



REPUBLIC OF KENYA



KENYA LAW
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**Munoru v Equity Bank Limited & another (Civil Appeal
59 of 2020) [2023] KEHC 2190 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2190 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL 59 OF 2020
EM MURIITHI, J
MARCH 16, 2023**

BETWEEN

STEPHEN KIREMIA MUNORU APPELLANT

AND

EQUITY BANK LIMITED APPLICANT

AND

**CREDIT REFERENCE BUREAU AFRICA LTD T/A
RANSUNION RESPONDENT**

RULING

1. The court is called upon to determine a notice of motion dated March 23, 2022 by the applicant, brought under section 3A, 1A, 1B and 75 (1) of the *Civil Procedure Act*, order 42 rules 6, order 51 rule 1 and order 50 rule 6 of the *Civil Procedure Rules* and all other enabling provisions of the law, seeking that:
 1. The applicant be granted leave to file cross-appeal out of time against the appellant's appeal being this appeal Meru HCCA No 59 of 2020 of the same parties.
 2. There be a stay of proceedings of this appeal No 59 of 2020, pending the hearing and determination of the application.
 3. Costs of this application be provided for.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Kariuki Kingori, the applicant's legal manager sworn on even date. He contends that the appellant sued the respondent and itself in Maua CMCC No 117 of 2016 and, after the matter



was heard and judgment delivered on July 2, 2020, the appellant's counsel wrote to the applicant seeking to settle the decretal sum and bring the matter to closure. When the decree was extracted and served upon the applicant, the applicant proceeded to pay out the decretal sum *vide* a bankers cheque issued on August 27, 2020. The applicant settled the claim with the knowledge and understanding that no further claim would be brought afterwards.

3. However, during the engagements on the settlement of the claim, the appellant failed to disclose to the applicant that he would prefer an appeal against the trial court's judgment. In the circumstances, the applicant is now desirous of challenging the trial court's judgment and its intended appeal has high chances of success. The delay in filing the appeal, which is not inordinate, was occasioned by the fact that since the applicant had already settled the claim, it had been discharged from further liability. The applicant prays for an opportunity to ventilate its case, as no prejudice will be occasioned to the respondent and the appellant.
4. The appellant, Stephen Kirema Munoru, opposed the application through his replying affidavit sworn on June 9, 2022. He avers that the application is brought in bad faith, aimed at delaying the appeal from being determined and unmerited as the applicant has not explained the delay of almost 2 years. He urges that the applicant ought to have acted on their right to file a cross-appeal without any undue delay as equity aids the vigilant not the indolent. There was no written agreement or undertaking that once the applicant settled the claim, he would not have any further claim. He contends that he will be highly prejudiced since he had already filed his submissions in compliance with the directions of the court and what is left is to fix a date for judgment.

Submissions

5. The applicant submits that the principles governing leave to file cross appeal out of time have been laid in *Diamond Trust Bank (K) Limited v Galaxy Ventures (K) Limited* (2020) eKLR. It urges that its settlement of the decretal sum was not an affirmation that it was satisfied with the trial court's decision. It urges that the appellant's mere act of receiving the decretal sum immortalized its bonafide belief that the matter had been marked as settled, only to be surprised by the appellant's service of the memorandum of appeal. It accuses the appellant of being bent to gain undue advantage and urges the court not to allow him to approbate and reprobate at the same time, and cites *Republic v Institute of Certified Public Secretaries of Kenya Ex-Parte Mundia Njeru Geteria* (2010) eKLR and *Mwangi S Kimenyi v Attorney General & another* (2014) eKLR. It urges that the delay in filing the application was occasioned by its belief that the settlement of the decretal sum, which was received by the appellant without any objection, settled the matter to finality, and no further claims would precipitate therefrom. It urges that its intended cross appeal raises arguable issues with high chances of success, and relies on *Christopher Ndolo Mutuku & another v Mfcb Stanbic Bank Limited* (2013) eKLR and *Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi* (2014) eKLR. It urges that the appellant will not suffer any prejudice if the application is allowed because he already received Ksh 307,880 from the applicant, and in any event, such prejudice can be redressed by an award of costs.
6. The appellant urges that there was inordinate delay in filing this application as the applicant was aware of the existence of this appeal all along, and relies on *Bulsbo Trading Company Limited v Rosemary Likhola Mutakha and another* (2020) eKLR and *Ferruz Omar Mahendan & 4 others v Ahmed Mohamed Honey* (2016) eKLR. He urges that the delay which is nearly 2 years is inordinate and inexcusable to warrant exercise of judicial discretion of this court in the applicant's favour. He faults the applicant for failing to demonstrate that it will suffer harm if leave is denied, and cites *Watu Credit v Geoffrey Mokaya & Karen Chepkurui* (2022) eKLR. He beseeches the court to strike a balance between the appellant's right to expeditious disposal of the appeal and the applicant's right to stay. He



urges that the application is brought in bad faith, aimed to delay the appeal from being determined, and therefore it should be dismissed with costs.

