



**Naked Wilderness Afrika Ltd & another v Nkukuu (Miscellaneous Civil Application
E095 of 2022) [2023] KEHC 2716 (KLR) (Civ) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2716 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E095 OF 2022
CW MEOLI, J
MARCH 23, 2023**

BETWEEN

NAKED WILDERNESS AFRIKA LTD 1ST APPLICANT

NORMAN MULINGE KALEI 2ND APPLICANT

AND

SAMMY LEMAIYAN NKUKUU RESPONDENT

RULING

1. For determination is the motion dated February 23, 2022 by Naked Wilderness Afrika Ltd and Norman Mulinge Kalei (hereafter the 1st & 2nd Applicant /Applicants) seeking leave to file an appeal out of time against the judgment delivered in favor of Sammy Lemaiyan Nkukuu (hereafter the Respondent) in Nairobi Milimani CMCC No. E3486 of 2020 and stay of execution of the said judgment pending hearing and determination of the intended appeal. The motion is expressed to be brought *inter alia* under Section 1A, 1B, 3A & 79G of the Civil Procedure Act and Order 22 Rule 22, Order 42 Rule 6 and Order 51 Rule 1 & 3 of the Civil Procedure Rules.
2. The grounds on the face of the motion are amplified in the supporting affidavit sworn by Grace Njoki Nyambura, counsel for the Applicant. The gist of her affidavit is that judgment in Nairobi Milimani CMCC No. E3486 of 2020 was delivered on September 6, 2021 and via a letter dated September 21, 2021 the Applicants sought to obtain certified copies of proceedings and judgment for purposes of lodging an appeal. That subsequently an application seeking stay of execution pending appeal was filed in the lower court but was dismissed with costs on February 22, 2022. She goes on to depose that counsel previously handling the matter inadvertently failed to file an appeal in the prescribed time and that the mistake of counsel should not be visited upon the Applicants.



3. She asserts that the Applicants are aggrieved by the whole decision of the lower court and are apprehensive that in the absence of an order to stay execution the Respondent may proceed to execute thereby subjecting the Applicants to irreparable harm and substantial loss as the Respondent will not be able to refund any monies paid in the event the appeal succeeds. Counsel goes on to express the Applicants' willingness to furnish security for satisfaction of the decree by way of insurance bond or bank guarantee if so directed by the court. She contends further that the intended appeal raises arguable issues for determination and that the motion has been filed expeditiously.
4. The Respondent opposes the motion through the replying affidavit dated April 26, 2022. He views the motion as incompetent, misconceived, fatally defective, lacking in merit and brought in bad faith to delay enjoyment of his fruits of successful litigation. He contends that the asserted inadvertency on the part of the Applicants' counsel has not been sufficiently explained or disclosed hence no good or sufficient cause has been tendered for failure to file the appeal within time. That there has been unexplained and inordinate delay on the part of the Applicants in filing the instant motion and that the intended appeal lacks merit.
5. He goes on to depose that the Applicants motion has not satisfied the requisite conditions for issuance of orders to stay execution pending appeal and expresses his ability as a salaried person to refund the decretal sum should the appeal succeed. He pleaded with the court to strike a balance between the parties' interests and to order deposit of security by the Applicants.
6. The motion was canvassed by way of written submissions. Counsel for the Applicants began by reiterating the affidavit material in support of the motion. Concerning the prayer for leave to appeal out of time he relied on the decision in *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited* [2020] eKLR and that the mistake and or oversight of counsel ought not be visited on Applicants. He emphasized Applicants' constitutional right to a hearing on the merits of their arguable appeal that has a high probability of success.
7. Addressing the court on the question of stay of execution pending appeal counsel cited *Loice Khachendi Onyango v Alex Inyang'u & Another* [2017] eKLR and *Michael Ntouthi Mitheu v Abraham Kivondo Musau* [2021] eKLR to submit that the decretal sum is inordinately high and the Applicants are apprehensive that if stay is not granted they will suffer irreparable loss as they were unlikely to recover the decretal sum from the Respondent, which event would render the appeal nugatory. Counsel further expressed the Applicants willingness to provide security. The court was urged to allow the motion as prayed.
8. On the part of the Respondent, counsel in addressing the prayer for leave to appeal out of time, relied on the decision in *Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR to assert that there was inordinate delay in bringing the instant motion, hence the Applicants do not deserve the court's discretion. He cited several authorities including *Rajesh Rugban v Fifty Investment Ltd & Another* [2005] eKLR, *Itute Ngui & Anor v Isumail Mwakavi Mwendwa* Civil Application No. Nai 166 of 1997, and Nicholas Salat (*supra*) in asserting that the Applicants failed to diligently institute their appeal and thus should not to expect the court to exercise its discretion in their favour.
9. He asserted that on account of the injuries he sustained as a result of a road traffic accident, the Respondent will be prejudiced if the motion is allowed. That he ought to be allowed to enjoy the fruits of his judgment. Regarding the prayer for stay of execution, counsel relied on the decision in *Velji Shahmad v Shamji Bros. and Popatal Karman & Co. Ltd* [1957] EA 438 *inter alia* to contend that, the Applicants motion has not met the requisite conditions and that the appeal does not raise any triable issues. In conclusion, he urged the court to dismiss the motion with costs.



