



**Muchami v Kenya Commercial Bank Ltd (Miscellaneous Civil Application E033 of 2022)
[2023] KEHC 18164 (KLR) (Commercial and Tax) (19 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18164 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E033 OF 2022**

FG MUGAMBI, J

MAY 19, 2023

BETWEEN

JAMES MAINA MUCHAMI APPELLANT

AND

KENYA COMMERCIAL BANK LTD RESPONDENT

RULING

Brief Facts

1. The dispute between the parties arose from a loan facility of Kshs 5,360,000/= advanced by the respondent to the applicant for the purchase of two heavy duty motor vehicles. According to the respondent the applicant defaulted in the payment of the facility. As a result, the respondent instituted a suit against the applicant in the trial court by a plaint dated July 20, 2015 seeking a sum of Kshs 5,433,477.20. On November 30, 2021, judgment was delivered against the applicant for Kshs 5,433,477.20. Aggrieved by the judgment the applicant lodged an appeal before this court by a Memorandum of Appeal dated January 17, 2022. Simultaneously with the appeal, the applicant filed the present application dated January 17, 2022 brought under Section 1A, 1B, 3A& 79G of the *Civil Procedure Act* and Order 42 Rule 6(1) (2) of the *Civil Procedure Rules*.
2. The application seeks the following orders;
 - i. Spent
 - ii. Spent
 - iii. That pending the hearing and determination of the intended appeal herein this Honourable Court be pleased to stay execution of the decree of the judgment of Hon LB Koech (Mrs) signed, dated and delivered on November 30, 2021.



- iv. That the applicant herein be allowed to file the appeal out of time and the attached Memorandum of Appeal be deemed to be properly filed and served and served upon the respondent.
 - v. That costs of the application be provided.
3. The application was supported by the grounds on the face of it and further by the supporting affidavit sworn by James Maina Muchami. Briefly, the applicant's case was that the trial court delivered an ex parte judgment on November 30, 2021 for the sum of Kshs 5,433,477.20 in Nairobi CMCC No 4169 of 2015.
 4. The applicant was dissatisfied with the judgment and had preferred an appeal to the High Court. The appeal challenged the trial court's decision to proceed ex parte without hearing the applicant and also challenged the trial court for failing to find that the sale and transfer of the motor vehicle registration numbers KBJ 701H and trailer registration number ZD21903 was fraudulent and in breach of the contract between the parties as a result of which the applicant had suffered loss since 2010 to date. These grounds of appeal were laid out in an annexed Memorandum of Appeal.
 5. The applicant's contention is that the delay in filing this application was not unreasonable as he applied for certified proceedings on December 7, 2021 and received the same on January 14, 2022. The applicant averred that the intended appeal had a high chance of success and the applicant would be highly prejudiced if the application for stay was not granted.
 6. In his submissions dated January 31, 2023, the applicant further submitted that he would suffer substantial loss if he is directed to pay the judgment sum and the appeal would be rendered nugatory if the stay orders are not granted given that he was able and willing to offer security for costs.
 7. The respondent opposed the application vide a replying affidavit dated February 21, 2022 sworn by Nelly Musau and urged the court to find that the application was incompetent and an abuse of the court process. The respondent rebuts the averment by the applicant that the judgment was issued ex parte and insists that the dispute was heard and disposed of on merit. In further objection to the application, the respondent also put in written submissions.
 8. The respondent pointed out that despite the allegation made by the applicant, no evidence had been produced to show that the applicant applied for proceedings within time. Further, it was contended that there was no valid reason as to why the Memorandum of Appeal which did not require to be filed together with the proceedings and judgment, was not filed within the 30 days required.
 9. With respect to the stay of execution Counsel submitted that the applicant had only states but not demonstrated how he would suffer substantial loss if the orders were not granted. It was further averred that the applicant had not deposited any security for the performance of the decree and finally that there was unreasonable delay in bringing the application.

Analysis

10. I have considered the application, pleadings, rival submissions and the authorities relied on by the parties. There are two main issues for determination which are:- whether the court should extend the time for filing the appeal and whether the applicant should be granted a stay of execution pending appeal.



Extension of time to file an appeal

11. Section 79 G of *Civil Procedure Act* gives the timelines for filing an appeal from a subordinate court to the High Court. It 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 applicant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the applicant satisfies the court that he had good and sufficient cause for not filing the appeal in time."

12. The Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR laid out the principles for extension of time and stated thus;

- i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
- ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
- iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
- iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
- v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
- vi. Whether the application has been brought without undue delay; and
- vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

13. From the evidence on record, judgment having been delivered on November 30, 2021 meant that for the appeal to be validly lodged, it ought to have been filed on or before December 30, 2021. The application for extension of time was filed in January 17, 2022. This is about two (2) months after the judgment in the lower court was delivered, being on November 30, 2021.

