



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Nyabuto v Kimani (Civil Case 358 of 2014)
[2023] KEHC 4070 (KLR) (Civ) (8 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 4070 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 358 OF 2014

AN ONGERI, J

MAY 8, 2023

BETWEEN

FRED ONYONI NYABUTO PLAINTIFF

AND

KIMANI WALTER ALIAS WALTER NGUGI KIMANI DEFENDANT

RULING

1. The application coming for consideration in this ruling is the one dated June 25, 2021 seeking the following prayers;
 - i. That this application herein be certified as extremely urgent and be heard expeditiously and ex-parte in the first instance;
 - ii. That pending the inter-partes hearing and determination of this application, the honourable court be pleased to issue a temporarily order of stay of execution of judgment and decree of Milimani High Court Civil Case no 358 of 2014 (Hon B Thurania Jaden) dated June 26, 2019.
 - iii. That the honourable court be pleased to issue a stay of execution of the judgment and decree of Milimani High Court Civil Case no 358 of 2014 (Hon B Thurania Jaden) dated June 26, 2019 pending the hearing and determination of Court of Appeal Civil Application no E119 of 2021 (Nairobi) for stay of execution and extension of time to file a record of appeal.
 - iv. That the applicant's application dated April 30, 2021 for reinstatement of the dismissed application dated April 7, 2021 be marked as withdrawn and be substituted with this application.



- v. That this honourable court be pleased to give further orders and directions as it may deem fit and just.
 - vi. That the costs of this application be provided for.
2. The application is based on the grounds of the face of it as follows; that the superior court issued its determination and judgement and both the applicant and the insurer being aggrieved by the judgement of the High Court of Kenya in Civil Case No 358 of 2014 at Milimani dated June 26, 2019 filed a notice of appeal against the same on the July 9, 2019 and the instructions were issued by the insurer.
 3. On March 30, 2021 the applicant learnt from the respondent that the insurer had not filed a record of appeal and memorandum of appeal. This was partly attributed to the fact that vide notice of motion dated August 2, 2019 the respondent filed an application seeking to strike out the appellant's notice of appeal filed on July 9, 2019 on the grounds that the applicant failed to serve it on the respondent's advocate within seven days of its filing.
 4. That the court of appeal delivered its ruling on March 19, 2021 ruling that the delay in service of the notice of appeal was not inordinate and no prejudice has been occasioned to the applicant by that delay. The court was satisfied with the explanation and declined to strike out the appeal.
 5. The applicant has an arguable appeal, lodged a notice of appeal within 14 days and the delay to lodge the memorandum and record of appeal within the time stipulated was as a result of inadvertence on the insurer who had authority to represent the applicant in the superior court and the appeal in the court of appeal.
 6. That the applicant through an application in Nairobi Court of Appeal Civil Application No E119 of 2021 dated April 21, 2021, moved the court of appeal for orders of stay against the Judgement and Decree of this court and leave to file the record of appeal out of time provided for in the court of appeal rules.
 7. On June 22, 2021, the respondent moved this court for issuance for issuance of an order for police assistance to enable the appointed auctioneer to remove proclaimed goods for auction under the supervision.
 8. The application is supported by the affidavit of Kimani Walter alias Walter Ngugi Kimani in which he deponed that he is aggrieved by the judgment dated June 26, 2019 in Milimani Civil Case No 358 of 2014 as judgement was entered against him for Kshs 12,984,101. During the hearing of the matter, he did not have control over the entire matter as he entirely on the updates from the insurer.
 9. The insurer thereafter instructed an advocate to file a notice of appeal, memorandum of appeal and record of appeal. A notice of appeal was filed on July 9, 2019 however the respondent vide a notice of motion dated August 2, 2019 sought to strike out the notice of appeal on the grounds that he failed to serve it on the respondent within seven days of its filing as required by Rule 77 (1) of the [*Court of Appeal Rules*](#). The Court of appeal delivered its ruling on March 19, 2021 and held that the delay in service of the notice of appeal was not inordinate and no prejudice had been occasioned to the respondent.
 10. On March 30, 2021, auctioneers went to his house as instructed by the respondent and proclaimed various of his goods in order to satisfy a decree issued pursuant to the Judgement in Milimani Civil Case No 358 of 2014.
 11. On April 21, 2021 he instructed his Advocate to file an application for stay of execution and also seek leave to file the record of appeal out of time at the court of appeal and is coming up for hearing and determination on June 30, 2021.



