



Gakono & another v Jepkorir (Suing as the Legal Representative of Pius Kipkoech Maiyo - Deceased) (Miscellaneous Application 183 of 2023) [2023] KEHC 22342 (KLR) (20 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22342 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS APPLICATION 183 OF 2023
RN NYAKUNDI, J
SEPTEMBER 20, 2023**

BETWEEN

JULIUS SOMOEI 1ST APPLICANT

GERALD WACHIRA GAKONO 2ND APPLICANT

AND

JOAN JEPKORIR (SUING AS THE LEGAL REPRESENTATIVE OF PIUS KIPKOECH MAIYO - DECEASED) RESPONDENT

RULING

1. By a Notice of Motion dated 17/7/2023, the Applicants seek the following orders:
 1. Spent.
 2. Spent.
 3. There be an order of stay of execution in Eldoret CMCC Numbr 838 of 2022 pending the hearing of this application inter partes.
 4. The Applicant be granted leave to file an appeal out of time.
 5. Costs of this application be in the cause.
2. The application is premised on the ground therein and is further supported by the affidavit sworn by Gerald Wachira Gakono on 11/7/2023.

The Applicants' Case

3. The applicants deposed that on 7/7/2023, the lower Court entered judgment against them in favour of the Respondent which copy they received from their Advocates on record on 5/6/2023.



4. The Applicants further deposed that by the time, they went through the judgment and got hold of their Advocates on record to give them instructions to appeal, the time within which to appeal has lapsed.
5. The Applicants maintain that the intended appeal has merits, raises triable issues and has high chances of success.
6. The Applicant further deposed that that the application herein has need filed expeditiously and without any delay.
7. The Applicant are apprehensive that Respondents may resort to execution as currently there no orders of stay of execution in place.
8. The Applicants further deposed that in the vent that execution is levied against them, the intended appeal and the application herein will be rendered nugatory and that they will suffer irreparable loss.
9. The application is opposed by the Respondent vide her Replying affidavit dated 31/7/2023.
10. The Respondent contends that the Applicants herein were represented by their Advocate who was well aware of the judgment. Further the Respondent contend that the delay occasioned in filing the appeal herein is unexplained and inordinate in the circumstances. According to the Respondent the application herein ought to be dismissed.
11. The Respondents contends that the Applicants herein have not satisfied the conditions to warrant the grant of orders of stay as they have not demonstrated the substantial loss they are likely to suffer in the event stay orders are not granted.
12. According to the Respondent, allowing this application will only delay the enjoyment of the fruits of her judgment.
13. The Respondent further contends that the Applicants conduct is wanting since they only when execution is eminent.
14. The application was canvassed vide written submissions. On 31/7/2023 the Applicants filed their submissions dated 28/7/2023.

The Applicants' Submissions

15. On whether the application was brought without undue delay, Counsel for the Applicants submitted that the trial Court entered judgment against the Applicants and in favour of the Respondent on 7/6/2023. This instant application is dated 12/7/2023 being a month and five days after judgment was delivered. Counsel further argued that the instructing client, the insurance of the Applicants herein, had to take time to analyse the viability of an appeal before issuing them with the present instructions to file this instant application on 10/7/2023.
16. According to the Applicants' Counsel, there has been no delay on the part of the Applicants herein in filing the present application as the same has been timely filed and without any delay. Counsel relied on the following cases to support his arguments on the issue; *Jaber Mohsen Ali & Another V Priscillah Boit & Another* [2014] eKLR and *Richard Muthusi V Patrick Gituma Ngomo & Another* [2017] eKLR.
17. With regard to substantial loss, Counsel submitted that in event that execution is levied against the Applicants then the intended appeal will be rendered nugatory and that the Applicants will suffer irreparable loss. Counsel relied on the case of *Kenya Shell Limited V Benjamin Karuga Kibiru & Another* [1986] eKLR and several several other cases to buttress his submissions on the issue.



18. With regard to security, Counsel submitted that the Applicants are willing and ready to abide by the Court orders should this Court deem it fit to order the same. Counsel relied on the case of [*Joseph Schmaderer V Serah Njeri Ngene*](#) [2021] eKLR and several other cases to buttress his arguments on the issue.
19. With regard to leave to appeal out of time; Counsel cited the provisions of Section 79G of the [*Civil Procedure Act*](#). Counsel further relied on the holdings in the following cases; [*Thuita Mwangi V Kenya Airways Ltd*](#) [2003] eKLR and the case of [*Nicholas Kiptoo Korir Salat v Independent Electoral and Boundaries Commission & 7 others*](#) [2014] eKLR.
20. Counsel reiterated that trial Court entered judgment against the Applicants and in favour of the Respondent on 7/6/2023. This instant application is dated 12/7/2023 being a month and five days after judgment was delivered. Counsel further argued that the instructing client, the insurance of the Applicants herein, had to take time to analyse the viability of an appeal before issuing them with the present instructions to file this instant application on 10/7/2023.
21. Counsel argued that stay orders had been temporarily granted for 30days on 7/6/2023 when the learned Magistrate delivered the judgment. That the interim stay of execution orders lapsed on 7/7/2023. That the present application was filed on 12/7/2023, five days after the said orders had lapsed. According to Counsel the five-day delay in filing an appeal was not deliberate as the instructing client took time to assess the viability of an appeal and after the decision was made the instant application was brought timeously.
22. Counsel urged the Court not lock the door of justice but to allow the applicants to file their appeal out of time as the appeal is arguable and merited.

