



REPUBLIC OF KENYA



Aswa Developers & Contractors Limited v Mbugua t/a Munleo Hardware & Metal Fabricators & another (Civil Appeal 38 of 2018) [2023] KEHC 24009 (KLR) (Civ) (19 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24009 (KLR)

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

CIVIL

CIVIL APPEAL 38 OF 2018

JN MULWA, J

OCTOBER 19, 2023

BETWEEN

ASWA DEVELOPERS & CONTRACTORS LIMITED APPELLANT

AND

**LEONARD MUNYUA MBUGUA T/A MUNLEO HARDWARE & METAL
FABRICATORS 1ST RESPONDENT**

G NORTH AND SONS LIMITED 2ND RESPONDENT

(Hon. Justice PM Mulwa J dated March 31, 2023)

RULING

1. Before the court is an application dated May 25, 2023 brought by G North and Sons Limited under Article 159(2) (d) of *the Constitution* and sections A, 3A and 72 of the *Civil Procedure Act*, Order 21 Rule 1, Order 42 Rule 6, and order 51 Rule 1 of the *Civil Procedure Rules* and Section 7 of the *Appellate Jurisdiction Act*. The orders the applicant seeks are two;
 1. Leave to appeal out of time against the judgment and decree of Hon. Justice PM Mulwa J dated March 31, 2023 and the Notice of Appeal filed out of time on May 23, 2023 be deemed as properly filed and served.
 2. An order of stay of execution of the said judgment and decree pending the hearing and determination of the intended appeal.
2. The supporting affidavit is sworn by one Peter Kithinji Mugambi, Director of the Applicant's Company on May 25, 2023.



3. In opposing the application, a Replying Affidavit sworn on the July 24, 2023 was filed by the 1st Respondent Mr Leonard Munyua. The 2nd Respondent does not oppose the application.
4. The court has considered the parties respective affidavits in support and in opposition of the application as well as their respective oral submissions, and flags two issues for determination; Whether the applicant should be granted leave to file appeal out of time and whether the applicant has satisfied conditions for grant of stay of execution pending the intended appeal.

Whether the Applicant should be granted leave to file appeal out of time.

5. The court (P Mulwa J) delivered its judgment on 31st March 2023. 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...'

6. Under the provision of Rule 4 of the [Court of Appeal Rules](#), this Court has power to enlarge time required for the performance of any acts set out in the Rules notwithstanding that the said time has expired. It therefore follows that whether to extend time is a matter of judicial discretion.
7. Rule 75(2) of the Court of Appeal requires that the notice of appeal be lodged within fourteen (14) days of the judgment and the same is to be served within seven (7) days of filing as per rule 77(1).
8. In the Court of Appeal decision of *Leo Sila Mutiso versus Rose Hellen Wangari Mwangi Nairobi CA No 255 of 1997* wherein, this Court laid down this guiding principle.

' It is now well 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 this Court takes into account in deciding whether to grant an 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 if the application is granted.'

9. Additionally, under the provisions of Section 95 of the [Civil Procedure Act](#) and Order 50, Rule 5 of the Civil Procedure Rules, the courts have power to enlarge time required for the performance of any act under the Rules even where such time has expired.
10. In the case of *Thuita Mwangi v Kenya Airways Ltd [2003] eKLR* the Court of Appeal illustrated the conditions to be met in deciding whether to extend the period for filing an appeal out of time and which I shall address hereunder.
11. Under the first condition touching on length of delay, while it is apparent that the Notice of Appeal was filed on May 19, 2023 which was forty-nine (49) days after the impugned judgment. The last day for filing the appeal ought to have been April 30, 2023. In my mind, while there has clearly been a delay in filing the motion, I do not find the delay to be inordinate.



12. In the High Court decision of *Mwangi S Kimenyi Vs Attorney General & another (2014) eKLR* considered what constitutes inordinate delay, and said as follows:

' There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable...Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases.'

13. Concerning the reasons for the delay, the Applicant explained that the delay was occasioned by the fact that they found out on April 12, 2023 through the e filing portal that judgment had been delivered on March 31, 2023 without notice after it had been indicated that the Easter Recess with effect from March 30, 2023 to April 12, 2023 both days inclusive.
14. The 1st Respondent contends that the applicant has not advanced any reasonable grounds to warrant grant of the orders sought, as it appears to blame the court for delivering the impugned on March 31, 2023 when indeed there is nothing wrong for the court to sit during its recess when already it has issued a notice and/or directions of the delivery of the judgment. The explanation given by the applicant, in my view, is reasonable in the circumstances.
15. As relates to the condition on whether or not an arguable appeal exists, it is the applicants' assertion on the one hand that they have an arguable appeal which raises valid points of law and fact as may be seen in the draft memorandum annexed to the motion. I am therefore satisfied that the applicant has demonstrated existence of arguable points of law and fact and therefore not frivolous in the proposed appeal.
16. In addressing the final condition on prejudice, the applicant asserts that the 1st Respondent does not stand to suffer any substantial loss that cannot be compensated in damages or by an award of costs. I therefore find it prudent to grant the applicant an opportunity to challenge the judgment before the Court of Appeal.

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

17. 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.'



18. The first condition being that the application must have been brought without unreasonable delay has already been addressed hereinabove.
19. As regards substantial loss, the Applicant states that he is apprehensive that unless this Court grants a stay of execution pending the hearing and determination of this application and the appeal, the 1st Respondent will proceed with execution of the decree thus making the intended appeal nugatory.
20. The question on who has the burden of proof on the issue of refund of the decretal sum was discussed by the Court of Appeal in the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR* when it held that:

' Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...'
21. In the absence of anything on record to ascertain the 1st respondent's financial capacity to refund the decretal sum, I am satisfied that the applicant has reasonably demonstrated that it stands to suffer substantial loss if the decretal sum is paid out to him and the appeal turns out successful.
22. Under the final condition which is the provision of security for the due performance of a decree or order, none of the parties made any suggestions on the same and left it to the court to give its directions. It is noted that the full decretal sum is already deposited in court. It is common ground that the appeal may not be heard and determined so soon as parties may wish due to usual challenges known to the parties. I am therefore of the view that an order for deposit of the decretal sum in a joint interest earning account would constitute the most suitable mode of security.
23. For the foregoing, the court allows the Applicant's Notice of Motion dated May 25, 2023 upon the applicant complying with the following conditions:
 - i. The Applicant is granted leave to Appeal to the Court of Appeal out of time against the whole of the Judgment and Decree of this court dated March 31, 2023. The Notice of Appeal shall be filed and served within 7 days of this ruling.
 - ii. There shall be a stay of execution of the judgment delivered on March 31, 2023 on condition that the applicant deposits the entire decretal sum in an interest earning account in the joint names of the parties' advocates within 45 days of this order failing which the order of stay shall lapse automatically. To effect compliance of this order, I direct that the decretal sum deposited into court as security be forthwith released to the applicant to facilitate deposit of the same in a bank account as stated above and in any event within 30 days.
 - iii. Costs of the application to be borne by the applicant.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 19TH DAY OF OCTOBER, 2023.

JANET MULWA
JUDGE.

