



Mugo & 2 others v Ndiritu (Suing as the administrator of the Estate of Joseph Ndura Gichuhi - Deceased) (Miscellaneous Civil Application E005 of 2022) [2023] KEHC 831 (KLR) (9 February 2023) (Ruling)

Neutral citation: [2023] KEHC 831 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
MISCELLANEOUS CIVIL APPLICATION E005 OF 2022
FN MUCHEMI, J
FEBRUARY 9, 2023**

BETWEEN

**STANLEY NDICHU MUGO 1ST APPLICANT
KENNEDY ONKOBA AGANI 2ND APPLICANT
SIDIAN BANK LIMITED 3RD APPLICANT**

AND

JOHN NGATIA NDIRITU (SUING AS THE ADMINISTRATOR OF THE ESTATE OF JOSEPH NDURA GICHUHI - DECEASED) RESPONDENT

RULING

Brief facts

1. This application dated 3rd March 2022 brought under Section 3, 3A of the *Civil Procedure Act*, Order 42 Rule 6, Order 50 Rule 5, Order 51 Rules 1 & 3 and Order 22 Rule 22 of the Civil Procedure Rules seeks leave to file an appeal out of time against the judgment in Karatina PMCC No. 18 of 2019 delivered on 14th December 2021. The applicants further seek for orders of stay of execution of the decree and judgment in the same case pending the hearing and determination of the appeal.
2. The respondent filed a Replying Affidavit dated 12th April 2022, in opposition to the application.

Applicants' Case

3. The applicants depose that time to file an appeal has expired and that failure to comply with time lines was not intentional but the reason for delay was due to the fact that the advocate in conduct of the matter failed to diarize the matter and resigned abruptly without notice. The applicants state that they came to know of the judgment when they were served with the respondent's bill of costs. Upon



realization of the judgment, the applicants immediately informed their insurers, Directline Assurance, who instructed them through email to file an appeal.

4. The applicants aver that they never received the email due to some technological glitch. On 2/3/2022, the insurers called the respondents inquiring whether the email had been filed and that is when the applicants realized that an email had been sent which they did not receive.
5. The applicants contend that they intend to lodge an appeal against the judgment of the trial court delivered on 14/12/2021. They further depose that the delay occasioned in presenting the appeal is inordinate and in any event the intended appeal has high chances of success.
6. The applicants are apprehensive that the respondent shall proceed to execute and attach their property since stay was not granted in the trial court.
7. The applicants aver that the respondent is a man of straw and if the decretal amount is paid to him they shall not be able to recover the said funds in the event that the appeal succeeds thus rendering the appeal nugatory. Moreover, the applicants state that their insurers are ready, willing and able to furnish the court with a bank guarantee as security to the court.
8. The applicants urge the court to grant them stay of execution and extend time for filing the appeal. It is further stated that no prejudice shall be suffered by the respondent if this application is allowed.

The Respondent's Case

9. The respondent states that the application is an abuse of the court process and that it is meant to delay him from enjoying the fruits of his judgment. The respondent argues that the judgment in issue is a monetary decree for Kshs. 1,522,905/- and no substantial loss shall be suffered by the applicant as he is a large-scale farmer and thus a man of means. In the event the decretal amount is paid to him, and the applicant turns out to be successful, he shall have the means and ability to refund the same. The respondent contends that if the court is inclined to grant the application the court ought to direct the applicant to pay half the decretal amount to him pending the outcome of the appeal.
10. Parties hereby disposed of the application by way of written submissions.

