on email we expected the court to issue notice once the judgment was delivered.
 - f. On 1st March, 2024 we received a letter for assessment of costs from the 1st Respondent, and immediately applied for a copy of judgment.
 - g. However, owing to the backlog in the typing pool, there was a delay in obtaining the copy of judgment which we obtained on 3rd April, 2024.
 - h. Upon obtaining and reviewing the judgment the Applicant is desirous of lodging and/or preferring and appeal against the judgment of the trial court.
 - i. In any event the timelines in which one can lodge or prefer an appeal has since lapsed and there is therefore need for leave from the honourable court to file and/or lodge the same outside the statutory period.
 - j. In any event, the failure of the Applicant to file the appeal within the statutory period was not making of the Applicant but the non-issue of notice and delay in typing of the judgment.
 - k. Notwithstanding the foregoing, the Applicant is apprehensive that the 1st Respondent shall commence execution against him exposing him to suffer substantial loss.
 - l. The Applicant has not delay in issuing instructions to appeal after receiving the copy of judgment.
 - m. The Intended appeal cannot be mounted unless leave of this honourable court is granted.
 - n. The decretal amount is colossal in nature hence there is need to have an order of stay of execution in place in order to safeguard the Applicant's interest pending the hearing and determination of the intended appeal.
 - o. The intended appeal raises salient and pertinent issues of law.
 - p. No prejudice will be occasioned to the Respondent that cannot be compensated by way of costs if the application is allowed.
 - q. It is in the interest of justice that the application be allowed.
3. The application is supported by a supporting affidavit of Charles Gichuhi Gachanja (the applicant) sworn on 16th April, 2024 wherein he stated that the 1st Respondent filed and/or lodged a suit against him and the 2nd Respondent for Kshs.1,326,505/- together with the costs and interest of the suit vide Nyahururu CMCC No. 18 of 2016.



4. It is further deponed that upon completion of the hearing, parties exchanged submissions and judgment was set to be delivered on 13th July, 2023 and on the said date the judgment was deferred to 17th August, 2023 owing to errors as explained by the trial magistrate.
5. That on 17th August, 2023 the Applicant's counsel appeared to take the judgment which had been delivered on 13th July, 2023, and applied for a copy of the judgment vide a letter dated 21st August, 2023 and sent to the court registry on the same date. On 23rd August, 2023 a response was received indicating that the file was in chambers and the judgment was yet to be delivered.
6. That on 14th September, 2023 the Applicant's counsel requested for a copy of the judgment and received a response on the same day indicating that the judgment was yet to be delivered and further on 18th September, 2023 the Applicant sent another request inquiring when judgment was to be delivered.
7. On 15th January, 2024 another reminder was sent to the court inquiring the status of the judgment. On 1st March, 2024 the Applicant's advocate received a letter for assessment of costs from the 1st Respondent's advocate and immediately applied for a copy of judgment in the matter.
8. That owing to the backlog in the typing pool, and the file in movement for the signing of the decree, there was a delay in obtaining the copy of judgment which was obtained on 3rd April, 2024 and that upon obtaining and reviewing the judgment, the Applicant was dissatisfied and desirous of preferring an appeal against the judgment of the trial court.
9. That the timeline in which the Applicant can lodge or prefer an appeal has since lapsed and there is therefore need for leave from court to file and/or lodge the same outside the statutory period.
10. The Applicant has received a copy of the decree from the 1st Respondent's advocate and they have threatened execution if same is not settled.
11. That the appeal is merited, arguable and raises pertinent points of law with overwhelming chances of successes and the Applicant is willing to abide by terms and conditions as the honourable court may deem fit and expedient as pertains to granting stay of execution. And that unless the orders are granted, the Applicant stand deprived of a window to ventilate the intended appeal before the superior court.
12. Charles depones that the 1st Respondent herein is keen to execute the decree which execution will render the Applicants to suffer substantial loss and the intended appeal shall equally be rendered nugatory and/or an academic exercise unless an order staying execution of the judgment and decree of the trial court is issued.
13. Further, that the Respondent shall not be prejudiced if this application is allowed, in any event, the court will render itself on the appeal which is a right to the Applicant to be heard and Respondent will be given a chance to contest the appeal.
14. The 1st Respondent filed a replying affidavit dated 27th May, 2024 stating that the Applicant's application has no merits on facts and in law and there is no compelling reasons to disturb the lower court's exercise of its discretion and the same should be dismissed with costs instantly.
15. That pursuant to the judgment delivered in Nyahururu CMCC No. 18 of 2016, the Applicants were held liable for breach of a contract since the same was particularized with fraud and deceit and the Applicant's case in the lower court was dismissed with costs to the Respondent.
16. That the Applicants have not demonstrated the efforts they made or their advocates took to ensure that they acquired judgment in good time and as such the delay in filing the present application was