Analysis and Determination

23. I must point out from the onset that in a court exercising jurisdiction to grant or decline the remedy on stay of execution pending an appeal. Some of the key features to form the substratum of the discretion include the following:
 1. There must be a pending appeal.
 2. The appeal must be competent and arguable on its merits
 3. A stay of proceedings will be granted to preserve the res
 4. Where a stay of proceedings will cause greater hardship than when it is refused, the court will not grant it
 5. Where a stay is likely to render the rights sought to be protected null and void, it will be refused
 6. Where an appeal raises issues of jurisdiction, it is a strong factor in support.
24. I have carefully considered the application, the grounds and supporting affidavit, the response thereof as well as the submissions and the applicable law. The main issues for determination are whether the Applicant deserves the orders for extension of time to file an appeal and secondly, whether this court should stay execution of decree in the lower court.
25. I begin with the application for leave to file an appeal out of time. In essence in approaching the High Court for an appeal any such litigant has 30 days as provided in Section 79(G) of the [*Civil Procedure Act*](#) to lodge the appeal.



26. Section 79G of the *Civil Procedure Act* 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 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.

27. Some of the usual conditions precedent to be fulfilled by the movant are well captured in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* CA No. 255 of 1997 thus:

It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which the Court takes into account in deciding whether to grant extension of time are: first the length of the delay, secondly, the reason for the delay, thirdly possibly the chances of the appeal succeeding if the application is granted and fourthly, the degree of prejudice to the respondent.”

28. It is trite to note that 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. That discretion, however, must be exercised judiciously.

29. An analysis of the record and evidence shows that the trial Court delivered its judgment on 7/7/2023. The present application was filed on 12/7/2023 being a month and five days after judgment was delivered. In my view the delay of five days is not so grave so as to deny the Applicants to pursue their intended appeal.

30. The Application for stay of judgment is primarily governed by the terms of Order 42 Rule 6 of the *Civil Procedure Rules*. The conditions to be met by an Applicant in order to be entitled to an order for stay are provided in the following terms:

6.

(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 sub-rule (1) unless—

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

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.



31. Regarding stay of execution Order 42 Rule 6 of the *Civil Procedure Rules* governs the conditions to be met by a party to the proceedings seeking stay of execution of the Judgment. It provides that the application must be filed without undue delay. At the hearing of the application, it must be demonstrated that the applicant will suffer substantial loss if the order on stay is denied. That the Court considering the application does factor security for due performance of the decree.
32. The approach to be adopted by the Court on an application for stay of execution is outlined in several decisions of the High Court and Court of Appeal including the cases of *Reliance Bank Ltd v Nor Lake Investments Ltd* {2002} 1EA 227, *Githunguri v Jimba Credit Corporation Ltd* {1988} KLR 838, *Damji Pragji Mandavia v Sara Lee Household and Body Care Ltd* CA No. 345 of 2004, *National Bank of Kenya Ltd v Jivraj Rai Shi and Brothers Ltd* Civil Application No. 153 of 2002.
33. The principles enunciated in the above decisions are as follows for grant of a stay of execution pending appeal thus:
 - (1). That there is sufficient cause for the grant of the order for stay of execution of the decree or order.
 - (2). That the application has been made without unreasonable delay.
 - (3). That the substantial loss may result to the applicant unless the order is made.
 - (4). That the successful party is entitled to the enjoyment of the fruits of his or her success.

While on the other hand, the aggrieved party is entitled to exercise his or her constitutional right of appeal and the intended appeal succeeding should not be rendered nugatory.

34. Applying the above principles, I have perused the record and corresponding Notice of motion. In my view the applicant has discharged the burden on the conditions precedent based on the affidavit evidence to support exercise of discretion in its favour under Order 42 Rule 6 of the *Civil Procedure Rules*. There is however need for the Applicants to deposit security of the quantum in a joint earning interest account of both counsels in a reputable financial institution within 45 days from today's date. In the same vein the applicant in the alternative be at liberty to secure bank guarantee for security deposit within the same period defined above. In order to Fast-track the appeal as stipulated in order 42 of the *Civil Procedure Rules* a record of appeal be prepared, lodged with the registry and served upon the respondent be complied within a period of 30 days from today's ruling. The costs of the application to abide the intended appeal.

It is ordered so.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 20TH SEPTEMBER 2023.

R. NYAKUNDI

JUDGE