Analysis and Determination

7. The issues for determination is whether leave to file a cross appeal out of time should be issued.

Leave To Appeal Out Of Time

8. The principles for consideration on an application for extension of time to appeal out of time are that, the power is discretionary but the applicants must prove to the satisfaction of the court that the delay is not inordinate, reasons for delay are plausible, that the appeal is arguable and not frivolous and that the respondent will not be unduly prejudiced by the order being made. See [*Nicholas Kiptoo Korir Arap Salt v Independent Electoral & Boundaries Commission & 7 others*](#) (2014) eKLR.
9. There is no dispute that there has been inordinate delay between the delivery of the judgment sought to be cross appealed against on July 2, 2020 and the filing of the instant application on March 23, 2022. The issue in contention is whether the reason proffered for delay is excusable.
10. The applicant contends that it delayed in lodging its cross appeal because it successfully engaged the appellant's counsel and even paid the decretal sum in full. Once the receipt of the decretal sum was acknowledged by the appellant's counsel, it believed, and mistakenly so, that the appellant would not pursue any further claim in regard to this matter. It was taken aback when the appellant served it with a memorandum of appeal, thus necessitating its desire to file a cross appeal.
11. The appellant contends that there was no undertaking that once the entire decretal sum had been paid, he would not pursue the matter further. In equality of arms, if the appellant decreeholder received the decretal sum on a without prejudice basis, the same position would hold for the judgment debtor who paid the decretal sum.
12. The appellant admits having received the decretal sum from the applicant, and the court has noted the bankers cheque dated August 27, 2020 for Ksh 307,880. The appellant lodged his memorandum of appeal in this court on July 30, 2020, and the applicant acknowledges being served with it on October 6, 2020. What the applicant had not explained is why it had to wait until March 23, 2022 to file the instant application yet it was served with the memorandum of appeal on October 6, 2020. That delay of close to 2 years is clearly inordinate and inexcusable, as no satisfactory explanation had been offered for it.
13. However, it would appear to the court that the applicant reasonably expected that upon payment of the decretal sum, the appellant would not pursue an appeal. To be fair to both parties, if the decreeholder whose full decretal sum has been paid by the judgment debtor seeks to appeal, the court must uphold and promote the expectation on the part of the judgment debtor that the payment would be without prejudice to its right to appeal the award.
14. On the arguability or otherwise of the intended appeal, the grounds raised in the draft memorandum of appeal on cross appeal faulting the trial court for shifting the burden of proof to the applicant and holding that the applicant acted in breach of contract in affording the appellant more time to repay the loan among others cannot be said to be frivolous. This court notes that the issues in dispute will be finally determined if the applicant is allowed to lodge cross appeal. This court deems it fit to enlarge time to lodge the cross appeal out of time, the inordinately delay notwithstanding.



15. The fact that the filing of the application herein was inordinately delayed is not denied. Whereas the applicant contends that the appellant will suffer no prejudice if the application is granted, the appellant is certain that he will be greatly prejudiced as his appeal is at the tail end of conclusion.
16. The court has power to extend time under the rules in terms of order 50 rule 6 of the Civil Procedure Rules as follows:
- “Power to enlarge time [order 50, rule 6]
- Where a limited time has been fixed for doing any act or taking any proceedings under these rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:
- Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”
17. As the appeal has not been set down for hearing, the cross-appeal may be canvassed together with the appeal and the appellant need only file amended or further submissions on the cross-appeal. The court has considered that the prejudice in the delay occasioned by the later hearing and determination of the matter may properly and adequately be compensated by an award of costs in accordance with the proviso to order 50 rule 6 of the Civil Procedure Rules.

Orders

18. Accordingly, for the reasons set out above, this court allows the applicant’s application dated March 23, 2022 on the following terms:-
1. The applicant is granted leave to file a cross appeal out of time.
 2. The record of cross-appeal together with written submissions thereon to be filed within 30 days from the date hereof, in default of which the cross appeal shall stand as dismissed and the appellant shall be at liberty to execute.
 3. The appellant shall file, as necessary, further written submissions on the cross-appeal with 30 days of service.
 4. The costs of this application shall be paid by the applicant to the appellant in terms of order 50 rule 6 of the Civil Procedure Rules.
- 19 Order accordingly.

DATED AND DELIVERED ON THIS 16TH DAY OF MARCH, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S G. M. Wanjohi, Mutuma & Co. Advocates for the Appellant.

M/S Gathara Mahinda & Co. Advocates for the 1st Respondent.

M/S Otieno & Amisi Advocates for the 2nd Respondent.

