



**Kimani v Mwongela & 2 others (Miscellaneous Application  
E128 of 2022) [2023] KEHC 3269 (KLR) (17 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3269 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
MISCELLANEOUS APPLICATION E128 OF 2022**

**MW MUIGAI, J**

**APRIL 17, 2023**

**BETWEEN**

**ALFRED GITHAE KIMANI ..... APPLICANT**

**AND**

**JOSEPH MUSAU MWONGELA ..... 1<sup>ST</sup> RESPONDENT**

**CHINA RAILWAYS 21ST BUREAU GROUP (K) LIMITED ... 2<sup>ND</sup> RESPONDENT**

**AMICA SAVINGS & CREDIT CO-OP SOCIETY ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Applicant filed an Application under certificate of urgency dated September 26, 2022 seeking the following orders that:
  - a. Spent
  - b. Spent
  - c. That leave be granted to the Applicant herein to lodge an Appeal against the judgment and decree in Mavoko CMCC 1344 of 2018 out of time.
  - d. This Court be pleased to order stay of execution of decree in Mavoko CMCC No 1344 of 2018 pending the hearing and determination of the intended Appeal.
  - e. This Court allow the Applicant to furnish the court with security in the form of a Bank Guarantee from Family Bank
  - f. Spent
  - g. The costs of this Application abide the outcome of the intended Appeal.



- h. This Court be pleased to issue any other and/or direction it deem fit to grant in the circumstances
2. The application is supported by the affidavit of Alfred Githae Kimani deponed on September 26, 2022 in which he contended that judgment in Mavoko CMCC 1344 of 2018 was delivered on December 9, 2021 and being dissatisfied by the judgment he wished to Appeal and the 30days stay of execution had lapsed. He contended that as per the Counsel's records, the matter came up for mention to confirm filing of submissions on November 4, 2021 but the matter was not cause listed and he was not served with any mention notice nor the judgment notice and only became aware of the judgment when counsel for the Plaintiff sent an email inquiring about payment of the award. Further delay, it was contended was caused by the unavailability of a copy of the judgment of the court to enable the Applicant make an informed decision of the judgment as the file had been moved to the archives.
3. The Applicant contends that the intended Appeal is arguable and if leave is not granted, stands to suffer great prejudice and substantial loss. It was opined that through M/S Directline Assurance Company Limited is able , ready and willing to furnish the Court with security in the form of a Bank Guarantee from the Family Bank.

### **Replying Affidavit**

4. The 1<sup>st</sup> Respondent filed an affidavit in opposition of the Application deponed by Evans M. Mochama, Advocate on October 17, 2022 in which he indicated that no reasonable or sufficient reasons had been advanced by the Applicant for failure to file the purported Appeal within the prescribed time. Counsel deponed that the Applicant was dully represented when the judgment was delivered and therefore it is not true that they only became aware of the judgment when they received an email.
5. It was contended that the assertion that the Applicant is willing to give a bank guarantee was a mockery of the judgment as no allegations had been made that the 1<sup>st</sup> Respondent is a pauper and a person of no means and will not manage to return the funds if released to him if the Appeal succeeds.
6. Counsel proposed that half the decretal sum be released to the advocates on record while the balance be deposited in joint names of the advocates on record in an interest earning account and the conditions be met in 30 days.
7. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent did not file any response.

### **Appellants/Applicant Submissions Dated November 4, 2022**

8. While relying on Section 3A of the Civil Procedure Act and the case of Wachira Karani v Bildad Wachira (2016) eKLR and Patel v EA Cargo Handling Services (1974) EA 75, the court was urged to admit the appeal for hearing and proceed to make a determination based on merits. Further reliance was placed on section 95 of the Civil Procedure Act that it was contended grants the court power to enlarge time that it was said says;

“where any period is fixed or granted by the court for doing any act prescribed or allowed by this Act, the Court may ,in its discretion , from time to time enlarge such period originally fixed or granted may have expired.”

9. It was submitted that the delay was inexcusable and not inordinate as the delay was that the Appellant was not aware that judgment had been delivered on the matter.



10. It was contended that the Appeal was arguable and serious points of law and fact warrant the court's interference on Appeal. That it was not a requirement to show that the appeal had high chances of success, reliance was placed on the case of *Bake 'N' Bite (Nrb)Limited v Daniel Mutisya Mwalonzi* [2015] e KLR.
11. It was submitted that the Applicant had demonstrated a good and sufficient cause for this Honourable Court to exercise its wide discretion and grant leave to the Applicant to Appeal out of time. That they only became aware of the judgment almost a year after it had been delivered. Reliance was placed on Section 79G and 95 of the *Civil Procedure Act*, Order 50 rule 6 of the *Civil Procedure Rules* and the case of *Esther Wamaitiba Njibia & 2 others v Safaricom Limited* [2014] eKLR.
12. On stay of execution, while relying on order 42 Rule 6 and Order 22 Rule 22 (1 ) of the *Civil Procedure Rules 2010* and the case of *Tabro Transported Limited v Absalom Dova Lumbasi* [2012] eKLR and *Mukuma v Abuga* [1988] KLR 645. It was submitted that substantial loss will occur since the Respondents are unknown and are unlikely capable of refunding the decretal sum in the event the Appeal succeeds and that the 1<sup>st</sup> Respondent has not shown that they have the means of paying the decretal sum in the absence of an affidavit of means. Further reliance was placed on the case of *Edward Kamau & another v Hannah Mukui Gichuki & another* [2015] e KLR.
13. it was submitted that there was no delay in filing the application and the Applicant was ready and willing to furnish security in the form of a Bank Guarantee.

