



Agri Tunza Limited v One Spot Agencies Limited (Civil Appeal 036 of 2023) [2023] KEHC 17261 (KLR) (3 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17261 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 036 OF 2023**

FR OLEL, J

MAY 3, 2023

BETWEEN

AGRI TUNZA LIMITED APPELLANT

AND

ONE SPOT AGENCIES LIMITED RESPONDENT

RULING

1. The application before this court is the Notice of Motion application dated March 14, 2023 brought pursuant to provisions of Section 1A, 3A & 79 of the [Civil Procedure Act](#), Order 42 Rule 6(2) of the [Civil Procedure Rules](#) and all other enabling provision of law. Prayers 1 and 2 of the said application are basically spent and the main prayers sought is for extension of time to file the appeal and that there be a stay of execution of the judgment/decreed issued in Machakos Small Claims Court SCC Claim No E218 of 2022 herein pending the hearing and determination of the appeal filed. The application is supported by the supporting affidavit of the appellant Mirrium Ngina dated March 14, 2023 and a further affidavit dated March 30, 2023. The applicant also filed submission in support of their application dated March 22, 2023.
2. This application is opposed by the Respondents who filed their Replying Affidavit's dated March 23, 2022 sworn by one Eddah Molyne Wambui Wainaina.
3. The Appellant averred that they are aggrieved by the Judgement dated December 9, 2022 delivered in Machakos SCCOMM No E 218 of 2022, where the respondent was awarded Ksh 885,097,000/= plus costs and interest. They sought leave of this court to have the appeal admitted out of time as the delay of 20 days in filing the same was not a long delay. Secondly, they averred that they have an arguable appeal which is was meritorious and stands a good chance of success as demonstrated in the Memorandum of Appeal filed.



4. Further the Appellant stated that the respondents had already set in motion execution process by sending auctioneers to proclaim the appellant's property and unless stay is granted they will suffer substantial loss, which the respondents cannot make good refund should the appeal be successful.
5. Finally, the Applicants stated that they are ready and willing to give security for the decretal sum by depositing into court the title deed of Kajiado/Kitengela/45657 & Kajiado/Kitengela/45658. The titles were held in the names of Rose Mbula, who was a director of the Appellant Company. They attached form CR12 showing that indeed she was a director of the appellant company and the value was sufficient to allow for stay of execution to be issued.
6. The Respondent did oppose this application by their Replying Affidavit dated March 23, 2023. They stated that the said application was not meritorious, was fatally defective and otherwise constituted a gross abuse of the process of court. The applicants had not set out the correct provisions of law rendering the application, incapable of being comprehended. The applicants also had not given any plausible reason as to why they failed to file the appeal on time since the delay was 41 days and not 20 days as submitted by the applicants.
7. The respondent further stated that the applicants had not shown substantial loss which they all suffer should the orders be denied and no security had been offered for due performance of their obligation under the decree appealed from. Finally, the respondents stated that they were in the business of supplying agricultural products to various entities, the applicants included and that even if paid the decretal sum they would be in a position to refund the same.

Submissions

8. The appellant filed submission dated March 22, 2023. They submitted that in considering the prayer for extension of time, the court ought to be consider the period of delay, reasons proffered for the delay, degree of prejudice to the respondent, if the order sought are granted and finally whether the matters raised were of public importance. They relied on the citation of *Edith Gichungu koine v Stephen Njagi Thoithi* [2014]eKLR.
9. They submitted that there was no inordinate delay in filing this application and that no prejudice would be occasioned upon the respondent should this application be allowed. As to whether they should be granted stay pending appeal, the applicants submitted that they have sufficiently demonstrated that they would suffer substantial loss if stay of execution was not granted and that their appeal would be rendered nugatory. The respondent also had not demonstrated that they were capable of refunding the sums owed should the appeal be successful and thus the courts discretion should be exercised in their favour. See *GN Muema P/A Mt view Maternity & Nursing home v Miriam Maalim Bisbar & Another* [2018] eKLR & *Butt v Rent Restriction Tribunal* [1982] KLR 417.
10. Finally the applicants submitted that they were ready and willing to provide security of a title deed to be deposited in court. The value of the title deed was way higher than the decretal sum and would secure the respondents interest should this appeal fail. They relied on the decision of *Gitai & another Vs Warugongo* (1988) KLR 621 where it was stated that, "security may take many forms. A bank guarantee and payment into court are but two of them..... So long as it is adequate, then the form of it is a matter which is immaterial."
11. The applicants prayed to be allowed to deposit the two titled deeds in court as security.
12. The Respondents did not file any submissions.



