



Matunda (Fruits) Bus Services Limited v Oyaya & another (Suing as the Administrators of the Estate of the Late Simeon Opiyo Oyaya) (Miscellaneous Civil Application E275 of 2024) [2024] KEHC 14390 (KLR) (19 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14390 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CIVIL APPLICATION E275 OF 2024
SM MOHOCHI, J
NOVEMBER 19, 2024**

BETWEEN

MATUNDA (FRUITS) BUS SERVICES LIMITED APPLICANT

AND

JAMES OWUOR OYAYA 1ST RESPONDENT

VERONICA ADHIAMBO 2ND RESPONDENT

SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE SIMEON OPIYO OYAYA

RULING

1. For determination is the Applicant's Notice of Motion Application dated 28th August, 2024 brought under Article 159 2(d) of *the Constitution*, Sections 1A, 1B, 3A 79G and 95 of the *Civil Procedure Act* and Order 42 Rule 6 (1), (2) & (7), Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules wherein it seeks:
 - a. Spent;
 - b. That the Honourable Court be pleased to grant the Applicant leave to Appeal out of time in respect to the judgment/decree delivered in Nakuru CMCC No. 355 of 2021 by Hon. Bildad Ochieng (CM);
 - c. Spent;
 - d. That the Honourable Court be pleased to grant an order of Stay of Execution of the judgment and or Decree delivered on 13th June, 2024 and all consequential orders arising therefrom pending the hearing and determination of the intended Appeal herein;



- e. This Court be pleased to issue an order for provision of a bank guarantee of the entire decretal sum awarded by the Trial Court Kshs 5,104,075 as security pending the hearing and determination of the intended appeal herein;
 - f. The Honourable Court be pleased to issue any other order as it may deem just appropriate and expediate in the interest of justice;
 - g. Costs of this Application be provided for.
2. The Application was predicated on the grounds on its face and the Supporting Affidavit of Ann Kagira, Advocate sworn on the same date.

Applicant's Case

3. Counsel deposed that judgement in Nakuru CMCC No. 355 of 2019 was delivered on 13th June, 2024 in favour of the Respondent and the delay in filing the appeal was inadvertent as the judgment was delivered in their absence. That no notice had been issued despite the Court having directed that the judgment would be delivered on notice.
4. She deposed further that, they received a Judgment Notice from the firm of Musil Mbiti dated 28th October, 2023 with information that it would be delivered on 7th December, 2023. That on 7th December, 2023, they enquired on the judgment and were advised that the suit had a judgement date for 27th December, 2023. On 27th December, 2023 they were informed by the clerk that it would be delivered on notice.
5. It was averred that; their office clerk has been tracing the file and was able to obtain a copy of the judgement on 23rd August 2024. She informed and followed up with on payment of the claim. The instructing client being dissatisfied with the judgment, instructed them to file an appeal. That by the time they got the instructions the 30 days period set for lodging of appeal had already lapsed.
6. It was also deposed that, the appeal raises triable issues on points of law and has high chances of succeeding. That they are apprehensive that the Respondent will commence execution proceedings thereby rendering the appeal nugatory. That the Applicant also stands to suffer irreparable loss and damage if the Application is not allowed and the intended appeal is heard and determined.
7. Counsel also deposed that the income of the Respondent remains unknown and may not be in a position to refund the same in the event the appeal succeeds. That they are willing to provide a bank guarantee for the decretal sum from Family Bank pending hearing and determination of the appeal.
8. She argued that the Applicant's right of appeal will be injured if the prayers sought are not allowed and the matter is preserved. That the Respondent will not be prejudiced in any way if the orders sought are granted and that the Applicant is willing to abide by the terms and conditions that will be imposed. The Application is made in utmost good faith and without undue delay.

Respondents' Case

9. The Application was opposed through the Respondents' joint Replying Affidavit sworn on 4th September, 2023. They deposed that they have been in Court for the last five years seeking justice for their kin.
10. The Respondents prayed that the Court does exercise its discretion and weigh the Respondents right of enjoying fruits of their judgment against the Applicant's rights and requested for the Court to set stay conditions and proposed that the Applicant pays them half of the decretal amount and deposit



the other half in a joint earning interest account in the name of both advocates within 21 days' failure to which execution shall proceed.

