



Kotecha v Forbros Tyres & Treads Limited (Miscellaneous Civil Application E083 of 2024 & Civil Appeal 108 of 2023 (Consolidated)) [2024] KEHC 12526 (KLR) (15 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12526 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS CIVIL APPLICATION E083 OF 2024
& CIVIL APPEAL 108 OF 2023 (CONSOLIDATED)
MW MUIGAI, J
OCTOBER 15, 2024**

BETWEEN

JAYESH KOTECHEA APPELLANT

AND

FORBROS TYRES & TREADS LIMITED RESPONDENT

*(Being an appeal from the Judgment and decree in Mavoko
CMCC no. 1497 of 2018 delivered on 4th December, 2023)*

RULING

Notice Of Motion

1. Vide a Notice of Motion dated 2nd April, 2024 filed in Court under Certificate of Urgency the Appellant herein seeks the following orders that:
 1. Spent.
 - SUBPARA 2.
Spent.
 3. This Court to grant leave to the Appellant/Applicant to file an appeal in terms of the Draft memorandum of Appeal filed herewith out of time against the judgment entered against him in Mavoko CMCC No. 1497 of 2018.
 4. This Court grants stay of execution of the judgment and decree entered on 4th December, 2023.
 5. The costs of this application be in the cause.
2. The grounds upon which this Application is based are on the body of the said Application.



Supporting Affidavit

3. The Application is supported by an affidavit sworn on even date by the Appellant/Applicant wherein he stated that the matter in the subordinate Court was initially filed on the 15th November, 2018 and only two Defendants were sued. On the 18th May, 2022 almost 4 years after the suit was filed the Plaintiff amended his Plaint dated 17th May, 2022 and enjoined the Appellant as the 3rd Defendant due to allegation that the Appellant was the Managing Director on the 1st and 2nd Defendants therein.
4. That the fact that he was the Managing Directors of the 1st and 2nd Defendants in the suit without more and without pleading any cause of action against the Appellant is not enough to enjoin him as a Defendant in the suit.
5. That the Trial Magistrate erred and misdirected herself in entering judgment against the Appellant on 4/12/2023.
6. The intended Appeal against the Judgment delivered on 4/12/2023 is not idle nor spurious but raised substantial issues of fact and of law.

Replying Affidavit

7. The Application is opposed by the Respondent's Replying Affidavit sworn 23rd April, 2024 by Jaison Jose, the Respondent's Managing Director herein.
8. He stated inter alia that the Appellant was enjoined as a party in the Lower Court File after a formal application was made and was duly allowed by the Trial Court; that the Appellant /Witness Statement marked as "JJ2" he described his role as the prime mover of the 1st and 2nd Defendant's businesses and the one who issued cheques that bounced which gave rise to the claim in the lower Court;
9. That the explanation on why the Appellant delayed to file his appeal has not been sufficiently explained as there is a record showing that the Respondents Advocates informed the Appellants Advocate on the judgment date, drawing of decree, demand for payment of decretal amount and proclamation of the Auctioneer.
10. That the Application for stay is meant to deny the Respondent the fruits of the Lower Court Judgment.
11. That the Appellant has not demonstrated how he stands to suffer substantial loss if the orders sought are not granted and finally that the Appellant has not adduced any evidence in the application to prove his financial ability to provide security for due performance of the judgment and decree in favour of the Respondent.
12. The matter was canvassed by written submissions.

Submissions

Appellant Applicant's Submissions

13. The Appellant/Applicant submitted that the Notice of Motion came up for interpartes hearing on 13/05/2024 and directions were given that the Appellant/Applicant files and serves submissions within 21 days.



14. The said submissions by the appellant shall be limited to the prayer of stay of execution of judgment and decree pending the hearing and determination of the Appeal which has already been filed as Machakos HCCA No.108 of 2023.
15. In the Amended Plaint there is no cause of action pleaded against the Appellant or indeed any relief sought against him.
16. In the Amended Plaint, the only reason Jatesh Kotecha was joined as 3rd Defendant in Mavoko CMCC No 1497 of 2018 Forbros Tyres& Retread Limited (vs) Midland Tyres & Retread Limited & 2 Others was because he was the Managing Director of the 2 Defendant Companies. The 1st & 2nd Defendants are by averments in the Plaint & Amended Plaint Companies incorporated under the *Companies Act* 2015 and that being the case are separate and distinct persons from Jayesh Kotecha. This position was settled long ago in the case of Aron Salomon vs Salomon & Company Limited (1897) AC 22. On this being the law one must wonder on what footing the Trial Court Could possibly enter judgment against Jayesh Kotecha.
17. The Trial Court had no justification nor basis of entering judgment against the Appellant.

Respondent's Submissions

18. On behalf of the Respondent the following issues are raised for determination
 - a. Whether the Appellants Application for grant of leave to file appeal out of time is merited/
 - b. Whether the Appellant has met the threshold for stay of execution?
19. The decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion just like any other exercise of discretion by the court.
20. The Supreme Court in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR laid down the principles that govern the exercise of discretion in applications for extension of time as follows:
 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 for 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. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 5. Whether there will be any prejudice suffered by the respondents if the 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.”
21. On whether the Appellant has tendered a satisfactory reason for delay? The answer to this question is No. Judgment was delivered by the lower court on 4th December,2023. The period for filing a



memorandum of appeal lapsed on 4th January,2024. The Appellant intends to file a memorandum of appeal after the lapse of 4 months.

