



REPUBLIC OF KENYA



**KENYA LAW**  
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**Abonyo t/a Patem Enterprises v BOM Sagegi Mixed Secondary School (Miscellaneous Civil Application 19 of 2022) [2023] KEHC 2098 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2098 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
MISCELLANEOUS CIVIL APPLICATION 19 OF 2022**

**RPV WENDOH, J**

**MARCH 16, 2023**

**BETWEEN**

**MARY FRANCY ABONYO T/A PATEM ENTERPRISES ..... APPLICANT**

**AND**

**BOM SAGEGI MIXED SECONDARY SCHOOL ..... RESPONDENT**

**RULING**

1. The application for consideration is the one dated July 11, 2022 and filed in court on July 12, 2022. The applicant seeks the following orders:-
  1. Spent.
  2. That pending the hearing and determination of this application interparties, there be an order of stay of execution of judgement delivered o February 28, 2022 in Migori PMCC No 009 of 2021;
  3. That pending the hearing and determination of the intended appeal, there be an order of stay of execution of judgement delivered on February 28, 2022 in Migori PMCC No 7 of 2021;
  4. That this court be pleased to grant leave to the applicant to appeal the judgement in Migori PMCC No 7 of 2021;
  5. Costs be in the cause.
2. The grounds upon which the application is based, are found in its body and the supporting affidavit of Mary Francy Abonyo, the applicant. The applicant deponed that she was the plaintiff in Migori PMCC No 9 of 2021 where she claimed of Kshs 1,460,000/= against the respondent for the value of cereals supplied to the school which they refused to pay; that the judgement was delivered on February 28, 2022 in favour of the respondent notwithstanding that the respondent admitted that the school owed



- her; that being aggrieved by the judgement, she applied and paid for certified copies of the proceedings on March 16, 2022 but there was delay in obtaining the proceedings.
3. Further, the applicant deposed that after delivery of the judgment, the principal of the school called and told her of their intention to pay, only to learn later that the school had filed a bill of costs and they were in the process of execution; that she has an arguable appeal with high chances of success and this application is not an afterthought; that in the event the stay orders are not granted, she stands to suffer irreparable loss and the intended appeal will be rendered a nugatory.
  4. The application was opposed. The respondent through Enosh Matongo Nyambego, the principal of the respondent, swore and filed a replying dated July 28, 2022. He deponed that judgement was delivered on February 28, 2022 in the respondent's favour and a bill of costs was drawn and assessed by the trial court on June 2, 2022; that the applicant has not established that she has an arguable appeal with probability of success; that the application is an afterthought to arrest the execution of costs awarded to the respondent as the time for filing an appeal lapsed on March 28, 2022.
  5. The respondent further deposed that there is no application filed for extension of time to file an appeal out of time by the applicant hence the instant application is an abuse of the court process; that it is settled law that stay of execution cannot attach to a negative judgement or order and that only positive orders may be stayed; that the applicant has not established that the respondent is incapable of refunding the costs if the intended appeal succeeds. The respondent asked this court to dismiss the application with costs.
  6. The court directed that the application be canvassed by way of written submissions. On January 19, 2023, this court directed that the applicant serves her submissions and the respondent responds to the submissions. When this application came for a further mention on February 13, 2023 to confirm compliance, the applicant did not appear in court despite being served. None of the parties filed their submissions.
  7. The application is one of stay pending appeal and leave to appeal out of time. Order 42 Rule (6) (1) and (2) of the [Civil Procedure Rules](#) makes provision for stay pending appeal 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 order set aside.
    - (2) 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."
  8. In order for orders of stay of execution to issue, the applicant should demonstrate;
    - a. She will suffer substantial loss if stay is not granted;
    - b. That the application has been filed without unreasonable delay;



