



REPUBLIC OF KENYA



**Kisangau t/a Maki Stores Transporters Limited v Kioko t/a Malindi Arcade Total Service Station
(Miscellaneous Application E041 of 2022) [2023] KEHC 3120 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 3120 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS APPLICATION E041 OF 2022**

**SM GITHINJI, J
MARCH 23, 2023**

BETWEEN

**MATHEW PAUL KISANGAU T/A MAKI STORES TRANSPORTERS
LIMITED APPLICANT**

AND

**REUBEN MULWA KIOKO T/A MALINDI ARCADE TOTAL SERVICE
STATION RESPONDENT**

RULING

1. The Applicant herein filed a Notice of Motion application dated the 24th day of June, 2022 brought under Sections 1A, 1B & 3A of the *Civil Procedure Act*, and Order 22 rule 51 (2), 52 and Order 50 rule 6 of the *Civil Procedure Rules* seeking the following orders;
 1. Spent.
 2. That the Honourable Court be pleased to make an order of stay of execution of Judgment dated March 25, 2022 and any consequential decree in Chief Magistrate's court case No 190 of 2017 at Malindi between the parties herein pending the hearing and determination of this application.
 3. That the Honourable Court be pleased to make an order of stay of execution of Judgment dated March 25, 2022 and any consequential decree in Chief Magistrate's court case No 190 of 2017 at Malindi between the parties herein pending the hearing and determination of the intended appeal.
 4. That the Honourable court be pleased to extend time for filing the appeal and applicant be allowed to file the appeal out of time.
 5. That the annexed draft memorandum of appeal be deemed as duly filed and served on time.



6. Costs be provided for.
2. The application is supported by the affidavit sworn by Mathew Paul Kisangau on the same day. He deposed that it came to his knowledge that the court delivered judgment on March 25, 2022 which judgment was delivered in the absence of his counsel. That being unaware of the of the Judgment, he wrote to the court which letter is unanswered to date. He also deposed that he only became aware of the judgment when the Respondent called him to ask when he intended to start making payments and that he only got a copy of the Judgment on May 25, 2022.
3. In response the Respondent filed a Replying Affidavit sworn by Reuben Mulwa Kioko on September 23, 2022. He asserted that the application has been brought after prolonged delay and without proper explanation of the inordinate delay. That extension of time is not a right to a party but is only available to a deserving party and at the discretion of the court. He also contended that soon after the judgment was rendered, the Applicant and his then advocate were made aware of it and proposed to comply by paying the decretal amount together with costs by instalments. That he further contended that the applicant deliberately failed to honour his proposal and instead, brought the instant application with the intention of further delaying the matter.

Disposition

4. This court has considered the application dated June 24, 2022, the response as well as the submissions by the parties. The issues this court is called upon to determine are;
 - a. Whether the prayer for stay pending appeal is merited?
 - b. Whether the extension of time application is merited?
 - c. What are the just orders to make in the circumstances?
5. Order 42 rule 6(1) and (2) of the *Civil Procedure Rules* provides as follows:
 - (1) No appeal or second appeal shall operate as a stay of execution or proceeding 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.”
6. I am duly guided by the case of *Visbaram Ravji Halai v Thornton & Turpin* Civil Application No Nai 15 of 1990 KLR 365, where the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 42 rule 6 of the *Civil Procedure Rules* is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.



7. On extension of time to file an appeal, the key enabling provision relied on by the applicant is Section 79G of the [Civil Procedure Act](#), which stipulates 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 anytime 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:

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.”

8. In my view, the objective of this proviso is ensuring that parties are afforded the opportunity to ventilate their grievances on appeal as opposed to restricting access to justice, particularly where no prejudice would be suffered by the respondent. Indeed, in *Banco Arabe v Bank of Uganda* (1999) 1 EA 22, it was held 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.”

9. More importantly, it is now a constitutional imperative to apply provisions such as Section 79G of the [Civil Procedure Act](#) with the necessary adaptations to give effect to [the Constitution of Kenya 2010](#). Section 7(1) of the Sixth Schedule reads:

“All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.”

10. I wish to point out that when considering an application such as the instant one, the court has unfettered discretion; and therefore, need only concern itself with whether justifiable cause has been shown to warrant such exercise of discretion. For this reason, the principles laid down by the Supreme Court in [Nicholas Kiptoo Korir arap Salat v IEBC & 7 Others](#) (2014) eKLR are pertinent; namely:

“The underlying principles a court should consider in exercise of such discretion include:

1. 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;
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 Respondent if the extension is granted;



6. Whether the application has been brought without undue delay.
11. In the present application, the applicant contends that while judgment was delivered on March 25, 2022, he only came to know about it on May 25, 2022 upon getting a copy of the Judgment from the court. I note that the applicant only approached this court on the 24th day of June, 2022, 3 months later.
12. Taking all relevant factors into account and in order not to render the intended appeal nugatory while at the same time securing the interests of the successful party, I do allow the application on condition that the Applicant pays the Respondent a sum of Kshs 250,000.00/=. The said condition be met within 30 days from the date of this ruling and in default the application be deemed dismissed with costs and the Respondent be at liberty to execute. The costs of this application to abide the outcome of the appeal. It is so ordered.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 23RD DAY OF MARCH, 2023.

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S.M. GITHINJI

JUDGE

In the Presence of: -

Mr Matini for the Plaintiff/Respondent

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S.M. GITHINJI

JUDGE

23.3.2023

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