



REPUBLIC OF KENYA



**Kaguu & another v Nyagaresi (Miscellaneous Civil Case E004 of 2024)
[2024] KEHC 13623 (KLR) (5 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13623 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KILGORIS
MISCELLANEOUS CIVIL CASE E004 OF 2024
F GIKONYO, J
NOVEMBER 5, 2024**

BETWEEN

CHARLES GATHONGO KAGUU 1ST APPLICANT

WAMBUGU VETFARM LIMITED 2ND APPLICANT

AND

ERICK NYAGARESIS RESPONDENT

(Being an application for leave to file appeal out of time and stay of execution of the judgment by Hon.W.C. Waswa dated 28/06/2024 in Kilgoris CMCC No. 43 of 2022)

RULING

Stay of execution and leave to appeal out of time

1. The Notice of Motion dated 14.8.24 is seeking for leave to appeal out of time as well as stay of execution of judgement and decree in Kilgoris CMCC No. 43 of 2022.
2. The Notice of Motion is expressed to be brought under section 1A, 1B, 3A, 63(e), 79G and 95 of the [Civil Procedure Act](#), and Order 42 rule 6, and Order 51 rule 1 of the Civil Procedure Rules and all enabling provisions of the law. It is supported by the affidavit of ODEL WISLSON and grounds set out in the application and augmented in the submissions.

Directions of the court

3. The application was canvassed by way of written submissions.

The applicant's submissions.

4. The applicants submitted that they did not file appeal in time due to an inadvertent failure by their insurer to give instructions in time to file appeal. They claimed that the delay is not inordinate.



Therefore, no prejudice will be suffered by the respondent. They beseeched the court to exercise discretion under section 79G of the [Civil Procedure Act](#) and grant them leave to file appeal out of time.

5. The applicants also submitted on stay of execution that; the respondent will not be able to refund the decretal sum if the appeal succeeds leaving them with a barren success. They however stated that they are ready, able and wiling to deposit one half of the decretal sum in an interest-earning account in the joint names of the legal counsel for the parties herein.

Respondent's replying affidavit and submissions

6. The respondent blamed the applicants of deliberate failure to file appeal in time. He views the decision to appeal as mere afterthought aimed at depriving him of the fruits of his judgment. And, on that basis, urged the court to decline its leave.
7. The respondent averred that the applicants have not demonstrated the kind of substantial loss they would incur unless stay of execution is ordered.
8. The respondent, however, stated that, if the court is inclined at granting stay of execution, it should order the applicants to pay one half of the decretal sum to the respondent and deposit the other half in an interest-earning account in the joint names of the legal counsel for the parties herein.

Analysis And Determination

Issues

9. This court has considered the application dated 14.8.24, the affidavits filed and the rival submissions of the parties.
10. Arising therefrom are the main issues:
 - i. Whether leave to appeal out of time should be granted; and
 - ii. Whether stay of execution is merited.

Leave to file appeal out of time

11. '...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'. S. 79G of the [Civil Procedure Act](#)
12. The test is 'good and sufficient cause for filing the appeal in time' making it a discretionary remedy. *Diplack Kenya Limited vs William Muthama Kitonyi* [2018] eKLR.
But, the discretion is exercised upon principles or relevant considerations, including;
 - a. the length of delay,
 - b. the reason for the delay which must be explained to the satisfaction of the court,
 - c. the chances of the appeal succeeding if the application is granted,
 - d. the importance of compliance with the prescribed time lines for the particular litigation,
 - e. the degree of prejudice to the respondent if the application is granted, and
 - f. the application was made without unreasonable delay.



See the Supreme Court in the case of Nicholas Kiptoo Korir Arap Salat vs IEBC and 7 Others [2014] eKLR and the Court of Appeal in Paul Musili Wambua vs Attorney General & 2 Others [2015] eKLR and Thuita MWANGI vs. Kenya Airways Ltd [2003] eKLR.

13. Applying the above principles to the present case, the judgment herein was delivered on 28th June, 2024 and the applicant filed the current application on 14.8.2024. This is about 45 days delay. The applicant has attributed the delay in not filing appeal in time to the inadvertent failure by the applicants' insurer to give instructions to appeal the judgment. According to the applicant, the delay is not inordinate.
14. The respondent was of the view that the applicants deliberately failed to file appeal in time, and that they have not explained the delay to the satisfaction of the court. In the estimation of the respondent, the decision to appeal is an afterthought which is intended to deny the respondent the fruits of his judgment.
15. Although litigants should be vigilant and prompt in pursuing their right of appeal, nothing depicts the applicants as indolent suitors. Their explanations for the delay-inadvertent failure by the insurer to give instructions in time to appeal the judgment- is plausible. The delay has been explained to the satisfaction of the court. Also, a period of 45 days may not be categorized as inordinate.
16. In light thereof, the applicants are hereby granted leave to file appeal within 21 days of this ruling.

Of stay of execution

17. '...the court to which...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...' Order 42 Rule 6 (1) and 2 of the Civil Procedure Rules.
18. In determining what 'may seem just', the court should be satisfied—
 - a. that substantial loss may result to the applicant unless the order is made;
 - b. that the application has been made without unreasonable delay; and
 - c. of 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.
19. The court has found that the delay herein is not inordinate. Similarly, the application for stay of execution was filed without unreasonable delay.
20. The bigger hurdle would be to establish that substantial loss would occur unless stay of execution is ordered; a loss of 'real worth or value, as distinguished from a loss without value or loss that is merely nominal'. Sewankambo Dickson Vs. Ziwa Abby HCT-00-CC MA 0178 of 2005, High Court of Uganda at Kampala.
21. According to the applicant, the respondent may not be able to refund the decretal sum if the appeal is successful which will render their success merely paper success.
22. This ground was not argued in the submissions by the applicant but in the supporting affidavit.
23. The respondent argued that the applicant has not demonstrated the kind of substantial loss they would suffer if stay is not granted. The respondent, however, stated that, if the court be inclined to grant stay of execution, the applicants should pay half of the decretal sum to the respondent and deposit the other half in an interest earning account in the joint names of the advocates on record.



24. Contrary to the respondent's argument, the applicants stated that substantial loss consists in the respondent's inability to refund the decretal sum if the appeal succeeds. The respondent did not address this claim. Such eventuality, would leave the applicants' success in the appeal, mere paper success or barren result. This is a kind of loss that is of real worth or value, and, therefore, substantial loss in the sense of order 42 rule 6 of the CPR.
25. The saving grace, however, is in the fact that the applicants propose to provide security by depositing half of the decretal sum in an interest earning account in the joint names of the advocates on record.
26. What seems to be just in this case?
27. The question calls for proportioned balance between the competing rights of the parties herein in a manner stated in *Absalom Dova vs. Tarbo Transporters* [2013] eKLR that:
"The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination".
28. No right is the lesser. No party should suffer disadvantage or prejudice.
29. It seems just in this case for the applicants to pay half of the decretal sum to the respondent within 30 days. The balance to abide by the result of the appeal. It is so ordered.
30. No orders as to costs.
31. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT KILGORIS THROUGH TEAMS APPLICATION, THIS 5TH DAY OF NOVEMBER, 2024.

F. GIKONYO M.

JUDGE

In the Presence of:

CA - Nyangaresi

M/s. Anyango hb for Ataka for Applicant – present

Atisi hb for Gichana for Respondent - present

