Badar Hardware Limited & another v Waweru & 3 others (Civil Appeal 23 of 2022) [2023] KEHC 1994 (KLR) (10 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1994 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 23 OF 2022

OA SEWE, J

MARCH 10, 2023

BETWEEN

BADAR HARDWARE LIMITED ..... 1ST APPELLANT

JIMMY KIMEI MUTHOKA ..... 2ND APPELLANT

AND

MARY MWIHAKI WAWERU ..... 1ST RESPONDENT

JANE NJERI WAWERU ..... 2ND RESPONDENT

JOSEPH GATHITHU MWANGI (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF PETER GATHITHU MWANGI) ..... 3RD RESPONDENT

MAGUNA ANDU WHOLESALERS (K) LTD ..... 4TH RESPONDENT

RULING

[1] The appellants were some of the defendants in Mombasa Chief Magistrate's Civil Case No. 1615 of 2012. Being aggrieved by the decision of Hon. M. Nabibya, Principal Magistrate, delivered on December 16, 2021, they filed this appeal on February 17, 2022. They also filed a notice of motion dated February 25, 2022 seeking orders that:

[a] Spent

[b] The Court be pleased to issue an order of stay of execution of the judgment delivered on 16th December 2021 by the Principal Magistrate, Hon. Maureen L. Nabibya, in the case of Mary Mwihaki Waweru & 2 Others v Talib Abubakar & Others, Mombasa Chief Magistrate's Civil Case No. 1615 of 2012, pending the hearing and determination of the application inter partes, and subsequently pending the hearing and determination of the appeal.

[c] That after the hearing of the application inter partes the court be pleased to admit the appeal herein out of time.

[d] That the costs of the application be provided for.

[2] In response to the said application Mr. Denis Onyimbo Onyinkwa, Advocate, filed a Notice of Preliminary Objection dated March 3, 2022 contending that:

[a] The application dated February 25, 2022 is incompetent, unprocedural and incurably defective.

[b] The application has been presented in an appeal that is incompetent for having been lodged without leave of the Court.

[c] The application is unmerited and is self-defeating in nature.

[3] Learned counsel agreed that the Preliminary Objection be disposed of first, and to that end, directions were given on May 24, 2022 that the same be canvassed by way of written submissions. The appellant's written submissions were filed on June 8, 2022 by Mr. Jengo, Advocate. He nevertheless made submissions, not only in response to the respondents' preliminary objection, but also proceeded to urge his own application for admission of the appeal out of time as well as for stay of execution. Counsel explained that the reason the appeal was filed out of time was that the lower court delivered its judgment without notice to the parties; and that it was not until 16th February 2022 that he stumbled on the file in the Registry and got to learn that judgment had been delivered.

[4] Mr. Jengo further submitted that, by that time, the statutory time for filing the appeal had lapsed by 8 days. He made reference to several authorities, including *Masoud M.Y. Noorani v General Tyre Sales Ltd* [2014] eKLR; *Gerald M'Limbine v Joseph Kangangi* [2009] eKLR, *Martha Wambui v Irene Wanjiru Mwangi & Another* [2015] eKLR and *Re Estate of Nzolove Kisuke (Deceased)* [2020] eKLR, for the proposition that the Court has the discretion to admit the instant appeal out of time under section 79G of the *Civil Procedure Act*; and that the use of the term "admitted" connotes both the act of allowing an appeal to be filed out of time as well as the act of allowing an appeal already filed to be admitted out of time.

[5] Accordingly, Mr. Jengo urged the court to find that, to the extent that the respondents' Preliminary Objection was filed after the appellants' application for admission of the appeal out of time under section 79G of the *Civil Procedure Act* had been made, and before the admission of the appeal under section 79B of the *Civil Procedure Act*, the same is untenable.

[6] In like manner, Mr. Onyinkwa for the respondents also prepared his submissions in response to the preliminary objection as well as the appellants' application dated February 25, 2022. He accordingly proposed the following two issues for determination:

[a] Whether the appeal should be admitted out of time;

[b] Whether the appellant qualifies for an order of stay of execution of the judgment as prayed for.

[7] Mr. Onyinkwa relied on *Athuman Nusura Juma v Afwa Mohamed Ramadhan,* Civil Application No. 277 of 2015 to buttress his argument that, in considering an application for extension of time, the court must give attention to the length of delay, the reasons for the delay, the conduct of the parties, as well as possible prejudice to the respondent. He took the view that, in the instant matter, the delay of two months between December 16, 2021 and February 28, 2022 was not only inordinate but was also

unexplained by the appellants. Mr. Onyinkwa further submitted that the conduct of the appellants is wanting in so far as they are guilty of laches.