The Applicants' Submissions

11. The applicants submit that judgment was delivered on 14/12/2021 where the respondent was awarded Kshs. 1,522,905/- plus costs and interest. The applicants further rely on the cases of Focin Motorcycle Co. Limited vs Ann Wambui Wangui & Another [2018] eKLR and G. N. Muema P/A (Sic) Mt. View Maternity & Nursing Home vs Miriam Maalim Bishar & Another [2018] eKLR and submit that they stand to suffer substantial loss as the respondent might impound and proclaim the properties of the insured, who continue to pay insurance premiums. Thus the loss would be dire and double. Although the respondent stated in his affidavit that he is a large-scale farmer, the applicants argue that he did not provide any evidence to support his claim. The respondent ought to have produced bank statements or pay/bonus slips. The applicant further argues that it is a reputable insurance institution with financial capacity and muscle to pay the decretal amount if the appeal fails.
12. The applicants contend that the instant application was filed expeditiously. Judgment was delivered on 14/12/2021, stay of execution was granted till 14/1/2022 and the instant application was filed on 3/3/2022. The applicants argue that the delay is for about 1 month and 11 days, which is reasonable and negligible. Moreover, the applicants argue that their reason for delay is plausible. To support their contentions, they refer to the case of Kinyunjuri Muguta vs Wotuku Muguta [2018] eKLR.



13. The applicants further reiterate that they have undertaken to deposit security in the form of a bank guarantee from Family Bank should the court grant the orders of stay of execution. The applicants further argue that the respondent has not demonstrated any prejudice that he would suffer if the orders sought are granted. Furthermore, the applicants contend that if the orders sought are not granted, the respondent will impound and auction their assets thus rendering the appeal nugatory.
14. The applicants rely on the case of Housing Finance Company of Kenya vs Sharok Kher Mohammed Ali Hirji & Another [2015] eKLR and submit that the intended appeal raises cogent points of law and facts that are arguable and thus the appeal has high chances of success. The applicants further argue that the grounds raised in their draft memorandum of appeal include the trial court applying the wrong principles of law to arrive at the award given at quantum which was excessive and unconventional to previous precedents.

The Respondent's Submissions

15. The respondent submits that the applicant has not met the requirements for granting of stay of execution pursuant to Order 42 Rule 6 of the Civil Procedure Rules. The respondent argues that the applicants have not demonstrated what loss they stand to suffer nor have they attached a decree to persuade the court that indeed execution is eminent. The respondent states that he is a large scale farmer and thus a man of means and should the decretal sum be paid to him and the appeal succeeds, he has the means and ability to refund the same. Moreover, the respondent submits that there is no way a monetary decree can be rendered nugatory if paid to a successful litigant and the applicants are only aiming to deny him the fruits of his judgment.
16. The respondent submits that no decree or any prove of intention or threat to execute has been tendered by the applicants and as such, the averments of threat to execute are mere red herrings. In any event, if there was execution in motion, the respondent argues that the same would be a lawful process flowing from a lawful judgment from a court of competent jurisdiction.
17. The respondent contends that the application has been brought after inordinate delay for the judgment was delivered on 14/12/2021 and further, the applicants have not given sufficient reasons for the delay. As such, the respondent submits that the application is unmeritorious and frivolous and ought to be dismissed with costs. The respondent supports his submissions by relying on the cases of Nairobi High Court Civil Appeal No. 327 of 2021 Jessikay Enterprises Ltd vs George Kahoto Muiruri and Nairobi High Court Misc. Application No. 453 of 2017 Congress Rental South Africa vs Kenyatta International Convention Centre & 2 Others.
18. In the event the court is inclined to allow the application, the respondent contends that the court direct the applicants to pay half the decretal sum to him.

The Law

Whether the court should exercise its discretion to grant the applicants leave to file their appeal out of time;

19. 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.

20. It is clear from the wording of section 79G of the *Civil Procedure Act*, that before the court considers extension of time, an applicant must satisfy the court that that he has good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of *Diplack Kenya Limited vs William Muthama Kitonyi* [2018]eKLR 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.
21. 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.
22. 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.”

23. The applicants state that they were not aware of the judgment delivered in *Karatina PMCC No. 18 of 2019* as the advocate in personal conduct of the matter at the time failed to diarize the matter and ceased to act for them without notice. The applicants state that they came to realize of the delivery of judgment when they were served by the respondent’s bill of costs. The applicant further stated that they informed their insurers of the judgment who instructed a counsel to file an appeal, which email, counsel states she never received due to a likely technological glitch. Counsel further averred that she realized this when the insurers called inquiring on whether an appeal had been filed. I have perused the



court record and noted that judgment was delivered on 14th December 2021. The instant application was filed on 15th March 2022. This is a duration of about 3 months since judgment was delivered. However, this court in exercising its discretion, is of the opinion that the duration of 3 months for the delay is not inordinate given the breakdown of communication between the applicants and their advocate. Additionally, I do not see any great prejudice that will be occasioned to the respondent if time is extended to allow the applicants to file their appeal. It is therefore my considered view that the applicants are deserving extension of time to file the appeal.