#### **1<sup>st</sup> Respondent Submissions**

14. It was submitted that the Application should have been filed on or before August 26, 2022 and no reasonable or sufficient reasons had been advanced to explain the said delay.
15. While relying on section 79 G of the *Civil Procedure Act*, it was submitted that no good or sufficient reasons to warrant the court to exercise its discretion had been shown. The delay was inordinate. The allegation of the unavailability of the court judgment was casual, vague and mockery to the ends of justice.
16. It was submitted that the Appeal had no chances of success as the same was determined upon full trial and hearing of the 1<sup>st</sup> Respondent and no serious issue had been raised in the Appeal to warrant any success. Further, it was contended that the 1<sup>st</sup> Respondent should be allowed to enjoy the fruits of judgment without further delay.
17. On the security, the proposal in the replying affidavit was reiterated or in the alternative, the whole decretal sum be deposited in a joint interest earning account of both advocates on record until final determination of the Appeal.

#### **Determination**

18. This court has considered the Application, the response thereto and the submissions of the parties and the issues of determination can be condensed into two;
  - a. Whether the Applicant should be granted leave to file an appeal out of time
  - b. Whether there should be an order for stay of execution pending hearing and determination of the Appeal.



19. 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.

20. In the case of *Daphne Parry v Murray Alexander Carson* [1963] EA 546 the provision for extension of time requires

“sufficient reason” .....

21. In determining such applications, the discretion of the court comes to play. The factors to be considered in such a case were enumerated in the case of *First American Bank of Kenya Ltd v Gulab P Shah & 2 others* Nairobi (Milimani) HCCC No 2255 of 2000 [2002] 1 EA 65 as follows;

- i. The explanation if any for the delay;
- ii. The merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;
- iii. whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

22. As regards the reason for delay, in this case, the Applicant contends that he was not aware of the judgment and only learnt about it when he received an email. However the 1<sup>st</sup> Respondent’s advocate opines that this is not true as the Applicant was represented in court when the Judgment was being read which has not been denied. None of the parties have annexed the judgement nor proceedings to enable the court make its own independent finding, without which the court cannot also make a finding as to whether the Applicant is deserving of a day in court on appeal.

23. On the issue of stay, Order 42 Rule 6(1) and (2) of the *Civil Procedure Rules, 2010* 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.”

24. The judgment in this case is said to have been delivered on December 9, 2021 and the Application herein was filed on September 27, 2022. About 10 and a half months later. I find the reason for the delay not satisfactory and there are no efforts on the part the Applicant to indicate that he followed up on the matter since the day of mention for submissions. It is upon a party to follow up on a matter and as such this ground fails.
25. As regards substantial loss, even if the application was to be considered on merit it would still fail the test for the grant of stay since the Applicant has not shown the substantial loss he stands to suffer if the stay is not granted. Substantial loss was discussed in the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, as:
- “No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
26. On the ability of the 1<sup>st</sup> Respondent financial incapability of paying back the decretal sum being one of the reasons the orders should be granted, I beg to differ. The onus of proving the 1<sup>st</sup> Respondent’s inability goes beyond throwing an allegation without evidence. It is upon the Applicant who alleges the same to go ahead and prove it. Nonetheless, the court has settled this matter and stated that this should not be the reason an order of stay is granted. This was held in *Stephen Wanjohi v Central Glass Industries Ltd*, Nairobi HCCC No 6726 of 1991, financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonorable miscreant without any form of income.
27. On the issue of security, the Applicant indicates that he is ready to comply with the orders of the court. Furnishing of security is key in getting orders of stay pending appeal. The Applicant has indicated that his insurer is willing to deposit security on his behalf in the form of a bank guarantee. The Respondent on the other hand indicates that he is being denied from enjoying the fruits of the judgment the Court has a duty to balance the rights of both parties.
28. The bank guarantee between DTB bank and the Applicant’s insurance company, Directline Assurance Company Limited is for a period of 12 months from February 2022, the same has since expired and there is no guarantee that the interests of the Respondents will be catered for. In addition, the execution of the bank Guarantee is incomplete. This court cannot rely on such a document. This limb therefore fails.
29. In *Machira T/A Machira & Co Advocates v East African Standard (No 2)* [2002] KLR 63 it was held that:

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial



discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.

**Disposition**

30. Consequently, the Motion dated September 26, 2022 fails and the application is dismissed with costs to the Respondents.

**DELIVERED DATED & SIGNED IN OPEN COURT IN MACHAKOS ON 17<sup>TH</sup> APRIL, 2023  
(PHYSICAL/VIRTUAL CONFERENCE).**

**M.W.MUIGAI**

**JUDGE**

**In The Presence Of:**

Kimondo - For The Applicant

Mochama - For The Respondent

Patrick - Court Assistant