12. He averred that in the interest of justice this court should allow the orders sought herein and give him an opportunity to finalize the ongoing application at the court of appeal. He indicated that the respondent will not suffer any prejudice if the orders sought herein are granted.
13. The application was opposed by the replying affidavit of Fred Onyoni Nyabuto dated November 7, 2022. In it he deponed that the application herein is an abuse of the court process and is made with the intention of denying him access to the fruits of his judgement.
14. He acknowledged that the applicant filed a Notice of Motion at the court of appeal dates April 21, 2021 and that on July 2, 2021 the Court of Appeal, Judge Dr KI Laibuta made a ruling and ordered that time be extended for the applicant to file and serve his memorandum of appeal and record of appeal within 30 days from the date thereof, that pending application for stay of execution of the judgement and decree of the superior court delivered on June 26, 2019 be listed for determination by a full bench of the court on a priority basis and that the costs of the application in the cause.
15. He indicated that the court of appeal is yet to constitute the panel to determine the said application and that the application herein has already been overtaken by events. He added that the common law principle of Stare Decisis dictates that the lower court adhered to the decisions of superior court and therefore this court is bound by the decision of the Court of Appeal.
16. The parties filed submissions as follows: the applicant submitted that he has an appeal in the court of appeal which has solid grounds as it is based on the fabrication of evidence by the respondent. That he would suffer substantial loss as the appeal will be rendered nugatory if the orders sought are not granted. That if execution is left to proceed the respondent will not be able to refund the decretal sum as the award for damages in this case is Kshs 12,983,101.
17. The applicant indicated that this application was brought timeously upon the court of appeal allowing the application of the applicant and granting leave to the applicant to file the notice of appeal out of time.
18. Additionally, that the court should consider the decretal amount herein is Kshs 12,983,101 which may cripple the applicant and may discourage him from pursuing his appeal if ordered to deposit the whole amount. The ripple effect of such an impossible to comply with order will have an implication where the applicant would be executed and his rights under the appeal compromised and violated.
19. The sole issue for determination is whether the court should grant stay of execution pending appeal.
20. The governing provision of Order 42 Rule 6 which provides as follows;
 - ' (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 order set aside.
 - (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 Applicants 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 Applicants'.

- 21. In granting stay of execution pending appeal the court should balance the interests of the parties.
- 22. The appellant's right of appeal should be considered against the respondent's right to enjoy the fruits of her judgment. In *Machira T/A Machira & Co Advocates vs East African Standard (No 2) [2002] KLR 63* it was held that:

' To be obsessed with the protection of an appellant or intending appellant in total disregard or fitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.'

- 23. I find that this matter is pending appeal in the Court of Appeal where it is awaiting the Constitution of a bench to hear Civil Application no E119 of 2021 (Nairobi) for stay of execution and extension of time to file a record of appeal.
- 24. The Applications being filed by the parties have only served the purpose of delaying the determination of the pending appeal.
- 25. It is in the interest of justice that stay of execution of the judgment and decree of Milimani High Court Civil Case no 358 of 2014 (Hon B Thurania Jaden) dated June 26, 2019 be granted pending the hearing and determination of Court of Appeal Civil Application no E119 of 2021 (Nairobi) seeking stay of execution and extension of time to file a record of appeal.
- 26. I find that it not in dispute that this Application dated June 25, 2021 was brought timeously upon the court of appeal allowing the application of the applicant and granting leave to the applicant to file the notice of appeal out of time.
- 27. I accordingly allow the Application dated June 25, 2021 to enable the parties expedite the appeal. The proceedings in this file have been typed and the record of appeal should be prepared and the same forwarded to the Court of Appeal forthwith.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 8TH DAY OF MAY, 2023.

.....
A. N. ONGERI
JUDGE



In the presence of:

..... for the Plaintiff

..... for the Defendant