- c. The applicant is willing to furnish security for the due performance of the decree;
- d. The applicant has an arguable appeal.
9. The respondent's argument is that no stay orders can issue since the judgement and order from the trial court was a negative order. The applicant admitted in her application that her suit was dismissed with costs to the respondent. Section 2 of the *Civil Procedure Act* defines a decree holder as one with an order/decree that is capable of being executed. It gives a positive tenor. From the averments of both parties, the applicant's suit was simply dismissed with costs to the respondent.
10. In *Co-operative Bank of Kenya Limited vs Banking Insurance & Finance Union (Kenya) (2015) eKLR* the Court of Appeal (Kantai JA) held as follows: -
- ‘ An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a 'positive order' – either an order that has not been complied with or has partly been complied with . See, for this general proposition, the holding of the Court of Appeal of Uganda in *Mugenyi & Co Advocates v National Insurance Corporation (Civil Appeal No 13 of 1984)* where it was stated:
- ‘... .. an order for stay of execution must be intended to serve a purpose ....’
11. Further, in *Kenya Commercial Bank Limited vs Tamarind Meadows Limited & 7 Others (2016) eKLR*, the Court of Appeal expounded on stay of execution by stating:-
- In *Kanwal Sarjit Singh Dhiman v. Keshavji Juvraj Shah [2008] eKLR*, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows: -
- ‘ The 2<sup>nd</sup> prayer in the application is for stay (of execution) of the order of the superior court made on December 18, 2006. The order of December 18, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see *Western College of Arts & Applied Sciences vs Oranga & Others [1976] KLR 63* at page 66 paragraph C).’
12. Bearing in mind the definition of a decree under Section 2 of the *Civil Procedure Act*, the facts presented before this court is that there is no order or subsequent decree capable of being executed for an order of stay of execution to issue.
13. On the leave to appeal out of time, Section 79G of the *Civil Procedure Act* provides that appeals from subordinate courts should be filed within thirty (30) days from the date of judgement. The judgement herein was delivered on February 28, 2022. The appeal ought to have been lodged on or about March 28, 2022.
14. In *Edith Gichungu Koine vs Stephen Njagi Thoithi (2014) eKLR* the Court of Appeal gave guidelines on the factors a court has to take into account before granting extension to file an appeal out of time:-
- ‘Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but no limited to, the period of delay, the reasons for the



delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.'

15. On the period and reasons for the delay, the instant application was filed on July 11, 2022. This is a period of about 4 months after the lapse of the statutory period of 30 days. The reason given by the applicant for the delay was that she paid and applied to be supplied with the certified copies of the proceedings but the same have not been availed to enable her to file a record of appeal. Order 42 Rule 1 provides that an appeal is commenced with filing of a memorandum of appeal. There is no requirement that a party has to file a complete record of appeal at once. The applicant has annexed to her application a draft copy of the memorandum of appeal. That is the document which the applicant should have used to commence the appeal proceedings within the required statutory period. The delay of four months has not been satisfactorily explained.
16. In addition, the annexures in the applicant's application offend the provisions of Rule 9 of the *Oaths and Statutory Declarations Act* which provides: -

All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner and shall be marked with serial letters of identification.'
17. The omission to seal the exhibits properly has been a subject of determination and it is well settled that such documents cannot be said to be part of the evidence that an applicant intends to rely on. In essence, there is no evidence which the applicant has presented to this court and the allegations remain unsupported. See *Solomon Omwega Omache & Another vs Zachary O Ayieko & 2 Others (2016) eKLR* and *Shadrack Muasya Mutunga v St Catherine Schools Ltd & another (2020) eKLR*.
18. Considering the conduct of the applicant in these proceedings, that though this is her application, she has not been keen to attend court or prosecute it. The applicant has also not demonstrated the steps or subsequent letters written to the registry requesting to know the status of the proceedings. There is generally lack of good faith and diligence on the applicants part and coupled with failure to seal the exhibits the instant application is incompetent and is an abuse of the court process.
19. For the above stated reasons, this court finds no merit in the application dated July 11, 2022 and the same is hereby dismissed with costs to the respondent.

**DATED, DELIVERED AND SIGNED AT MIGORI THIS 16<sup>TH</sup> DAY OF MARCH, 2023**

**JUDGE**

**Ruling delivered in the presence of:-**

Mr. Abisai for the Applicant

No appearance for the Respondent

**Nyauke Court Assistant**