Analysis & Determination

13. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and applicant's submissions and discern that two issues arise for determination.
 - a. Whether this court should extend time and allow the appellant to appeal out of time and
 - b. The second issue is whether the Appellant's has met the conditions necessary for the grant of stay pending appeal.
14. This application was filed in court on March 15, 2023, while the judgment against which the appellant seeks to appeal against was entered on December 9, 2022. By virtue of provisions of section 79G of the *civil procedure Act*, the appellants were to file their appeal within 30 days but filed their appeal late and without leave on February 20, 2023. They were thus late in filing their appeal by 40 days, but if the period when time does not run under the civil procedure code is considered this period would reduce by another 15 days or so.
15. The appellant deponed that they had filed an application for review before the trial magistrate and a ruling was delivered January 31, 2023, which delayed the process of filing the appeal and the delay in filing the same was not unreasonable as they had shown all along that they are diligent while pursuing this matter. The respondent on their part alleged that this application was made after unreasonable delay of 41 days and the applicants had failed to satisfy the basic requirements of the orders sought and thus this application should be dismissed.
16. Applications for extension of time are governed under provisions of Order 50 rule 6 of the *Civil Procedure Rules*.
Order 50 Rule 6 of the *Civil procedure* provides that;

“where a limited time has been fixed for doing any act or taking of any proceedings under these rules, or by summary notice or by order of the court, the court shall have power to enlarge time upon such terms (if Any) as the justice of the case may require, and such enlargement maybe ordered although the application for the same is not made until after the expiration of time appointed or allowed.”
17. Extension of time is not a right of a party. It is an equitable remedy that is only available to deserving parties at the discretion of the court, which discretion has to be exercised judiciously and not on whim, sympathy and/or caprice. The court also has to consider the period of delay, reasons for the delay, chances of appeal succeeding and finally the degree of prejudice to the respondent. See *salat v independent Electoral & boundaries commission & 7 others* [2014] KLR-SCK, & *Paul Wanjohi Mathenge Vs Duncan Gichane Mathenge* [2013] eKLR
18. Giving consideration to the above guiding factors, I do find that this application has been filed within a reasonable period of two to three weeks after the time allowed to file the appeal had lapsed, the reasons advanced though weak are plausible and the court is inclined to give the appellant the benefit of doubt, the proposed appeal raises triable issues and finally the prejudice suffered by the respondent can be compensated by way of costs. The prayer for leave to lodge an appeal out of time against the judgment and decree of the Honourable Ann Nyoike principal Magistrate judgment dated February 16, 2023 in Machakos CMCC No E86 of 2020 is allowed.
19. Stay of execution pending appeal is governed by Order 42 Rule 6 of the *Civil Procedure Rules*. It is evident from the said provision that power to grant stay of execution pending appeal is an exercise of



discretion of the court on sufficient cause being shown by the Applicant that substantial loss may result to the applicant if the orders are denied; the application should be made without undue delay and the court will impose such security for the due performance of any decree or order as may ultimately be binding on the Applicant

(see *Butt v Rent Restriction Tribunal* [1982] KLR 417 and *James Wangalwa & Another v Agnes Nalika Chereto* [2012] eKLR)

20. In the case of *Masis Mwita v Damris Wanjiku Njeri* [2016] eKLR provided the guiding principles which the court should consider while determining an application of this nature. These were;
 - a. The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 - b. 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 to be rendered nugatory should that appeal court reverse the judge's discretion.
 - c. A judge should not refuse 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.
 - d. The court in exercising the discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the cases and unique requirements.
21. The judgment appealed against was delivered on 9th December, 202. The Appeal herein was filed on February 20, 2023 and this application filed on March 15, 2023. Thus, it can be said that this appeal and application for stay of execution have been file timeously.
22. On the likelihood of suffering substantial loss, it is evident that the decretal sum together with costs is a tidy sum of money. The Appellant raises reasonable grounds that the Respondent's will not be able to refund the said sum without hardship if paid out to them. I note that the Respondent did state that they are in business of supplying various entities with agriculture materials and can refund the decretal sum. That may be true but unfortunately, they have not filed an affidavit of means as a basis of assessing if they can repay the decretal sum (if paid out).
23. In the case of *GN Muema P/A (516) Mt View Maternity & Nursing Home v Miriam Maalim Bisbar & Another* [2010] eKLR the court states as follows;

