



REPUBLIC OF KENYA



Maina v Rono (Civil Appeal 182 of 2024) [2024] KEHC 12206 (KLR) (11 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12206 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 182 OF 2024
RN NYAKUNDI, J
OCTOBER 11, 2024**

BETWEEN

ACQUILLA MOSETI MAINA APPELLANT

AND

JOSEPHINE JEPKOSGEI RONO RESPONDENT

RULING

Representation:

Kimondo Gachoka & Co. Advocates

1. Before me for determination is the Notice of Motion dated 2/9/2024 wherein the Applicants seeks the following orders:
 1. Spent.
 2. That the Honourable Court be pleased to extend time for lodging of a Memorandum of Appeal against the judgment of Hon. K. Mukabi (PM) on 28/6/2024 in Eldoret CMCC No.748 of 2019, Josephine Jepkosgei Rono Vs. Acquilla Moseti Maina.
 3. That the Memorandum of Appeal dated 26/7/2021 be deemed as properly filed.
 4. That pending the hearing and determination of the application herein, there be stay of execution of the judgment made on 28/6/2024 in in Eldoret CMCC No.748 of 2019, Josephine Jepkosgei Rono Vs. Acquilla Moseti Maina and of all subsequent orders entered against the Appellant/Applicant emanating therefrom.
 5. That pending the hearing and determination of the appeal herein, there be stay of execution of the judgment made on 28/6/2024 in in Eldoret CMCC No.748 of 2019, Josephine Jepkosgei Rono Vs. Acquilla Moseti Maina and of all subsequent orders entered against the Appellant/Applicant emanating therefrom.



6. That pending the hearing and determination of the intended appeal the Applicant herein do avail security by way of Bank Guarantee from Family Bank for the whole judgment sum.
7. That the costs of and incidentals to this application abide the result of the Appeal.
2. The Application is premised on the grounds therein and it is further supported by the Affidavit sworn by the Applicant on the same date.
3. In the Affidavit the Applicant deposed that judgment was delivered in Eldoret CMCC No.748 of 2019, Josephine Jepkosgei Rono Vs. Acquilla Moseti Maina on 28/6/2024 wherein the Plaintiff was awarded a Net award of Kshs. 310, 600/= exclusive of costs and interest, that being dissatisfied with the judgment he has just instructed his Advocates to institute an appeal against the said judgment. The Applicant maintains that judgment having been delivered on 28/6/2024, he having been insured by Directline Assurance Company Limited had a difficult time in communicating and holding deliberations with his insurer due to the internal strife at the management level of the Company hence prompting the intervention of the Insurance Regulatory Authority which in turn occasioned difficulty in obtaining and issuing proper, express and timely instructions to his Counsels, that the period in which the judgment dated 28/6/2024 could be appealed according to statute lapsed on 20/7/2024 hence the need to seek an extension of time within which to lodge the instant appeal and have it deemed as properly filed, that upon the easing of the internal strife at management level 60 days had lapsed after the delivery of the said judgment whereupon instructions were issued to institute an appeal.
4. According to the Applicant, the appeal raises viable grounds of appeal which grounds warrant the intervention of the Court of Appeal, that the delay in filing this appeal was not deliberate and has been reasonably explained. The Applicant further deposed that 30 days stay of execution by the trial Court have since lapsed and unless stay of execution is granted the Application and consequently the intended appeal will be rendered nugatory and the Appellants will suffer irreparable loss and damage. The Applicant is apprehensive that the Respondent as the decree holder may proceed and levy execution against them as the 30 days stay period granted by the trial Court has lapsed a couple of days before lodging of this Application, that the Application has been brought without unreasonable and undue delay. The Applicant further deposed that the judgment is of a substantial amount and that he is apprehensive that if the Respondent is paid, she may deal with the same in a manner that is prejudicial to the Applicant's companies and if the intended appeal is successful, he might not be able to recover from the Respondent, that the Respondent has not disclosed nor furnished the Court with any documentary evidence to prove her financial standing, that his insurer is ready, willing and able to furnish the Court with a Bank Guarantee issued by Family Bank as security to the Court for the entire judgment sum.
5. In conclusion, the Applicant deposed that the Application has been made in good faith and it will not occasion any prejudice to the Respondent and it has been brought promptly and without unreasonable delay.

The Response

6. The Application is opposed by the Respondent vide her Replying Affidavit sworn on 16/9/2024.
7. In the Affidavit, she deposed that the Applicant's Application now before Court is without merit and ought to be dismissed with costs, that the judgment in the trial Court was delivered on 28/6/2024 and no good reason has been given for failure to file the appeal within the stipulated timelines, that the purported notice that has been relied upon for failure to act was declared null and void by the Commissioner of Insurance a day after it was issued, that delay is inordinate and inexcusable in the



circumstances, that from the annexed Memorandum of Appeal it apparent, the instructions to appeal if any, were given on time but no explanation has been given why the same was not filed, that the Applicant had been granted stay of execution by the trial Court at the time of delivery of judgment which stay has now lapsed and this Application is a ploy to reinstate the orders of stay.

