



Malik Boeki Co Ltd v JNM (Suing on behalf of EM (Minor) (Miscellaneous Civil Application E009 of 2023) [2023] KEHC 3558 (KLR) (20 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3558 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS CIVIL APPLICATION E009 OF 2023**

TW CHERERE, J

APRIL 20, 2023

BETWEEN

MALIK BOEKI CO LTD APPLICANT

AND

JNM (SUING ON BEHALF OF EM (MINOR) RESPONDENT

RULING

Background

1. On October 6, 2022, the court entered judgment in Maua CMCC No E014 Of 2021 in favour of the Respondent as against the Applicant for Kes 710,000/-.
2. By notice of motion dated and filed on February 6, 2023, Applicant seeks orders for:
 1. Stay of execution of judgment in Maua CMCC No E014 of 2021 pending the hearing and determination of the intended appeal
 2. Leave to appeal out of time
 3. Costs be provided for
3. The notice of motion is premised on grounds among others that the judgment was delivered without notice to the Applicant or his advocates and that Applicant is aggrieved by the judgment of the trial court and intends to file an appeal which has high chances of success.
4. The application is also supported by an affidavit sworn on February 6, 2023 by Lilian Simiyu, a legal officer with the Applicant's insurer MUA Insurance (Kenya) Ltd in which she reiterates the grounds on the face of the application. Additionally, she avers that Applicant only became aware of the judgment after the proclamation dated January 27, 2023 was served on the Applicant.



5. Respondent opposed the application by way of an affidavit sworn on March 3, 2022 in which he avers that Applicant has not satisfied the conditions for stay pending appeal set out under Order 42 rule 6 of the Civil Procedure rules. He also faults the Applicant for attempting to delay him from enjoying the fruits of the judgment.

Analysis and Determination

6. I have considered the application in light of affidavits on record and submissions and cited authorities and I have deduced the following issues for determination:
 1. Whether a case has been made for an order of stay of execution pending appeal
 2. Whether Applicants have made out a case for leave to appeal out
7. Order 42 (6) of the Civil Procedure Rules provides that no order for stay of execution shall be made unless application has been made without unreasonable delay; substantial loss is demonstrated and security for the due performance of such decree or order is offered. (See *Endmor Steel Millers Ltd v James Wakhulunya Makuto* [2016] eKLR).
8. The impugned judgment was delivered on October 6, 2022. This application was filed timeously on February 6, 2023 about 4 months after the judgment was delivered.
9. Having approached the court four months after the impugned judgment was delivered, the onus is on the Applicant to demonstrate that the delay was reasonable, justified and that the Respondent will not suffer any prejudice if the order is not granted.
10. The principles that govern the exercise of discretion in an application for extension of time are well known. In *Gitbuaka v Nduriri* [2004] 2 KLR at page 68 and in the oft-cited case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* Civil Application No Nai 255 of 1997 [1999] 2 EA 231 which was a decision of the Court of Appeal in which the judge stated 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 in general, the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted”.
11. In *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR, the Court of Appeal stated that:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”
12. The Applicant in the matter has explained that the judgment was delivered without notice to him and his advocate a fact that has not been controverted. Although the Applicant does not specifically disclose when the proclamation notice was served on him, his explanation for delay in filing the appeal is reasonable in the circumstances.



13. Concerning filing an appeal out of time, the Court of Appeal in *Muchugi Kiragu v James Muchugi Kiragu & Another* [1998] eKLR, had the following to say as regards the Court’s discretion to extend time to file appeal out of time:

“Lastly, we would like to observe that the discretion granted under rule 4 of the Rules of this Court to extend the time for lodging an appeal is, as is well known, unfettered and is only subject to it being granted on terms as the Court may think just. Within this context, this Court has on several occasions, granted extension of time, on the basis that an intended appeal is an arguable one and that it would therefore, be wrong to shut an applicant out of Court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances, inexcusable and that his opponent was prejudiced by it.”