22. Order 42 rule 6(2) of the Civil Procedure Rules provides the principles guiding the grant of stay of execution pending appeal.

The conditions for grant of stay are;

- i. The application must be made without unreasonable delay
- ii. Arguable Appeal
- iii. Proof of substantial loss
- iv. Furnishing security

23. The Appellant has not demonstrated to this court that it stands to suffer substantial loss. The Respondent's case was heard and a definitive conclusion provided in the Judgment, he therefore should enjoy the fruits of his judgment, which he is entitled to, being the successful party. The Application has also been made 4 months post-delivery of judgment hence there has been unreasonable delay. Moreover, the Appellant hasn't furnished security.

24. The Respondent has annexed to its application its financial statement which shows that it is healthy financially and can readily repay the decretal sum in the unlikely event that the appeal succeeds. Thus, the applicant will not suffer any substantial loss which cannot be repaid.

Determination

25. I have considered the pleadings and the submissions filed as well as the authorities relied upon.
26. The issues that commend for determination are whether the applicant has demonstrated the Application to file appeal out of time is merited and that the orders of stay of execution pending appeal are merited.

Leave To Appeal Out Of Time

27. The Trial Court judgment was delivered in Mavoko CMCC No. 1497 of 2018 on 4th December, 2023. The Application for leave to file appeal out of time was filed on 2/4/2024 after a lapse of 4 months and the Applicant explained that his Advocate was not aware of the delivery of the judgment. The Appellant explained further that the judgment was not availed until much later and he became aware of the judgment on 10/1/2024. In the meantime, he wrote to the Court seeking to obtain a copy of the judgment yet the said letter was not attached to the Application. After the Proclamation of 12/3/2024 is when the instant Application was filed.
28. The Respondent found this explanation unsatisfactory and vague reason as the Advocate failed to appear physically or online.
29. The Court considers the basis of application for leave out of time and exercises discretion judiciously. In the case of Paul Wanjohi Mathenge vs Duncan Gichane Mathenge 2013 eKLR JA ,Otieno -Odek stated;

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the



appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”

30. In Joseph Wanjohi Njau -vs- Benson Maina Kabau- Civil Application No. 97 of 2012 K. M’noti, J.A held,

“The Court of Appeal has observed that an arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before the Court.”

31. In Richard Nchapi Leiyagu -vs- IEBC & 2 others Civil Appeal No. 18 of 2013, this Court expressed itself as follows:-

“The right to a hearing has always been a well protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”

32. The above authorities disclose right to hearing as enshrined to Art 28 CoK access to justice takes priority over human error. The right of appeal against enjoying fruits of judgment prevails. The delay of 4 months is not inordinate and the explanation is plausible and the delay of obtaining the judgment should be visited on the Applicant. The Respondent who suffers any prejudice is entitled to be compensated by costs. The leave to file appeal is granted.

Stay Of Execution

33. The guiding principles for grant of stay of execution pending appeal are well established. These principles are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which is to the effect that:

“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.”

34. In the case of Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal observed thus:

“whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that 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. According to section 1A (2) of the [Civil Procedure Act](#):

“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.”

34. As to what substantial loss is, the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, observed 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.”

35. In the instant case, the Plaintiff/Respondents submitted and disclosed financial records of the Companies as per annexures marked JJIO. The Respondent is deprived of its fruits of the judgment.

36. Platt, Ag. JA (as he then was) in *Kenya Shell Limited vs. Kibiru* [1986] KLR 410, at page 416 expressed himself as follows:

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”.

37. In my considered view, where the sum involved is a large amount the court may have regard that the payment of such a sum may hinder the Applicant’s ability to pursue his appeal hence rendering the said appeal nugatory. In the instant case the amount involved is more than Kshs 10 million.

38. Under Order 42 rule 6 aforesaid, the Applicant is required to offer security for the due performance of the decree and the Court is entitled to take into account the fact that no such security has been offered in deciding an application thereunder.

39. In *Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others* [2015] eKLR, where it was held that:

“... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost.”

40. There is an arguable appeal that is an issue(s) to be ventilated on appeal whether successful or not is a matter for the Appellate Court to determine. Leave to file appeal is granted but this Court judicially noticed the appeal is already filed a separate file which is an abuse of Court process and both files



shall be consolidated. On substantial loss the Applicant has a right to be heard and the Respondent compensated through costs after the outcome of the appeal.

41. Taking all relevant factors into account and in order not to render the intended appeal illusory while at the same time securing the interests of the successful Plaintiff Company.

Disposition

1. The Court grants stay of execution pending appeal of the decree herein on condition that the Applicant's Advocate and Respondent's advocate on record open a joint interest earning Account Ksh 1,000,000/- of the decretal sum within 90 days.
 2. The said conditions to be met within 90 days from the date of this ruling and in default the application shall be deemed to have been dismissed with costs and the Respondent will be at liberty to execute.
 3. Upon compliance of the above terms; Appeal is duly filed, LCF retrieved and Record of Appeal to be filed and served.
 4. The costs of the application abide the outcome of the Appeal.
- 42 It is so ordered.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS HIGH COURT THIS 15TH DAY OF OCTOBER 2024 (PHYSICAL/VIRTUAL CONFERENCE).

M.W. MUIGAI

JUDGE