8. The Respondent contends that she stand to suffer loss and damage if the Application is allowed as presented as she has been waiting to be compensated for the injuries she sustained since 2019, that the Applicant's Counsel agreed with her Advocates on record on the costs of the suit but the Applicant is not referring to it all, that the Applicant ought not to be allowed to use internal issues within its insurer to delay the cause of justice. In the end, the Respondent prayed that the Application be dismissed with costs.
9. None of the parties filed their respective submissions.

Determination

10. I have carefully considered the Application, the grounds and supporting affidavit, the response thereof as well as the submissions and the applicable law. The main issues for determination are whether the Applicant deserves the orders for extension of time to file an appeal and secondly, whether this Court should stay execution of decree in the lower Court.
11. I begin with the Application for leave to file an appeal out of time. In essence in approaching the High Court for an appeal any such litigant has 30 days as provided in Section 79(G) of the [Civil Procedure Act](#) to lodge the appeal.

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.

12. Some of the usual conditions precedent to be fulfilled by the movant are well captured in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* CA No. 255 of 1997 thus:

“It is now 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 the Court takes into account in deciding whether to grant 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.”

13. It is trite to note that 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. That discretion, however, must be exercised judiciously.
14. An analysis of the record and evidence shows that the trial Court delivered its judgment on 28/6/2024. The present Application was filed on 10/9/2024 being 2 months and 14 days after judgment was delivered. The Applicant has explained the delay occasioned in filing the intended appeal. Issues surrounding the management of the Applicant's insurer, Directline Assurance Company Limited have been in public domain, I deem the delay in question to be justified and let the Applicant to proceed with the intended appeal.



15. The Application for stay of judgment is primarily governed by the terms of Order 42 Rule 6 of the Civil Procedure Rules. The conditions to be met by an Applicant in order to be entitled to an order for stay are provided in the following terms:
6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 order set aside.
- (2) No order for stay of execution shall be made under sub-rule (1) unless—
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
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.
16. Regarding stay of execution Order 42 Rule 6 of the Civil Procedure Rules governs the conditions to be met by a party to the proceedings seeking stay of execution of the Judgment. It provides that the Application must be filed without undue delay. At the hearing of the Application, it must be demonstrated that the Applicant will suffer substantial loss if the order on stay is denied. That the Court considering the Application does factor security for due performance of the decree.
17. The approach to be adopted by the Court on an Application for stay of execution is outlined in several decisions of the High Court and Court of Appeal including the cases of Reliance Bank Ltd v Nor Lake Investments Ltd {2002} 1EA 227, Githunguri v Jimba Credit Corporation Ltd {1988} KLR 838, Damji Pragji Mandavia v Sara Lee Household and Body Care Ltd CA No. 345 of 2004, National Bank of Kenya Ltd v Jivraj Rai Shi and Brothers Ltd Civil Application No. 153 of 2002.
18. The principles enunciated in the above decisions are as follows for grant of a stay of execution pending appeal thus:
- (1). That there is sufficient cause for the grant of the order for stay of execution of the decree or order.
- (2). That the Application has been made without unreasonable delay.
- (3). That the substantial loss may result to the applicant unless the order is made.
- (4). That the successful party is entitled to the enjoyment of the fruits of his or her success.
- While on the other hand, the aggrieved party is entitled to exercise his or her constitutional right of appeal and the intended appeal succeeding should not be rendered nugatory.
19. Applying the above principles, I have perused the record and corresponding Notice of motion. In my view the Applicant has discharged the burden on the conditions precedent based on the affidavit evidence to support exercise of discretion in its favour under Order 42 Rule 6 of the Civil Procedure Rules. Consequently, an order for stay of execution pending appeal is granted on condition that the Appellant/Applicant provides a bank guarantee from Family Bank Limited as security for the entire decretal sum pending the hearing and determination of the Appeal.



20. In default of satisfying this condition, the Applicant's right of appeal is liable to being non-suited. The Respondent to be at liberty to execute the Judgment of the trial Court. Further, the Applicants be at liberty upon fulfilling the condition on deposit of security for due performance of the decree within the stipulated period to file the record of appeal and have it served upon the Respondent within 30 days from the date of compliance with clause No. (2) herein above.
21. The costs of the Application to abide the intended appeal
22. It is ordered so.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 11TH DAY OF OCTOBER, 2024

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R. NYAKUNDI

JUDGE

