



REPUBLIC OF KENYA



Mohamed v HMB (minor suing through mother & next friend ADZ) (Miscellaneous Application E004 of 2022) [2023] KEHC 1888 (KLR) (1 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1888 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
MISCELLANEOUS APPLICATION E004 OF 2022**

SM GITHINJI, J

MARCH 1, 2023

BETWEEN

FATUMA ABDI MOHAMED APPLICANT

AND

**HMB (MINOR SUING THROUGH MOTHER & NEXT FRIEND
ADZ) RESPONDENT**

(Being an application for leave to appeal out of time against the Judgment by Honourable E. Kadima in Garsen Magistrate's Court Civil Suit No 54 of 2019.)

RULING

1. The Applicant herein has filed a Notice of Motion application brought under Sections 3A, 79G and 95 of the [Civil Procedure Act](#), order 2 rule 22, order 4 rule 6, order 50 rule 5 & order 51 rules 1 and 3 of the [Civil Procedure Rules](#) under Certificate of Urgency dated the 21th day of June, 2022 seeking the following orders:
 1. Spent.
 2. That this Honourable court be pleased to extend time and grant leave to the applicants to lodge a memorandum of appeal out of time against the Judgment by Honourable E. Kadima in Suit No 54 of 2019.
 3. That the annexed Memorandum of Appeal be deemed to be duly filed on time.
 4. That this Honourable Court be pleased to Stay Execution of the Judgment in Garsen Magistrate's Court Civil Suit No 54 of 2019 pending the hearing and determination of the application.



5. That this Honourable court be pleased to stay proceedings in the declaratory suit CMCC E009 of 2022 Garsen Law Court pending the hearing and determination of this application.
 6. Spent.
 7. That costs of this Application be in the cause.
2. The application is supported by the grounds on the face of it as well as a supporting affidavit sworn by Nyabero Bokoo Brasiny on June 21, 2022. He deponed that Judgment was delivered against the applicants wherein the plaintiff was awarded general damages of Kshs 900,000/- and special damages plus costs and interests of the suit. He contends that the Judgment was to be delivered on January 10, 2022 as was directed by the court but it was postponed to be delivered on notice but he received a demand letter from the Respondent advocate indicating that judgment had been delivered on March 10, 2022. That he received instructions from the appellant to appeal against that judgment when the time to file an appeal had already lapsed. He also asserted that the Judgment is of a substantial amount and the applicants are apprehensive that if the Respondent is paid he may deal with the same in a manner prejudicial to the applicant and if the intended appeal is successful, he might not be able to recover the same from the Plaintiff/ Respondent.
 3. The application was opposed by the Respondent through a Replying Affidavit sworn by Geoffrey Kilonzo on the 13th day of July, 2022. He deponed that the Applicant was served with the Plaintiff's statement of costs which they acknowledged on March 4, 2022 proving that they were well aware of the Judgment timeously. That the stay orders lapsed on 10.4. 22 and the Applicant approached the court on June 21, 2022 and that the 70 days delay is an act of indolence and an abuse of the court process. 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 application has been filed after inordinate and unreasonable delay especially bearing in mind that the Applicant was aware of the Judgment and that no sufficient cause has been shown why the court should exercise its discretion in favour of the Applicant. According to him, the court cannot stay proceedings in a suit that is not before it and, in any case, there is final judgment in the declaratory suit. Further, that the present application has been filed as a reaction to the warrant issued in respect to the Judgment in the declaratory suit and as such the application has been brought in bad faith.
 5. The application was to be canvassed by way of written submissions. At the time of writing this Ruling, only the Respondent had filed her submissions. The Respondent through her Advocate Wambua Kilonzo & Co. Advocates filed submissions on the 10th day of November, 2022.
 6. Counsel submitted that the Applicant was aware that Judgment in the trial court was delivered since the trial magistrate exercised due diligence to ensure that each party was made aware of the Judgment by delivering the same electronically to the advocates via their email addresses on March 10, 2022. He relied on the case of Kisumu COA Civil Application No 80 of 2020 *Samwel Mwangi Kanyari v Mathew Wacha Nyongesa* (2021) where it was held that parties are deemed to be aware of Judgment from the day it is delivered to them electronically via email addresses. According to him, the allegation that the applicant was unaware of the Judgment when it was delivered are untrue and thus the present application is an abuse of the court process. He relied on the case of Nairobi HCCC No 380 of 2013 *Kenya Commercial Bank v Suntra Investment Bank Ltd* (2015) eKLR.
 7. He also submitted that the applicant has not shown sufficient cause for not filing the appeal on time hence the provisions of Section 79G of the *Civil Procedure Act* have not been met. He relied on the case



