



**Didingwa v Kitsao (Miscellaneous Application 49 of 2022)
[2023] KEHC 3130 (KLR) (20 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 3130 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS APPLICATION 49 OF 2022
SM GITHINJI, J
MARCH 20, 2023**

BETWEEN

STEPHEN KARISA DIDINGWA APPLICANT

AND

JEREMIAH FURAHA KITSAO RESPONDENT

*(An application for stay of execution of the judgment of Honourable
Julie Oseko given on 21 April 2022 in Civil Suit No E128 of 2021.)*

RULING

1. For determination is the Applicant's Notice of Motion dated July 18, 2022 seeking the following orders;
 - a. Spent
 - b. That this honourable court be pleased to order stay of execution of the judgment of Honourable Julie Oseko given on 21 April 2022 in Civil Suit No E128 of 2021 pending the hearing and determination of this application and the intended appeal.
 - c. The honourable court be pleased to grant the applicant leave to file an appeal against the judgment of honourable Julie Oseko given on 21 April 2022 in civil suit No E128 of 2021 out of time.
 - d. The attached Memorandum of Appeal be deemed as duly filed upon payment of court fees.
 - e. Spent
 - f. That the costs of this application abide by the outcome of the appeal.



2. The application is founded on the grounds on its face and the sworn affidavit of Kelvin Ngunjiri the Deputy Claims Manager at Direct line assurance Company the insurers of the motor vehicle No KBA 671Q the subject of the suit. He deposed that judgment was delivered on April 24, 2022 in absence of the appellant and their advocate on record which judgment was in favour of the respondent herein. That aggrieved with the said judgment, they instructed the firm of Kimondo Gachoka & Company advocates to lodge an appeal out of time and they believe that the appeal is arguable and has high chances of success. In addition, it is in the interest of justice that stay of execution be granted.
3. In response to the application, the Respondent filed a Replying Affidavit sworn by Geoffrey Kilonzo on 26th day of July, 2022. He deposed that upon Judgment being delivered on 21/4/22 he wrote a letter to the applicant's advocates on 6/5/22 tabulating his costs which letter was duly received on the same date. He also deposed that for an application for leave to appeal out of time to succeed, the applicant must satisfy to the court that he had good and sufficient cause for not filing the Appeal on time.
4. He asserted that the appellant has equally not met the conditions warranting stay as in one limb of substantial loss, the applicants must clearly state what loss, if any, they stand to suffer and according to him, it is not indicated what loss will be suffered should the orders for stay fail to be granted. He further contends that the Respondent's right to execute has accrued and as such he should not be denied from enjoying the fruits of his Judgment and that the Respondent will be greatly prejudiced if this court grants the orders sought for reason that this case is not a statistic as it involves human life.
5. The application was canvassed by way of written submissions.

Analysis and Determination

6. I have considered the application, relied on grounds, affidavits, submissions and authorities cited by counsels. The applicant seeks leave to file an appeal out of time and stay of execution of the judgment and decree pending the hearing of the intended appeal.
7. Section 79G of the *Civil Procedure Act* provides:

“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.”
8. It is not disputed that Judgment in this matter was delivered on April 21, 2022 with a 30 days stay of execution. The applicant has not disputed having being served with the Judgment Notice by the Respondent which was received in their office on May 6, 2022 which Notice made them aware of the said Judgment.
9. The applicants' request to file an appeal out of time may only be accepted if it satisfies to the court that it had good and sufficient cause for not filing the appeal in time. The supreme court of Kenya sitting at Kisumu in the case of *County Executive of Kisumu vs County Government of Kisumu & others* (2017) eKLR while relying to its decision in the case of *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others* Application No 16 of 2014 (2014) eKLR the Hon. Judges reiterated the considerations to be made 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. That in certain cases, like election petitions, public interest should be a consideration for extending time.”
10. This court has considered the period of delay from April 21, 2022 to the filing of the application which was about 11 weeks noting that the court had granted the Defendants 30 days stay of execution. Further, from the time they were served with the judgment notice, there is no sufficient cause advanced as to why there was a delay in filing the appeal. The delay has not been accounted for and therefore I decline to grant leave to appeal out of time.
11. On the issue of stay of execution Order 42 Rule 6(2) of the *Civil Procedure Rules provides*:
- “(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.”
12. In the case of *Butt v Rent Restriction Tribunal* (1982) KLR 417 the court of Appeal gave guidance on how a court should exercise discretion in an application of stay of execution and held that:
1. “The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal
 2. 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 that appeal court reverse the judge’s discretion.
 3. 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. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.



5. 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 for costs as ordered will cause the order for stay of execution to lapse.”
13. The Applicant herein has not provided for any security for costs or demonstrated their willingness to provide the same. As such, I find that the application is void of merit and the same is hereby dismissed with costs to the respondent.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 20TH DAY OF MARCH, 2023.

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S.M. GITHINJI

JUDGE

In the Presence of; -

- 1. Mr Kilonzo for the Respondent**
- 2. Mr Nyabiero for the Applicant (absent)**