10. The Court has considered the rival affidavit material and submissions in respect of the motion. Alongside the prayer for leave to appeal out of time, the Applicants have sought stay of execution pending the hearing and determination of the intended appeal. It is evident on a plain reading of Order 42 Rule 6(1) of the *CPR*, that an order to stay execution pending appeal presupposes the existence of an appeal. The filing of an appeal is a condition precedent to the exercise of this court’s appellate jurisdiction under Order 42 Rule 6 (1) of the *Civil Procedure Rules*. Although the provision does not expressly say so, this can be inferred from the rule. Further, an analogy can be drawn from Order 42 Rule 6 (4) of the *Civil Procedure Rules* which states that an appeal is deemed filed in the Court of Appeal when the notice of appeal has been given. Equally, Order 42 Rule 6 (6) of the *Civil Procedure Rules* states:

“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.” (Emphasis added).
11. It would seem therefore that the invocation of the jurisdiction of this court under Order 42 Rule 6 (1) or 6 (6) of the *Civil Procedure Rules* must be preceded by the filing of an appeal, or compliance with the procedure for filing an appeal, in this case a memorandum of appeal (See Order 42 Rule 1 of the *Civil Procedure Rules*). Until the memorandum of appeal is filed, the court may be acting in vacuo by considering the Applicant’s prayer for stay of execution pending a non-existent appeal. The Court of Appeal in *Abubaker Mobamed Al-Amin v Firdaus Siwa Somo* [2018] eKLR while citing with approval the decision of the High Court in *Rosalindi Wanjiku Macharia vs. James Kiingati Kimani (Suing as the Legal Representative of the Estate of Martin Muiruri (Deceased))* [2017] eKLR concurred and adopted the foregoing reasoning.
12. Earlier, the Court of Appeal in the case of *Equity Bank -Vs- Westlink MBO Limited* [2013] eKLR while commenting on Rule 5 (2) (b) of the *Court of Appeal Rules*, whose wording is substantially similar to Order 42 Rule 6 (1) of the *Civil Procedure Rules*, and on Order 42 Rule 6 (6) of *Civil Procedure Rules*, left no room for doubt that an application for stay of execution pending appeal could only be entertained before it after the filing of an appeal or a Notice of Intended Appeal. (See also *Balozi Housing Co-operative Society Limited -Vs- Captain Francis E. K. Hinga* [2012] eKLR).
13. Order 42 Rule 1 of the *CPR* provides that an appeal to the High Court shall be in the form of a memorandum of appeal. In this case, an appeal is yet to be filed and therefore, there is no basis upon which this court could exercise its appellate jurisdiction under the said provision in a miscellaneous matter. If the Applicants desired to seek an order to stay execution alongside the prayer for the late admission of their appeal, they ought to have first filed the memorandum of appeal in a proper appeal and the relevant application. In my considered view, the words that “an appeal may be admitted out of time” in Section 79G, appears to admit both retrospective and prospective applications. So that leave under the Section may be sought before or after a memorandum of appeal is filed.
14. However, it may be more prudent for a party who also seeks stay of execution in the same motion for leave to appeal out of time to have filed the memorandum of appeal in advance. In the circumstances, the prayer seeking a stay of execution of the judgment in Nairobi Milimani CMCC No. E3486 of 2020 pending hearing and determination of the intended appeal has no legal anchor and cannot be entertained.



15. Turning now to the prayer seeking leave to appeal out of time, the power of the Court to enlarge time for filing an appeal out of time is expressly donated by Section 79G, as well as generally, by Section 95 of the Civil Procedure Act. Section 79G of the Civil Procedure Act provides that:

“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.”