Whether the applicants have satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

24. It is trite law 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 stipulates:-
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.
25. 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.
26. These principles were enunciated in *Butt vs Rent Restriction Tribunal* [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:-
1. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
 2. Secondly, 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 the appeal court reverse the judge’s discretion.



3. Thirdly, 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. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. 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 of costs as ordered will cause the order for stay of execution to lapse.

Substantial loss

27. 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.

28. The applicants argued that the appeal will be rendered nugatory and substantial loss suffered if execution of the decree proceeds as there is a likelihood that the respondent will be unable to repay the decretal sum should the appeal succeed. The respondent asserted that he is a large-scale farmer and therefore a man of means and that he would be in a financial position to repay back the decretal sum in the event the appeal succeeds.

29. In the case of *National Industrial Credit Bank Limited vs Aquinas Francis Wasike and Another* [2006] eKLR the Court of Appeal stated that:-

This court has said before and it would bear repeating that while the legal duty is on the applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.

30. The judgment awarded by the trial court is Kshs. 1,522,905/- which is a substantial sum. The respondent has averred that he is a man of means although he has not annexed any proof to support his contentions. It is therefore my considered view that given the substantial amount in the decree and in the absence of proof of the respondent's financial means, it may be well that if the decretal sum is paid out, the applicants may be unable to recover the sums in the event the appeal succeeds, thereby rendering the appeal nugatory. As such, I find that the applicants have demonstrated substantial loss that they stand to suffer.



Has the application has been made without unreasonable delay.

31. The instant application was filed on 15th March 2022 and judgment was delivered on 14th December 2021. This is a duration of about 3 months since judgment was delivered. It is noted that the applicant had applied for stay in the court below which was declined as deposed in the applicant's affidavit. All considered, I am of the view that the delay of 3 months is not inordinate.

Security of costs.

32. The applicant is required to give security for the due performance of the decree. The purpose of security was explained in the case of *Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* [2014] eKLR the court stated:-

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.

33. Evidently, the issue of security is discretionary and it is upon the court to determine the same. Notably, the applicants have stated that they are willing to offer security in the form of a bank guarantee from Family Bank. The respondent argues that in the event the court should consider allowing the application herein, it ought to direct that the applicants pay him half the decretal sum.
34. Additionally, the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Samvir Trustee Limited vs Guardian Bank Limited* [2007] eKLR the court stated:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”

35. The court in granting stay has to carry out a balancing act between the rights of the parties. The question then begs as to whether there is just cause for depriving the respondent of her right to enjoy her judgment. The respondent states that the applicant has not satisfied the conditions to warrant him stay of execution. The applicants on the other hand states that their appeal has high chances of success and if the orders sought are not granted, the appeal shall be rendered nugatory.
36. I have perused the grounds of appeal and noted that a question of fact and law have been raised on the issue of quantum. The evidence adduced at the trial court has also been challenged. Without going to the merits of the appeal, it is my considered view that the appeal raises arguable points of facts and law. In the interests of justice, it is my view, that the applicants be granted a chance to ventilate the issues on appeal.



37. In conclusion, I find this application merited and I allow it in the following terms:-

- a. That orders for stay of execution pending hearing and determination of the appeal do issue on condition that the applicant deposits half of the decretal amount in an interest earning account in the joint names of the counsels on record for the parties within thirty (30) days.
- b. That in default of order (a), the orders of stay of execution to lapse automatically.
- c. That the applicants have fourteen (14) days to file and serve their memorandum of appeal
- d. That the costs of this application to abide in the appeal.

38. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 9TH DAY OF FEBRUARY, 2023.

F. MUCHEMI

JUDGE

Ruling delivered through videolink this 9th day of February, 2023

