



REPUBLIC OF KENYA



Stephen Kibungei t/a Kibungei & Co. Advocates v Soin Limited (Civil Appeal E121 of 2022) [2023] KEHC 3857 (KLR) (Civ) (2 May 2023) (Ruling)

Neutral citation: [2023] KEHC 3857 (KLR)

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

CIVIL

CIVIL APPEAL E121 OF 2022

JN MULWA, J

MAY 2, 2023

BETWEEN

STEPHEN KIBUNGEI T/A KIBUNGEI & CO. ADVOCATES APPLICANT

AND

SOIN LIMITED RESPONDENT

RULING

1. This Ruling is in respect to the Applicant's Notice of Motion application dated 8th March 2022 brought under Order 42 Rule 6 of the *Civil Procedure Rules* and Sections 1A, 1B and 3A of the *Civil Procedure Act*. The Applicant seeks an order of stay of execution of the Judgment delivered on 4th February 2022 by Hon. D. W. Mburu in Milimani CMCC No. 2425 of 2019 – Soin Limited v Stephen Kibungei t/a Kibungei & Co. Advocates, pending the hearing and determination of the Applicant's Appeal. The Applicant also prays that the costs of this application abide in the outcome of the Appeal.
2. The Application is premised on the grounds on its face and the Supporting Affidavit of Stephen Kibungei, the Applicant herein.
3. The Respondent opposed the application by way of a Replying Affidavit sworn on 22nd April 2022 by Elizabeth Mbithi, a director of Verity Management, a property management agent for the Respondent herein.
4. The court has considered the parties respective affidavits in support of and in opposition of the application as well as their respective oral submissions. The issues that fall for determination are: whether the appeal was filed within time; and whether the Applicant has satisfied the conditions for the grant of stay of execution pending appeal.



Was the Applicant's appeal filed within time?

5. The Respondent contends that the orders sought cannot be granted as there is no proper and/or valid appeal on record as the Applicant filed its Memorandum of Appeal after the lapse of 30 days from the date the judgment was rendered without obtaining prior leave of the court.

6. The lower court delivered its judgment on 4th February 2022. Section 79G of the [Civil Procedure Act](#) stipulates that:

“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against excluding from such period anytime which the lower court may certify as having been requisite for preparation and delivery to the appellant of a copy of the decree or order:...”

7. The Applicant filed its Memorandum of Appeal on 7th March 2022 which was thirty one (31) days after the impugned judgment. The last day for filing the appeal ought to have been 6th March 2022 but this fell on a Sunday which is by law an excluded day in computation of time. Section 57 of the [Interpretation and General Provisions Act](#) states thus:

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

- a. A period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;
- b. If the last day of the period is Sunday or a public holiday or all 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;
- c. Where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;
- d. Where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.”

8. Order 50 Rule 3 of the [Civil Procedure Rules](#) echoes the above provisions by providing:

“3. Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof, such act or proceeding cannot be done, or taken on that day, such act or proceeding shall so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open.”

9. For the foregoing, the court finds that the Applicant's appeal was filed within time and is therefore properly on record.



Whether the Applicant has satisfied the conditions for stay pending appeal?

10. The conditions necessary for the grant of stay of execution pending appeal are laid out under Order 42 Rule 6(2) of the [Civil Procedure Rules](#) as follows:

- “(2) 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 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.”

11. There is no doubt that application was filed without unreasonable delay in the circumstances of this case. Upon delivery of the judgment of the lower court on 4th February 2022, the Applicant obtained a 30-days stay of execution in the said court. The stay lapsed on 6th March 2022 and the Applicant filed the instant application four days later on 10th March 2022. The court finds that the 4 days delay is not unreasonable.

12. As regards substantial loss, the Applicant states that he is apprehensive that if the Respondent proceeds to execute the Judgment against him, it may be impossible to recover the substantial decretal sum of Kshs. 1,836,291.68 in the event that his appeal succeeds. It is well settled that once an Applicant expresses a reasonable fear that the Respondent would have difficulties in refunding the decretal sum if paid before the determination of an appeal, the evidential burden shifts to the Respondent to demonstrate his ability by way of Affidavit evidence as that is a matter which is peculiarly within his or her knowledge; see [National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another](#) [2006] eKLR. The Respondent herein has not discharged this burden and thus the court is satisfied that the Applicant herein stands to suffer substantial loss if stay is not granted.

13. On the issue of security, the court notes that the Applicant had already deposited in court the sum of Kshs. 400,000/- as a condition for the grant of a temporary stay of execution. In the court’s view however, the said amount is not sufficient security for the due performance of decree that might ultimately become binding on the Applicant in this case.

14. For the foregoing, the court allows the Applicant’s Notice of Motion dated 8th March 2022 upon the Applicant complying with the following conditions:

1. The full decretal sum of Kshs. 1,836,291.68 shall be deposited into a joint interest earning account in the names of the advocates of both parties within 45 days from the date of this ruling. In this regard, the sum of Kshs. 400,000= deposited in court as security by the applicant shall be released to the applicant forthwith to facilitate compliance with the above order.
2. In default of order (1) above, the stay orders shall lapse automatically.
3. The Respondent shall have the costs of the application.

Orders accordingly.

DATED, DELIVERED AND SIGNED IN NAIROBI THIS 2ND DAY OF MAY, 2023.

JANET MULWA



JUDGE