14. On the degree of prejudice to the respondent, I am called upon to balance the competing interests of the parties, that is, the injustice to the Applicants, in denying them an extension, against the prejudice to the Respondent in granting an extension. The Applicants are aggrieved by the judgment of the trial court. It has not been demonstrated that Respondent will suffer any prejudice in the event that Applicants are allowed to appeal out of time.
15. I have considered whether Applicant has demonstrated that it is likely to suffer substantial loss if stay of execution and leave to appeal out of time is not granted. Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. (See *Standard Assurance Co Ltd v Alfred Mumea Komu* [2008] eKLR).
16. A party seeking an order of stay pending appeal bears a specific burden regarding proof of substantial loss. In this case, Applicant avers that Respondent is not in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. In those circumstances, the evidential burden shifts to the Respondent to show that she would be in a position to refund the decretal sum if it is paid out to her if the pending appeal were to succeed. Other than state that she is in a position to refund the decretal sum if the appeal succeeds, Respondent has discharged the evidential burden to prove that she has the means to refund the decretal sum in the event she loses the appeal.
17. Concerning stay of execution, Order 42 (6) of the *Civil Procedure Rules* provides:
- (2) No order for stay of execution shall be made under sub rule
- (1) Unless—
- a. The court is satisfied that substantial loss may result to the applicant unless the order is made
- b. That the application has been made without unreasonable delay; and
- c. 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.
18. There is a myriad of cases on what constitutes substantial loss. In *Standard Assurance Co Ltd -v- Alfred Mumea Komu* [2008] eKLR the Court stated-

“Substantial loss, in its various forms is the corner stone of best jurisdictions for granting a stay. That is what has to be presented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.”



19. Similarly, in Civil Case No 41 of 1995 *United Builders & Contractors (Africa) Limited v Standard Chartered Bank Ltd* the Court stated-

“If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other suits.”

20. Additionally, the court in *ABN Amro Bank NV v Le Monde Foods Ltd* Civil Application No Nairobi 15 of 2002 held that:

“Each party bears a specific burden regarding proof of substantial loss in a case such as before us.So all an Applicant in the position of the bank (Appellant) can reasonably be expected to do is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal was to succeed. In those circumstances, the legal burden still remains on the Applicant but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. This evidential burden would be very easy for a Respondent to discharge. He can simply show what assets he has – such as land, cash in the bank and so on.”

21. The Respondent was awarded general damages in the sum of Kshs 710,000/-. Whereas this is a money decree, there is no evidence that the Respondent is in a position to refund the decretal sum in the event that the appeal succeeds and that is persuasive evidence that Applicant is likely to suffer substantial loss if orders sought are not granted.

22. Security is a legal requirement under 42 (6) (2) (c) of the *Civil Procedure Rules*. On February 7, 2023, I gave a temporary stay of execution on condition that the Applicant deposits Kes 500,000/- with the court as security. There is no evidence that the order was complied with.

23. Whereas it is not my duty at this stage to determine if the Applicants have an arguable appeal, I am minded, in the interest of justice to exercise this court’s discretion under section 3A of the *Act* to afford the Appellants an opportunity to prosecute their appeal.

24. In the end, the notice of motion dated and filed on February 6, 2023 is allowed in the following terms:

1. Applicant is granted leave to file an appeal against the judgment in Maua CMCC No E014 of 2021 out of time
2. The Memorandum of appeal be filed and served on the Respondent within 14 (fourteen) days from the date hereof.
3. The record of appeal be filed and served not later than 45 days from the date of filing the Memorandum of appeal
4. There shall Maua CMCC No E014 of 2021 pending the hearing and determination of the intended appeal on condition that the Applicant shall deposit Kes500,000/- (five hundred thousand) with the court within 14 days from today’s date
5. Costs shall abide the outcome of the intended appeal

DATED IN MERU THIS 20TH DAY OF APRIL 2023

T.W. CHERERE

JUDGE



Appearances

Court - Morris Kinoti

For Applicant - Mr. Mungai for Kiruki & Kayika Advocates

For Respondent - Ms. Asuma for Mutembei & Kimathi Advocates