14. Although not specifically pleaded, since the order sought is a discretionary one where the Court is called upon to exercise its discretion, this Court is mindful of Order 50 rule 4 which provides for computation of time during the Christmas recess. It stipulates that;

"Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleadings or the doing of any other act:

Provided that this rule shall not apply to any application in respect of a temporary injunction."



15. The purport of Order 50 rule 4 was considered by the Court of appeal in *Gabriel Osimbo v Chripinus Mandare* [2020] eKLR where J Mohammed JA held as follows –

Therefore, one of the issues that emerges for determination in this appeal is whether the provisions of Order 50 Rule 4 of the Civil Procedure Rules, 2010, which provides for the exclusion of the period 21st December and 13th January in the next year in computing time, applies to the filing of appeals from the subordinate to the High Court. Order 50 Rule 4 of the Civil Procedure Rules provides... In determining this issue, I am guided by Section 57(b) of the Interpretation and General Provisions Act which provides that:-

“In computing time for the purposes of a written law, unless the contrary intention appears-

- b. If the last day of the period is Sunday or a public holiday or also official non-working days which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day”Regarding the vacations to be observed by the Courts and the offices of the High Court, Rule 2(2)(b) of the High Court Practice and Procedure Rules, made pursuant to Section 10 of the Judicature Act, provides that the Christmas vacation shall commence on 21st December and shall terminate on 13th of January. Therefore, applying the above to the instant matter, I find that the appeal to the High Court was filed in time as the Christmas vacation period is excluded for purposes of computation of time stipulated for filing of documents. See also, *Keziah Stella Pyman & 2 others v Paul Mwololo Mutevu & 8 others* [2013] eKLR.”

16. Relying on the foregoing dictum, this Court is of the view that at the time of recess only twenty days had lapsed, having ran from 1st to December 20, 2021. The applicant had up to January 24, 2022 or thereabout to file his appeal and would have instead of filing this application, done so. However, for this reason, I find that there was no delay in filing the present application.

On Stay of Execution Pending Appeal

17. The Principles for stay of execution are provided for under Order 42 rule 6 of the *Civil Procedure Rules* which stipulates as follows;

“No appeal or second appeal shall operate as a stay of execution or proceedings 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 orders set aside.

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 1st 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." (emphasis mine)

18. The Court of Appeal in the case of *Butt v Rent Restriction Tribunal* (1982) KLR 417 gave guidance on how a Court should exercise discretion and held that:

- “ 1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. 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 be rendered nugatory should that appeal Court reverse the Judge’s discretion.
3. A Judge should not refuse a 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.
4. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the applicant had an undoubted right of appeal.
5. The Court in exercising its powers under Order XLI rule 4 (2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

19. Further in *RWW vs EKW* [2019] eKLR, addressed its mind to the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the applicant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Applicant with those of the Respondent.”



20. I am cognizant of the requirement for the court to balance the interests of both parties to ensure that none of them is prejudiced by an order of the court. This was stated in the following words in *Absalom Dova vs Tarbo Transporters* [2013] eKLR,
- “The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Applicant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”
21. Additionally, in *Mwaura Karuga t/a Limit Enterprises vs Kenya Bus Services Ltd & 4 Others* [2015] eKLR, it was said:
- “... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”
22. I have already stated that the application herein was brought without any delay. In fact, it was brought before it was even out of time. The applicant further states that he ready to abide by security for the performance of the decree.
23. As to what amounts to substantial loss, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that:
24. “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.”
25. I have considered the Memorandum of Appeal and I note that the applicant herein challenges the trial court’s judgment in awarding the respondent the sum of Kshs 5,433,477.20. He raises triable issues that should be heard on appeal. He further states that following the sale of the vehicle and truck, he has incurred substantive loss since 2010. My finding is that the appeal would be rendered nugatory and an academic exercise if he pays the decretal amount as it is the subject of the appeal.

Determination and orders

26. In conclusion, I find merit in the application and I allow it on the following conditions;



- i. The applicant pays half of the decretal amount in a joint interest earning account in the names of the advocates for the respective parties within 30 days from the date of this ruling.
- ii. In the event that the condition stipulated in (i) is not fulfilled, the orders for stay of execution will lapse and the respondent will be at liberty to execute.
- iii. Costs shall be in the cause

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 19th DAY OF MAY 2023.

F. MUGAMBI

JUDGE

Court Assistant: Ms. Lucy Wandiri.