16. The principles governing leave to appeal out of time are settled. The successful applicant must demonstrate “good and sufficient cause” for not filing the appeal in time. In Thuita Mwangi v Kenya Airways [2003] e KLR, the Court of Appeal while considering Rule 4 of the Court of Appeal Rules which was in pari materia with Section 79G of the Civil Procedure Act, reiterated its decision in Mutiso v Mwangi [1997] KLR 630 as follows:

“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 general the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”

17. While the discretion of the court is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court’s discretion in his favor. The Supreme Court in the case of Nicholas Kiptoo Korir Arap (*supra*) enunciated the principles applicable in an application for leave to appeal out of time. The Court stated *inter alia* that:

“(T)he 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 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.
7.”



See also *County Executive of Kisumu v County Government of Kisumu & 8 Others* [2017] eKLR.

18. There is no dispute that the judgment of the lower court was delivered on September 6, 2021. After the judgment was delivered, the Applicants proceeded to file a motion before the lower court dated September 22, 2021, for stay of execution notwithstanding the absence of a pending appeal. The said motion was allegedly dismissed *vide* a ruling delivered on February 22, 2022, prompting the Applicants to file the instant motion. The delay is close to four (4) months and the reason advanced for the said delay is inadvertent mistake of counsel. It is settled that the period of delay as well as explanation thereof are key considerations in an application of this nature. A party seeking extension of time must not be seen to presume on the Court's discretion.

19. The Court of Appeal in *Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 Others* [2019] eKLR addressed the question of delay as follows;-

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained, hence a plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There have to be valid and clear reasons, upon which discretion can be favourably exercisable.....”

20. Meanwhile, the court will equally not entertain an indolent or dilatory litigant or visit the mistake of counsel on the innocent litigant. Apaloo, J.A. (as he then was) famously stated in *Phillip Kiptoo Chemwolo and & Anor. v Augustine Kubede* (1986) eKLR:-

“I think a distinguished equity judge has said:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merit.”

I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of parties and not for the purpose of imposing discipline....”

12. In its later decision the Court of Appeal in Tana and *Athi Rivers Development Authority v Jeremiah Kimigbo Mwakio & 3 Others*, [2015] eKLR no doubt advertent to the overriding objective in section 1A and 1B of the *Civil Procedure Act* made the following remarks:

“From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side...”

21. The explanation given by the Applicants' counsel appears no more than bare admission of failure without further explanation by counsel involved. From their affidavit, as of September 22, 2021 the Applicants had resolved to appeal the judgment of the lower court and the court cannot comprehend why they failed to file a memorandum of appeal and only moved this court after their motion in the lower court was dismissed. Nevertheless, the delay herein is not inordinate. It would be onerous for the



court to shut out a party from pursuing his right of appeal on account of the failures and or mistakes of his counsel that do not appear deliberate. The Respondent will not suffer prejudice that cannot be compensated through costs if the motion is allowed.

22. Concerning the arguability of the intended appeal, the court has perused the said draft memorandum of appeal. The grounds therein do not appear flimsy. However, based on the language employed in *Mutiso (supra)* the requirement touching on the viability of the intended appeal, is neither mandatory nor stringently applied in an application of this nature. The Court of Appeal in *Vishva (supra)* stated that “an arguable appeal need not (be one that will) succeed so long as it raises a bona fide issue for determination by the Court.”

23. In *Vishva’s case (supra)*, the Court emphasized the right of appeal in the following terms:

“Turning to the request to allow the applicant to exercise his now undoubted constitutionally underpinned right of appeal, the position is.... crystalized in the case of *Richard Ncharpi Leiyagu vs. IEBC & 2 Others* (supra); *Mbaki & Others vs. Macharia & Another* [2005] 2EA 206; and the Tanzanian case of *Abbas Sherally & Another vs. Abdul Fazaiboy*, Civil Application No. 33 of 2003; for the holding *inter alia* that:

- (i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;
- (ii) the right to be heard is a valued right; and
- (iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice;...”

24. In the circumstances of this case, the court is persuaded that in order to facilitate the Applicant’s undisputed right of appeal the motion dated February 23, 2022 ought to be granted. The appeal is to be filed within 14 days during which there will be a temporary order to maintain the status quo. The costs of the motion are awarded to the Respondent in any event.

DELIVERED AND SIGNED ELECTRONICALLY IN NAIROBI ON THIS 23RD DAY OF MARCH 2023.

C.MEOLI

JUDGE

In the presence of:

For the Applicants: Ms. Nyambura

For the Respondent: Mr Wanjohi

C/A: Carol