Applicant's Submissions

11. The Applicant submitted that the Application has merit and on the discretion to extend time for filing appeal the Applicant relied on the provisions of Section 79G of the Civil Procedure Act and the decision in Aviation Cargo Ltd vs St March Freight Services Ltd.
12. Counsel also relied on the position held in Edith Gichungu Koine vs Stephen Njagi Thoithi [2014] eKLR and invited the Court to be guided by the factors to be considered as highlighted in the said Court of Appeal decision when considering the application.
13. It was also submitted that the application was brought with no unreasonable delay and sufficient reasons for not filing the appeal on time were proved.
14. Reliance was placed in Belinda Mural & 9 Others vs Amos Wainanina [1978] eKLR and Shah H. Bharmal & Brothers vs Kumar [1961] EA 679 and Haman Singh & Others vs Mistri [1971] EA 122. Wherein it was held by the Courts in these cases that mistake of a legal advisor may amount to sufficient cause. Counsel submitted that despite there being no fault from counsel or the client the error should not be visited on an innocent litigant.
15. Counsel submitted that a proposal has been made to furnish a bank guarantee of Kshs 3,000,000 in order to ensure the Applicant is not locked out of its right to be heard and relied on Kamlesh Masukhala Damki Patni vs Director of Public prosecutions & 3 Others [2015] eKLR where the Court was of the view inter alia that Courts should be hesitant to close the door of justice before a party is heard. Articles 50(1) and 48 of the Constitution was also invoked.

Respondents Submissions

16. The Respondent relied on the decision in Edward Kamau & Another vs Hannah Mukui Gichuki [2018] eKLR to submit that the Court expressed the need to balance between the rights of the parties and emphasized as well on their proposal of being paid half of the decretal sum and the other half to be deposited in an interest earning joint account in the name of both counsels within 45 days.

Analysis and Determination

17. Having considered the material placed before Court and the arguments by both parties as well as the rival submissions the issues for determination by the Court are: -
 - a. Whether the threshold for grant of orders to enlarge time within which to file an appeal has been met.
 - b. Whether grant of orders of stay of execution pending appeal is merited.
 - c. Who bears costs of the Application.
18. Pertaining the first issue for extending time pending appeal, the Applicable law is found in Section 79G of the Civil Procedure Rules and various judicial pronouncements of the Courts which have set forth the factors and principles to be considered when dealing with an application to extend time to file an appeal.



19. Section 79G of the *Civil Procedure Act* provides as follows: -

“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 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.”

20. The Supreme Court in *Nicholas Kiptoo Korir arap Salat vs IEBC & & Others* [2014] eKLR stated that: -

- i. 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;
- ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court
- iii. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
- iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
- v. Whether there will be any prejudice suffered by the respondents if the extension is granted
- vi. Whether the application has been brought without undue delay; and
- vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

21. Judgment was delivered on 13th June, 2024 and the present application was filed on 29th August, 2023, one and a half months after the statutory period for filing an appeal. The advocates argued that the delay was because they were not aware of delivery of the judgment since it was to be delivered on notice and the notice was not given. Counsel submitted that they annexed a CTS extract marked as AK-1 which from the record was not annexed.

22. The Respondent’s advocates the firm of Musil Mbiti served them with a judgement Notice dated 28th October, 2023 for delivery of judgment on 7th December, 2023 which seemed not to have happened on the said date. The Applicant argued that there were other subsequent dates which reserved for delivery of judgment but the judgment was also not delivered until they were advised on it being delivered on notice.

23. It is worth noting that Respondents have also challenged those assertions by the Applicant that judgment was to be delivered on Notice or that the Applicant was not aware of delivery of judgement. In fact, the Respondents are insisting on pre-conditions for granting the orders.

24. I am inclined to allow the Applicant’s Application for leave to file the intended appeal noting that a month and a half is not inordinate and the reason that neither the Applicant or its advocates were aware of the delivery of the judgment appears plausible, convincingly explained and unchallenged. Further it appears that the Court took part in contributing to the delay.

