



**Moseti v Kuria & another (Miscellaneous Civil Application
E129 of 2022) [2023] KEHC 3228 (KLR) (17 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3228 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS CIVIL APPLICATION E129 OF 2022**

MW MUIGAI, J

APRIL 17, 2023

BETWEEN

CHRISTINE MWENDE MOSETI APPLICANT

AND

EZEKIEL NGANGA KURIA 1ST RESPONDENT

NAKAM SACCO 2ND RESPONDENT

RULING

Certificate of Urgency

1. The Applicant herein filed an Application under certificate of urgency dated September 26, 2022 seeking the following orders that:
 - a. Spent
 - b. Spent
 - c. This Court be pleased to order stay of execution of judgment and/or decree issued by Honourable Chief Magistrate's court at Mavoko delivered on July 26, 2022 by the Honourable Kemei Silas Kandie, Resident Magistrate in Mavoko CMCC NO 509 of 2021 pending the hearing and determination of the intended Appeal.
 - d. This Court be pleased to grant the Applicant leave to lodge an Appeal against the judgment and decree in Mavoko CMCC 509 of 2021 out of time
 - 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.
2. The Application is supported by the affidavit of Christine Mwendu Moseti deponed on September 24, 2022 in which she contended that she filed a memorandum of Appeal in Machakos HCCA No. 068 of 2022 appealing against the Ruling of the Trial Court in Mavoko CMCC 509 of 2021 delivered on May 13, 2022 and then filed an application dated June 27, 2022 and the High Court on 29th June issued orders that the judgment to be delivered on notice be arrested as well as stay of further proceedings. The order was filed in Mavoko Law courts via Email on July 5, 2022 and acknowledged as received the same day.
 3. The Applicant contended that on July 26, 2022, the matter came up for judgment but the Magistrate indicated that the Application and order from the High Court were not on record since the file had been in chambers and the clerks from the registry were not able to place them in the court file and proceeded to deliver the judgment. The Applicant indicates that he is dissatisfied by this judgment but the 30 days granted to appeal the judgment has since lapsed and further indicates that the delay was occasioned by the unavailability of a copy of the judgment of the court.
 4. The Applicant contends that the intended Appeal is arguable and if leave is not granted, stands to suffer great prejudice and substantial loss, that the Respondent had obtained a decree and intends to proceed with execution in no time. 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

5. The 1st Respondent filed an affidavit in opposition of the Application deponed by Evans M. Mochama, Advocate deposed on October 17, 2022 in which he indicated that the Applicant voluntarily withdrew the Memorandum of Appeal filed in HCCA No. E068 of 2022 together with its Notice of Motion dated June 27, 2022 voluntarily on August 17, 2022. 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 1st 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. It was deposed that the Applicant opted to abscond the proceedings in the lower court to intentionally delay, frustrate and embarrass the 1st Respondent. 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 2nd Respondent did not file any response.

Appellants/applicant Submissions Dated 4.11.2022

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 determine the appeal based on merits. Further reliance was placed on Section 95 of the *Civil Procedure Act* where it was contended the Court has power to enlarge time that it was said provides;

“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 in getting a copy of the judgment.
10. It was contended that the Appeal was arguable and had serious points of law and fact and warrant the court's intervention 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] eKLR.
11. It was submitted that the Applicant had demonstrated a good and sufficient cause for this H Court to exercise its wide discretion and grant leave to the Applicant to Appeal out of time. 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 Wamaitba 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, it was submitted that substantial loss will occur since the Respondents are unknown and are unlikely or incapable of refunding the decretal sum in the event the Appeal succeeds and that the 1st 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] eKLR.
13. It was submitted that there was no delay in filing the application and the Applicant was ready and willing to furnish security.

1st Respondent Submissions

14. It was submitted that the Appeal should have been filed on or before August 26, 2022 and no reasonable or sufficient reasons have 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 1st Respondent and no serious issue had been raised in the Appeal to warrant any success. Further, it was contended that the 1st 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. The Court has considered the application for stay of execution, Replying Affidavit and submissions by parties through their respective advocates on record.
19. The issues for determination are:
 - a. Whether leave should be granted to Appeal out of time
 - b. Whether stay of execution pending appeal ought to be granted or not.



20. 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.

21. In the case of *Daphne Parry v Murray Alexander Carson* [1963] EA 546 the provision for extension of time requires “sufficient reason”

22. The factors to be considered in a case for enlargement of time 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.

23. In this case, the Applicant has stated that the reason for the delay was caused by the unavailability of the judgment. Judgment in this case was delivered on July 26, 2022, the present application was filed on September 27, 2022. About 2 months later. I also note that Machakos HCCA No 68 of 2022 was withdrawn and the Applicant has not denied this position. The notice of withdrawal dated August 1, 2022 has been noted. What stopped the Applicant from filing a notice of Appeal within the 2 months? From the judgment, the Applicant was represented in court when the judgment was read. Nonetheless, I will extend the time for filing the record of appeal by 30 days failure to which that window will be closed.