“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”
24. In the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR the Court of Appeal held thus;

“Once an Applicant expresses a reasonable fact that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show whatever resources he has since that is a matter which is peculiarly within his knowledge.”
25. Guided by the above authorities and in the absence of the requisite proof from the Respondent that they are person of means, I find that the Appellant has satisfied this court that they would suffer



substantial loss if the entire decretal sum is paid to the Respondent before the appeal is heard and determined.

26. On the security, the Appellant have indicated that they are ready and willing to provide security and annexed two title deeds in the name of the director of the applicant, one Rose Mbula. The valuation attached there to gives the valuation of each parcel at Ksh 1,500,000/= each.
27. The court has to balance the interest of the Appellant who seeks to preserve the status quo pending hearing of the appeal and to ensure the appeal is not rendered nugatory and the interest of the Respondent who seeks to enjoy the fruits of their judgment. In other words, the court should not only consider the interest of the Appellant but also consider, in all fairness, the interest of the Respondent who has been denied the fruit of her judgment. See *Attorney General v Halal Meat Produces Limited* Civil Application No Nairobi 270 of 2008; *Kenya Shell Ltd Kiburu & another* (Supreme); *Mukuma v Abuoga* [1988] KLR 645.
28. The law is that where the Applicant succeeds, it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the Respondent who has a decree in his favour should not, if the applicant is eventually unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security.
29. This issue of adequacy of security was dealt with in the Court of Appeal in *Ndubiu Gitabi v Warugongo* [1988] KLR 621; IKAR 100; [1988-92] 2 KAR 100 where the Court of Appeal expressed itself as follows;

“The process of giving security is one which arises constantly so long as the opposite party can be adequately protected. It is right and proper that security should be given in a way which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantees and payment into court are but two of them. So long as it is adequate, then the form of it is a matter which is immaterial. In an application for stay pending appeal, the court is faced with a situation where judgment has been given. It is subject to appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even handedly without prejudicing the issues pending in the appeal. For that purpose, it matters not whether the plaintiff are secured in one way rather than the other, it would be easier for the defendants or if for any reasons they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no principles why they should not do so... The aim of the court in this case was to make sure, in an even handed manner, that there would not be prejudiced and that the decretal sum would be available if required. The Respondent is not entitled, for instance, to make life difficult for the Applicant so as to tempt him into settling the appeal nor will any party lose if the sum is actually paid with interest at court rates. Indeed in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it.”

Disposition

30. Taking all relevant factors into consideration I order as follows;
 - a. That leave is granted to the applicant to file their appeal out of time and the Memorandum of Appeal filed on February 20, 2023 is deemed properly filed.
 - b. I do grant stay of execution of the decree herein on condition that the appellant do deposit in court the original title deed to parcels Kajiado/Kitengela/45657 & Kajiado/Kitengela/ 45658



with the deputy registrar of this court. The same shall be deposited along with new and current land search showing they have no encumbrance.

- c. The applicants director one Rose Mbula who is the registered proprietor of the said parcels of land do swear an affidavit and have it filed before this court acknowledging that she has willingly offered her title deeds LR Kajiado/Kitengela/45657 & Kajiado/Kitengela/45658 as security in this appeal and the same will act as security for due performance of the applicants obligation under the decree issued in Machakos civil suit No SCCOMM E218/2022.
- d. That this court does issue and places an inhibition order as against LR Kajiado/Kitengela/45657 & Kajiado/Kitengela /45658 pending hearing and determination of this appeal.
- e. This condition is to be met within 30 days from the date of this ruling or in default, this application shall be deemed to have been dismissed with costs and the Respondent shall be at liberty to execute.

31. The costs of this application is awarded to the Respondent.

32. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 3RD DAY OF MAY 2023.

RAYOLA FRANCIS

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 3RD DAY OF MAY, 2023.

In the presence of;

.....for Appellant

.....for Respondent

.....Court Assistant