25. It follows that the application has merit and is for allowing.



26. As regards the second issue on Stay of Execution pending Appeal, the same is espoused under Order 42 Rule 6 of the Civil Procedure Rules. The conditions to be met before stay is granted are provided for under Rule 6(2) which states as follows:
- “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.”
27. On the first limb of substantial loss, Applicant argued that the Respondent will commence execution proceedings thereby rendering the appeal nugatory, that their right to appeal will be curtailed if the orders sought are not granted and that in the event that the appeal succeeds, the Respondents source of income has not been established and may not be able to refund the amount again rendering the appeal nugatory.
28. Kuloba J. (as he then was) held in the case of *Machira T/A Machira & Co. Advocates vs East Africa Standard* [2002] eKLR that the ground for substantial loss must be specific and detailed as it is not enough merely stating that substantial loss will result or that if the appeal is successful it will be rendered nugatory.
29. In *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR, held that fear of execution cannot be considered as substantial loss since execution is a lawful process.
30. Further the Court in *Stephen Wanjohi vs. Central Glass Industries Ltd. Nairobi HCCC No. 6726 of 1991* stated that the financial ability of a decree holder solely is not a reason for allowing stay.
31. With the foregoing decisions in mind, the Applicant has not proved that its stands to suffer substantial loss.
32. I take note of the fact that a copy of the decree has not been attached neither the judgment. The Applicant highlighted the particulars of the terms of the judgment and the decretal amount stood at Kshs. 5,104,075 plus costs and interests. This is not a small amount.
33. The Respondent have not addressed the allegations that their source of income is unknown and they would not be able to refund it although that should not be the reason the Respondent are denied the right to enjoy fruits of their judgement.
34. The Respondents have insisted that the family of their kin have been rendered destitute since the deceased was the bread winner. I don't think it would be in the interest of justice to subject the Respondents to execution which process would substantially cause them a lot of money and that have submitted they are struggling to provide for the family of the deceased. The deferment of execution can be put right by way of damages.
35. On the second limb of delay, I have found hereinabove the same to be considered not unreasonable and convincingly explained.
36. On the third limb as security, the Applicant has attached a Bank Guarantee from Family Bank dated 6th July, 2023 for a period of twelve(12) months. This Application was filed in August of 2024. By the time the Application was being filed the bank guarantee had ceased being effective.



37. Provision of security is a pre-condition for grant of stay, see *Arun C. Sharma vs Ashana Raikundalia t/ a Raikundalia & Co. Advocates & 2 Others* [2014] eKLR. How then is an expired bank guarantee to act as security for due performance of the decree? I find that the Applicant has not offered any security for the performance of the decree.
38. Be that as it, the issue of security is within the Court's discretionary powers and it is upon the Court set the terms. As submitted by the Respondents, the Court should balance the Applicant's right of appeal against the Respondent's right to enjoy the fruits of their judgment.
39. In the case of *Samvir Trustee Limited vs Guardian Bank Limited* [2007] eKLR the Court stated: -
- “The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the Court in a particular manner. But the yardstick is for the Court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”
40. The Applicant insists that they should be given half of the decretal amount as they lost their kin who was the bread winner. In weighing the rights of either party I am invited to consider whether there are sufficient reasons to warrant denying them the fruits of their judgment and what prejudice will be suffered by the Respondents if the orders sought are granted.
41. The Applicant is of the opinion that no prejudice will be suffered by the Respondent if the orders sought are issued. Whereas the Respondent submits they have been chasing the judgment for five years and would be denied the fruits of their judgments, the law on the other hand provides that a party shall be accorded every reasonable opportunity to ventilate their issues within the Courts systems.
42. The interests of justice in this regard demands that the Respondents enjoyment of their judgment be deferred in the meantime and the Applicant be allowed to ventilate its issue on merit. In any event there is nothing preventing the Respondents from realizing the decree on a later date and as stated the prejudice that will befall the Respondents can be put right by way of damage. The Applicant cannot be allowed to have blanket orders for stay of execution.
43. Therefore, the Notice of Motion dated 28th August, 2024 is allowed on the following conditions:
- a. That leave is hereby granted to the Applicant to file an Appeal out of time in respect to the judgment /decree delivered in Nakuru CMCC No. 355 of 2019 by Hon. Bildad Ochieng;
 - b. The Applicant shall file the Memorandum of Appeal within Fourteen (14) days from this Ruling;
 - c. The Applicant shall file the Record of Appeal within sixty (60) days of filing the Memomorandum of Appeal;
 - d. There shall be a stay of execution of the Judgement and or decree of the Honourable Court delivered on 13th June, 2024 pending the hearing and determination of the Applicant's appeal;
 - e. The Applicants to deposit the full decretal amount, in an interest-earning joint Bank Account in the name of their respective advocates within ninety (90) days of this Ruling;



- f. The Respondent shall have costs of this Application of assessed at Kshs 10,000 to be paid within thirty (30) days from this ruling;
- g. In default of any the orders in (e) and (f) hereinabove the stay shall stand vacated and the Respondent shall be at liberty to execute.

It is So Ordered.

DATED, SIGNED AND DELIVERED AT NAKURU ON THIS 19TH DAY OF NOVEMBER, 2024.

MOHOCHI S.M.

JUDGE

