



**Nesaga Investment Limited v Kenya Finance Bank (In Liquidation) & another
(Miscellaneous Case E046 of 2022) [2023] KEHC 21660 (KLR) (10 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 21660 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS CASE E046 OF 2022
SM GITHINJI, J
MAY 10, 2023**

BETWEEN

NESAGA INVESTMENT LIMITED APPLICANT

AND

WILLIM AUCTIONEERS 1ST RESPONDENT

KENYA FINANCE BANK (IN LIQUIDATION) 2ND RESPONDENT

RULING

- 1 For determination before the court is the notice of motion dated July 5, 2022 wherein the applicant seeks the following orders;
 1. Spent.
 2. Spent.
 3. That pending the hearing and determination of this appeal, this honourable court be pleased to grant an order for stay of execution prohibiting the respondents by themselves, their agents, servants and/or proxies from auctioning, selling, alienating, entering and/or interfering with the suit property known as LR 1043/11/832 located at Mazeras Town in Kilifi county.
 4. That this honourable court be pleased to grant the applicant leave to appeal out of time against the ruling delivered by Hon Dr Julie Oseko CM in Malindi CMCC No E001 of 2021.
 5. That the costs of the application be provided for.
- 2 The application is anchored on the grounds set out on the face of it and the sworn affidavit of Grace Adira Achiya the applicant's company director who deponed that the applicant intends to appeal against the ruling delivered by Hon Dr Julie Oseko CM in Malindi CMCC No E001 of 2021 in which the Hon Magistrate granted interim orders limited to a period until the respondent issues the requisite



- statutory notices under section 90 (1) of the Land Act. She stated that the respondents are at liberty to anytime exercise the chargee power of sale against the suit property upon issuance of the said notice and have issued the applicant with the 90 days statutory notice for the auction of the suit property.
- 3 It was further said that the Hon Magistrate in arriving at her decision overlooked that the issue in dispute was whether there was any balance payable and contended that full payments had been made and asks that this court ascertain the amount payable by the applicant before allowing the respondents to sell/auction the suit property.
- 4 In response to the application, the 1st and 2nd respondents filed a replying affidavit sworn by Dorcas Wanjala the resolution manager of the 1st respondent dated August 23, 2022. She stated that the application is premature and devoid of merit and only intends to frustrate the recovery efforts of the colossal loan arrears of Kshs. 20,044,494.50 owed by the applicant to the 1st respondent. Additionally, the prayers sought in the application are incapable of being issued since no positive order was issued by the court of first instance that is capable of being stayed.
- 5 The application was disposed of by way of written submissions. I have considered the rival affidavits, the submissions by the parties as well as the authorities relied on. The issues for determination are; whether stay of execution should be granted and leave to appeal out of time.
- 6 As regards the issue of stay of execution order 42 rule 6(2) of the Civil Procedure Rules provides:
- (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.”
- 7 In the case of Butt v Rent Restriction Tribunal (1982) KLR 417 the Court of Appeal gave guidance on how a court should exercise discretion in an application of stay of execution 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 appellant 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.”



8 The applicant has not provided for any security for costs or demonstrated their willingness to provide the same. Further, the applicant has not demonstrated how it is likely to suffer substantial loss in the event stay of execution is not granted. I find no merit in this prayer and the same is hereby declined.

9 On the issue of leave to appeal out of time, section 79G of the *Civil Procedure Act* provides:

“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.”

10 In the case of *County Executive of Kisumu v County Government of Kisumu & others* (2017) eKLR while relying on its decision in the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others* application No 16 of 2014 (2014) eKLR the Hon Judges of the Supreme Court reiterated the considerations to be made in such a case as follows:

1. 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;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. In certain cases, like election petitions, public interest should be a consideration for extending time.”

11 The trial court delivered its ruling on May 17, 2022. The court indicated that the same was delivered to the parties electronically. The instant application was filed on July 8, 2022 about 7 weeks from the date the ruling was delivered. There is no sufficient cause advanced as to why the delay occurred. In the premise, I am inclined to decline the prayer for leave to appeal out of time.

12 In the end, the application dated July 5, 2022 lacks merit and is hereby dismissed with costs to the respondents.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 10TH DAY OF MAY, 2023.

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S.M. GITHINJI

JUDGE

In the absence of; -



PARA 1.

Parties (They be notified and served).

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