[8] On whether the appellants qualified for stay order, Mr. Onyinkwa submitted that the purpose of the application is to delay the conclusion of the matter. In his view, the appellants utterly failed to demonstrate substantial loss; and therefore that the reason given for delay does not warrant the exercise of the Court's discretion in the appellants' favour. He relied on *Meteine Ole Kilelu & 10 Others v Moses K. Nailole,* Civil Appeal No. 340 of 2008, in which it was held that, where the decree appealed against is a money decree, the appellant must prove that he may never get back that money if his appeal succeeds, or that the decretal sum is so large vis-à-vis his status or business that the execution would in itself ruin his business or threaten its very existence. He accordingly prayed for the dismissal of the application with costs.

[9] I have given due consideration to the grounds set out in the defendant's preliminary objection in the light of the arguments advanced in the written submissions filed herein by learned counsel on behalf of the parties. It is imperative that the Preliminary Objection be considered first, granted that a preliminary objection properly so called should have the potential of effectually disposing of both the application and the appeal without delving into the merits. I reiterate the holding in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors* [1969] EA 696, that: -

> " ...a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...".

[10] The respondents' argument, in essence, is that the application has been presented in an appeal that is incompetent, for having been lodged out of time without leave of the Court. There is no dispute that the impugned judgment was delivered on December 16, 2021, and therefore that the instant appeal was lodged out of time on February 17, 2021; yet section 79G of the *Civil Procedure Act*, is explicit that:

> " Every appeal from a subordinate court to the High Court shall be filed within a period of 30 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 preparation and delivery to the appellant of a copy of the decree or order..."

[11] However, the proviso to the aforesaid provision also recognizes 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."

[12] Accordingly, it is permissible for an applicant to first seek and obtain leave before filing an appeal. In other situations, appellants have successfully opted to lodge their appeal and thereafter seek leave for admission of the appeal out of time. Therefore, although counsel for the respondent made heavy weather of the fact that the appellant lodged their appeal without prior leave of the Court, it is now trite that either the two procedures is perfectly permissible, granted the constitutional imperative in article 159(2)(d) of *the Constitution*. Thus, situations abound in which extension of time has been sought and granted pursuant to section 79G of the *Civil Procedure Act*, vide miscellaneous applications prior to

the filing of an appeal. For instance, in *Vincent Sunday Yier v Foam Mattress Limited* [2004] eKLR, Hon. Tanui, J. took the view that:

The first ground of the respondent is that section 79G of the *Civil Procedure Act* does not apply to this application as there is no appeal already filed out of time. I do not need [read] the proviso to section 79G as saying that an appeal has to be filed out of time before it being admitted. I think the correct meaning is that the court is empowered to extend time to enable an appeal be filed after 30 days have expired. In any case filing of appeal is a constitutional right of a litigant which the court should readily grant. The fact that the applicant has come under section 79G of the *CPA* instead of order XLIX rule 5 of CPR should not invalidate the proceedings as long as the jurisdiction is not affected and no prejudice is caused to the respondent (*Boyes v Gathure* [1969] EA 385.

[13] On the other hand, in *Gerald M'limbine v Joseph Kangangi* [2008] eKLR, Hon. Emukule, J. took the view that:

My understanding of the proviso to section 79G is that an applicant seeking "an appeal to be admitted out of time" must in effect file such an appeal, and at the same time seek the court's leave to have such an appeal admitted out of the statutory period of time. The proviso does not mean that an intending appellant first seeks the court's permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the court's process under section 79B which says:

> "79B Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree part of a decree or order appealed against he may notwithstanding section 79C, reject the appeal summarily"

It seems to me therefore that it is not open to the court to exercise its discretion under the proviso to section 79G of the *Civil Procedure Act* except upon the existence and perusal of the appeal to be "admitted" not to be "filed out of time." Admission presupposes that the appeal has been filed and will be "admitted" for hearing after a judge has established under Section 79B that there is "sufficient" ground for interfering with the decree part of a decree or order appealed against."

To allow the Applicant's Motion would be to defeat entirely the requirements of section 79B of the *Civil Procedure Act* and indeed section 79G itself upon which the Applicant relies – the requirement for a Certificate of Delay in the preparation and delivery to the appellant of a copy of a decree or order. The Applicant's motion is bereft of such explanation or certificate. Default by the Applicants former advocate would then have seen properly anchored on such certificate.

[14] The learned Judge proceeded to dismiss the application with costs. The same line of thought was expressed in *Ndungu Muhindi James & Another v Cecilia Wanjiku Waweru* [2020] eKLR in which Hon. Kasango, J. held thus after reviewing relevant authorities on the proper construction of the proviso to section 79G:

> "It follows that the prayers for an appeal to be filed out of time and stay pending the determination of that yet to be filed appeal will fail in view of the jurisprudence pronounced in the above case James Njau Githui (supra)..."

[15] Hence, Mr. Jengo made reference to no less than 4 other authorities on point. I therefore find no merit in the respondents' preliminary objection dated March 3, 2022.

[16] Turning now to the merits of the application dated February 25, 2022, it is now trite, that in an application of this nature, the applicant must satisfy the court as to the following pre-requisites:

[a] whether there is a good and reasonable explanation for the delay;

[b] whether the application has been brought without undue delay;

[c] whether the proposed appeal is arguable, and

[d] whether any prejudice will be suffered by respondent, if the application is allowed.