- inordinate with no explanations making these applications fatally defective and the same should be dismissed.
17. That the Applicants were not diligent in following up with the court registry to know whether judgment in this case had been delivered or not thus the conduct of the Applicant's in these applications demonstrate that they are misusing the court process to day execution of the judgment of the lower court.
 18. It is contended that the present applications are made in bad faith and crafted to waste court's time and deny the Respondents from enjoying the fruits of the judgment.
 19. It is averred that the Applicants have not demonstrated a prima facie good cause why the time for filing the intended appeal should be enlarged and have not demonstrated that the grounds of appeal are arguable owing to the fact that the 2nd Applicant admitted in evidence that there was a contract and he frustrated the said contract by failing to honour his part of the bargain.
 20. That the Applicants are undeserving parties of the court's discretion of granting the equitable remedy for extension of time having failed to discharge their burden of laying a basis to the satisfaction of court why leave to file an intended appeal out time should be granted and that the Respondents stand to suffer prejudice if the orders sought herein are granted. That the Respondent is aged 90 years old and further delay to execute the decree of judgment will only hinder and unjustly deprive her from enjoying fruits of the judgment delivered in her favour.
 21. It is urged that the Applicant has not satisfied the requirements of stay of execution, namely that;
 - a. The application must be made without unreasonable delay.
 - b. The Applicant must demonstrate that substantial loss may result if order of stay of execution is not granted.
 - c. The Applicant must furnish security.
 22. That the Applicants have not demonstrated that they will suffer substantial loss if the orders sought in the applications are not granted and they have not furnished any security for costs for the due performance in the circumstances this court orders the Applicants to make a security deposit of Kshs.2,000,000/-.
 23. That this court ought to not interfere with the exercise of discretion by the lower court as the Applicants have not shown how wrong the decision of the lower court was and it is a clear indicator that the Applicants are not ready to see this matter coming to an end but they want to go round courts doing forum shopping looking for favourable orders and wasting court's time.
 24. That stay of execution sought by the Applicant is superfluous and an abuse of the court process and it is fair and just that the Applicant's applications dated 16th April, 2024 and 30th April, 2024 be dismissed with costs.
 25. Both parties filed written submissions.
 26. I have had occasion to consider the application, the grounds and affidavit evidence in support thereto as well as the replying affidavit. I have had due regard to the learned submissions on record. The Issues for determination crystallize to 2;
 - a. Whether the court should exercise its discretion to grant the applicant leave to file his appeal out of time;



- b. Whether the applicant has met the prerequisite for grant of stay of execution pending appeal;
27. Section 79G of the *Civil Procedure Act* states:-
- “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 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.”
28. It is clear from the wording of section 79G of the *Civil Procedure Act* that before the court considers extension of time, the applicants must satisfy the court that they have good and sufficient cause for filing the appeal out of time. In *Diplack Kenya Limited vs William Muthama Kitonyi* [2018] eKLR the court explained that an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.
29. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that:- “The underlying principles a court should consider in exercise of such discretion should include:-
- a. Extension of time is not a right of any 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 by 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 respondent if the extension is granted;
 - f. Whether the application has been brought without undue delay.
30. Similarly in the case of *Paul Musili Wambua vs Attorney General & 2 Others* [2015] eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-
- “.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general, the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”
31. From the supporting affidavit and annexures to the same, it comes to the fore that the date when the judgement was delivered remains obscure and there is obvious dereliction of duty by the court in terms



of failure to notify the parties of the date of judgement and the quest to obtain the judgement was met with further attendant delay.

32. From the material on record and in line with the holding in *Diplack Kenya Limited vs William Muthama Kitonyi* [supra] the applicant has shown good cause for the delay in the filing of the appeal.
33. As regards the question whether the applicant has achieved the threshold for the grant of an order of stay of execution, the law is that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules and are stated as follows;
 1. “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.
 2. 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 1st 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.
34. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:
 1. Substantial loss may result to him/her unless the order is made;
 2. That the application has been made without unreasonable delay; and
 3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
35. Substantial loss was clearly explained in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR:-

“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.
36. The applicant is silent in his affidavit on how he stands to suffer substantial loss. The only time substantial loss is alluded to is at paragraph 18, 20 and 21 which I set out hereunder thus;



18. That in any event, I am ready and willing to abide by such terms and conditions as the honourable court may deem fit and expedient as pertains to granting stay of execution.
20. That the 1st Respondent herein is keen to execute the decree which execution will render me to suffer substantial loss.
21. That in view of the foregoing, it is imperative that the honourable court be pleased to grant leave to lodge an appeal albeit out of time and similarly to grant an order of stay of execution pending the hearing and determination of the intended appeal.
37. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show the manner in which execution will irreparably affect him or will alter the status quo to his detriment therefore rendering the appeal nugatory. No attempt was made to explain the manner in which the applicant would suffer substantial loss within the dictum in *James Wangalwa & Another vs Agnes Naliaka Cheseto* (supra). The decree in the instant matter is a monetary one and it has not been shown that the Respondent would not be in a position to refund the decretal sum should the appeal be successful.
38. On the material before court, the Applicant has failed to demonstrate that he would suffer substantial loss should execution proceed. The appellant has failed to demonstrate substantial loss. With that finding, a finding on offer of security becomes moot.
39. With the result that the application succeeds to the extent that leave to appeal out of time. The prayer for stay of execution fails.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF OCTOBER 2024

A.K. NDUNG’U

JUDGE