of *Thuita Mwangi v Kenya Airways Ltd* (2003) eKLR and that of *Dilpack Kenya Limited v William Muthama Kitony* (2018) eKLR. It is also his submission that the applicant has not met the conditions warranting stay as on the limb of substantial loss, the applicant must clearly state what loss, if any, they stand to suffer and on keenly perusing the applicant's application, it is not indicated or explained what loss (if any) will be suffered should the orders for stay fail to be granted. Lastly, the applicant has proved to this court that she is not deserving of the court's discretion having abused the 30 days stay earlier granted and expressing her desire to appeal too late in the day.

Disposition

8. This is an application for extension of time to appeal, for stay of execution of judgment or decree pending appeal and for stay of proceedings in the declaratory suit CMCC E009 of 2022 Garsen, pending hearing and determination of the application.
9. I will begin with the prayer for leave to appeal out of time. With regard to the delay in filing the appeal, the applicant has contended that they were not aware of the Judgment as the court had indicated that Judgment would be delivered on January 10, 2022 but the same was postponed to be delivered on notice and he only came to learn that the Judgment had been delivered when they received a letter demanding the Judgment sum. The Respondent on the other hand contends that they notified the Applicant of the Judgment through a letter dated April 12, 2022 that was received and acknowledged on receipt.
10. Section 79G of the *Civil Procedure Act* provides as follows:

“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.”
11. In my view and in the interest of justice, the applicant ought to be allowed the benefit of doubt in that respect as Article 159(2) of the *Constitution of Kenya 2010* enjoins courts to be more inclined to render substantive justice rather than determining matters on technicalities. I will allow the applicant a chance to file and argue her appeal, as section 79G of the *Civil Procedure Act* confers to this court powers to extend time to appeal.
12. On the issue of stay of execution pending appeal, the conditions to be taken into account by the court in determining such an application are contained in Order 42 Rule 6(2) of the *Civil Procedure Rules*, which provides as follows –
 - 6(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.



13. 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.”

14. The applicant has admitted to delay in filing the appeal and thus also to filing this application for stay. However, reasons for the delay have been given and the delay is not excessive. I thus find that the delay herein is not unreasonable. On whether the applicant will suffer substantial loss, I note that this is a money decree for a specific amount that has been determined by court. I hold that the applicant may stand to suffer substantial loss if stay is not granted but since the appeal is on quantum, the respondent will suffer prejudice if no amount is paid in the meantime. I am persuaded that stay ought to be granted but part of the decretal sum be paid to the respondent.

15. The applicant has also sought for an order to stay proceedings in a declaratory suit CMCC E009 of 2022 which in my opinion has not been substantiated and for that reason, the same is dismissed. For avoidance of doubt, I do allow the application dated June 21, 2022 in the following terms: -

1. Leave is granted to the applicants to file appeal out of time against the judgment delivered in Garsen Civil Suit No 54 of 2019.
2. The applicants to file and serve their Memorandum of Appeal within fourteen (14) from the date hereof.
3. Stay of execution of Judgment/ decree in Garsen CMCC No 54 of 2019 is granted pending determination of appeal provided the applicant pays the respondent part of the decretal sum of Kshs 500,000/- within 15 days from the date hereof.
4. In default of complying with either 1, 2 or 3 above, the orders staying execution shall lapse and the respondent shall be at liberty to execute.
5. Costs of the application is awarded to the respondent.



RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 1ST DAY OF MARCH, 2023.

S.M. GITHINJI

JUDGE

In the Presence of;

Mr Kilonzo for the Respondent

Mr Arasa for the Appellant/Applicant