[17] In Leo Sila Mutiso v Rose Hellen Wangari Mwangi (supra) the Court of Appeal held that:

> " 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."

[18] Accordingly, the first question to pose for determination is whether the applicant has satisfied the Court that it has good and sufficient cause for not filing his appeal within the period stipulated in Section 79G aforementioned. The appellants' explanation was that judgment was delivered without notice and that it was not until 16th February 2022 that its advocates got to learn that judgment had been delivered in the matter on 16th December 2021. That assertion was no rebutted by the respondent and is indeed a plausible account for the delay.

[19] Consequently, the period of delay, for purposes of the applicant's prayer for leave to file appeal out of time, can only be reckoned from 16th February 2022 when counsel for the applicant came to know of the existence of the judgment. The application having been filed on 27th February 2022, it cannot, in my view, be said that the delay of about 9 days in filing the instant application, is inordinate, granted that the Memorandum of Appeal was filed promptly on 17th February 2022.

[20] As to whether the proposed appeal is arguable, I have looked at the draft Memorandum of Appeal annexed to the Supporting Affidavit in the light of the Judgment of the lower court. The applicant proposes to challenge both liability and quantum and contends that the lower court erred in awarding the respondent special damages which had not been strictly proved. The proposed appeal is therefore arguable, bearing in mind that an arguable appeal is not necessarily an appeal that must ultimately succeed. In Kenya Tea Growers Association & Another v Kenya Planters & Agricultural Workers Union (supra), the Court of Appeal made this clear when it held that:

> " He (the applicant) need not show that such an appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the Court should pronounce its decision."

[21] On the question of prejudice, having weighed the competing interests and rights of the parties, I take the view that the party that would suffer the most prejudice would be the appellants, should they be denied a chance to pursue their appeal. As matters stand, the respondents already have a decree in their favour; and the delay in its enjoyment, if any, will invariably be compensated for by costs as well as interest on the principal sum, should the proposed appeal fail. In the premises, I find instructive the position taken in *Banco Arabe v Bank of Uganda* [1999] 1 EA 22, that:

> " The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors, lapses should not

necessarily debar a litigant from the pursuance of his rights and unless lack of adherence to rules renders the appeal process difficult and inoperative. It should seem that the main purpose of litigation, namely, the hearing and determination of disputes should be fostered rather than hindered."

[22] Thus, I am convinced that the appellants have satisfied the conditions for leave to appeal out of time for purposes of section 79G of the *Civil Procedure Act*; and I so find.

[23] Turning now to the second aspect of the application, which is the prayer for stay of execution pending appeal, the applicant relied on order 42 rule 6 of the Civil Procedure Rules. It provides that:

> " 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..."

[24] At this stage, it must be appreciated that the respondent, having been successful in her litigation, is entitled to the fruits of her judgment. Thus, it is useful to bear in mind the apt expressions made in *Machira T/A Machira & Co. Advocates v East African Standard (No. 2)* [2002] KLR 63, that:

> " The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."

[25] In the premises, an applicant for stay of execution of decree or order pending appeal is under obligation to satisfy the conditions set out in rule 6(2) of order 42 aforementioned, namely:

[a] that substantial loss may result to the applicant unless the order is made;

[b] that the application has been made without unreasonable delay.

[c] that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

[26] Counsel for the applicant urged the position, with which I entirely agree, that although the application involves a money decree, the appellants nevertheless stands to suffer substantial loss in the event of a successful appeal because the respondent has not shown that they will be in a position to refund the decretal sum, if paid now. In *Kenya Hotel Properties Ltd v Willesden Properties Ltd* the Court of Appeal held that:

> " The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a "man of straw" but is a person who, on the success of the appeal,

would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree."

[27] The onus of proving that the respondents are in a position to refund the decretal sum in the event of a successful appeal was on the respondents themselves. This was well discussed by the Court of Appeal in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR, thus:

> " This Court has said before and it would bear repeating that while the legal duty is on an 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 an 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."

[28] With the foregoing in mind, I have perused the respondent's response but find no such indication of means. I therefore find the applicant's assertion, that it stands to suffer substantial loss, unrebutted. And having ruled that the delay in filing the instant application is excusable, it follows that the appellants have indeed satisfied the Court that they are entitled to the grant of an order of stay pending appeal.

[29] In the result, I find merit in the application dated 25th February 2022. The same is hereby allowed and orders granted in respect thereof as hereunder:

[a] That the appeal herein be and is hereby admitted out of time and therefore deemed duly filed.

[b] That an order of stay of execution of the judgment delivered on December 16, 2021 by the Principal Magistrate, Hon. Maureen L. Nabibya, in the case of Mary Mwihaki Waweru & 2 others v Talib Abubakar & Others, Mombasa Chief Magistrate's Civil Case No. 1615 of 2012, be and is hereby granted pending the hearing and determination of the appeal.

[c] That the costs of the application be costs in the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 10TH DAY OF MARCH 2023

OLGA SEWE

JUDGE