24. Each party aggrieved by the Trial Court’s judgment, ruling, order or decree is entitled in law to exercise its right to appeal. An application for stay of execution pending appeal must be lodged in accordance with the prescribed law as outlined in Order 42 Rule 6 *CPR* 2010.

Arguable Appeal

25. The Appellant/Applicant deposed that it has an arguable Appeal. As to what constitutes an arguable appeal, the Court of Appeal in *Nairobi Women’s Hospital v Purity Kemunto* [2018] eKLR:-

“To say that an appeal is arguable is another way of saying that it is not frivolous and that it raises a bona fide issue deserving full consideration by the Court. Even one bona fide issue will satisfy the requirement, for the law does not look for a multiplicity of arguable issues.”



26. The Court of Appeal in *Kenya Revenue Authority v Sidney Keitany Changole & 3 Others* [2015] eKLR held that;

“This Court has further held that the applicant need only prove or establish one arguable point nothing that an arguable appeal is not necessarily one that will succeed but one that is not frivolous.”

27. In this case, the court had not had the opportunity to address its mind to the lower court record nor is there an Appeal before this court so as to determine whether the Appeal is arguable or not. The alleged court proceedings on record have not been certified and it is not clear where they have been obtained from nor whether they are the real record. The draft memorandum of Appeal seems to be arguable, therefore I find that this ground has been proved.

Unreasonable Delay

28. There is a draft Memorandum of Appeal on record. The Judgment being appealed against was delivered on 26th July 2022. The Applicant indicated that the court proceeded to deliver its judgment upon indication that the judgment from High Court E068 of 2022, the Applicant was in court that is not in dispute. Counsel heard the judgment, does it mean that the Applicant was not aware of the judgment until the physical copy was availed? The Appellant / Applicant could have sought for stay of execution immediately and even extended it as the case may be. There was delay but it was not unreasonable.

Substantial Loss

29. In *National Industrial Credit Bank limited v Aquinas Francis Wasike*, Court of Appeal Civil Application No.238 of 2005, the Court of Appeal held as follows: -

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”

30. In the case of *Tropical Commodities Suppliers Ltd and Others v International Credit Bank Limited (in liquidation)* (2004) EA LR 331, the Court defined substantial loss in the sense of Order 42 rule 6 as follows:

“... Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”

31. Similarly in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, it was observed that:

“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.”

32. The Applicant contends that the Respondent will execute at any time but has not provided any proof to that extent and therefore this ground fails.
33. As regards the Respondent’s ability to refund the decretal sum, the onus of proving the 1st 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. However, this court finds that this is not a reason to deny a party an order of stay.

Security

34. The Appellant is willing to give such security in the form of a bank Guarantee from Directline Assurance Company Limited. Upon perusal, the Guarantee is to Directline Assurance Company Limited, not the Applicant and has already lapsed if it was from February 2022 and seems to be incomplete as there is no execution page. This court can therefore not accept it.
35. The principles governing exercise of the judicial discretion are; there are no limits or restriction on the judge’s discretion, the discretion is intended so to be exercised to avoid injustice. In the case of [Selestical limited v Global Development](#) [2015] eKLR the Court stated that;

“In my view, the rules give the court unfettered discretion to issue any orders as to preserve the subject matter pending the hearing of the Appeal. There is no doubt therefore that the court has powers to order such security for the due performance of decree or order, and that the Appellant did not have to furnish such security upfront before arguing the application for stay pending appeal.”

36. This Court has considered the rival submissions on the conditions of granting stay of execution pending appeal. The record confirms that the appeal was filed out of statutory period and leave to extend the time has been sought. Consequently, I direct as follows;

The Applicant shall pursue the appeal and stay of execution to remain in force on condition that the Applicant furnishes security to safeguard the 1st Respondent’s interest by payment of half the decretal sum to the Respondent within 90 days from delivery of this Ruling, and the balance be deposited in an interest earning account in the name of the advocates on record for both parties pending hearing and determination of the appeal within 90 days.

Disposition

1. Leave to file the Appeal out of time has been extended to 30 days from the date of this Ruling.
2. Stay of execution pending appeal is granted on condition; 1/2 of the decretal sum to be paid to the Respondent within 90 days from delivery of this Ruling, and the balance be deposited in an interest earning account in the name of the advocates on record for both parties pending hearing and determination of the appeal within 90 days.



3. The costs shall abide the appeal.

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

M.W.MUIGAI

JUDGE

In the presence/absence of:

Mr. Kimondo - for the Applicant

Mr. Mocha

MA - for the Respondent

Patrick - Court Assistant

