



**Premier Credit Limited v Karugu & another (Commercial Appeal
E020 of 2024) [2024] KEHC 14743 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14743 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
COMMERCIAL APPEAL E020 OF 2024
FN MUCHEMI, J
NOVEMBER 21, 2024**

BETWEEN

PREMIER CREDIT LIMITED APPELLANT

AND

JANE WAMBUI KARUGU 1ST RESPONDENT

FAITH MUNYAO 2ND RESPONDENT

RULING

Brief facts

1. The application dated 16th August 2024 seeks for orders of leave to file an appeal out of time against the judgment in Thika Small Claims Court SCCCOMM No. E030 of 2024 delivered on 26th June 2024. The applicant further seeks for orders of stay of execution in respect of the said judgment pending the hearing and determination of the appeal.
2. The 1st respondent opposed the application and filed a Replying Affidavit dated 22nd August 2024.

Applicant's Case

3. The applicant states that the trial court in Thika SCCCOMM No. E030 of 2024 delivered the judgment on 26th June 2024 by uploading the same on the Case Tracking System on 27th June 2024.
4. The applicant states that the trial court had indicated on 22nd May 2024 that judgment would be delivered on 7th June 2024. But on 7th June 2024 the Honourable Adjudicator directed that rulings and judgments before her would be uploaded through the Case Tracking System by close of business on the same day. The applicant states that judgment was not uploaded and upon inquiry from the court registry, they were informed that judgment had not been delivered and a notice would be given.



5. The applicant states that they never received any notice from the court or the respondent and learnt that the judgment had been delivered in the absence of both parties on 26th June 2024 and uploaded through the Case Tracking System on 27th June 2024.
6. The applicant argues that the trial court did not give stay of execution and they have received the duly signed decree from the respondents issued on 16th July 2024 seeking payment of the decretal sum.
7. The applicant states that they filed an application on 18th July 2024 seeking stay of execution which was granted on 22nd July 2024.
8. The applicant is desirous of filing an appeal against the decision of the trial court and argues that the preferred appeal out of time was not voluntary and the delay is not inordinate. The applicant further states that it is willing to give security for costs by depositing the decretal sum in a joint interest earning account. The applicant argues that the preferred appeal risks being rendered nugatory if the orders sought are not granted.

The 1st Respondent's Case

9. The 1st respondent opposes the application on the premise that it is an afterthought, frivolous, incurably defective, bad in law, vexatious and a total abuse of the court process. The 1st respondent states that the application is pegged on issues that are already heard and determined by a competent court after being exhaustively canvassed by both parties. The 1st respondent argues that no appeal has been preferred by the applicant to date, more than 50 days since the delivery of judgment herein whereby the applicant was represented by counsel.
10. The 1st respondent states that her advocates on record came to learn of the said judgment through the applicant's counsel one Jackie Akinyi who called her advocates requesting him to extract a decree and serve them as they had intimated their intention to settle the decretal sum. Upon extraction of the decree, the same was served upon the applicant's advocates and they confirmed receipt and requested for an account where the decretal sum was to be deposited.
11. The 1st respondent states that instead of settling the said decretal sum, the applicant used the said decree to file an application at the lower court seeking stay of execution alleging that they learnt of the court's judgment upon service of the said decree.
12. The 1st respondent states that the decree was served upon the applicant's counsel on 16th July 2024 and the judgment was delivered on 26th June 2024 and thus the applicant was within time to file an appeal but decided not to do so. The 1st respondent argues that the applicant is intent on denying her the fruits of her judgment.
13. The 1st respondent argues that the applicant will not suffer substantial loss if execution is to be carried out and that she runs a successful business and therefore able to meet any obligations that would arise out of a successful appeal.
14. The 1st respondent argues that the applicant was granted stay orders by the lower court for 30 days on 22nd July 2024 and it has taken them 27 days to file the instant application thus the delay is quite unreasonable.
15. The 1st respondent states that the appeal has no chances of success as the same raises matters of facts which this court has no powers to entertain.
16. The applicant filed a Further Affidavit dated 11th October 2024 and states that the request for payment was in line with the need to have all the necessary information and not a foregoing of its right of appeal.



17. The applicant states that it is an institution and all decisions have to go through screening with full particulars. The applicant further states that after deliberate discussions it was decided that applicant proceeds with filing the appeal as the trial court delivered its judgment with the implications that failure to issue a loan application form meant that no loan agreement was entered into among other issues of law that need to be argued and ascertained.
18. The applicant states that the 1st respondent has not shown that she will suffer any prejudice if the orders sought are granted. Further, the 1st respondent has not brought any evidence to show that she is able to meet the financial obligation should the appeal be successful.
19. Parties put in written submissions.

The Applicant's Submissions

20. The applicant relies on Section 79G of the *Civil Procedure Act* and the case of Nicholas Kiptoo Korir arap Salat vs IEBC & 7 Others [2014] eKLR and submits that it has demonstrated good and sufficient cause for filing the appeal out of time. The applicant submits that judgment was delivered on 27th June 2024 without notice to the parties and it was following the due process of the law as per the Civil Procedure Rules by seeking stay of execution in the trial court. The applicant relies on the cases of Andrew Kiplagat Chemarigo vs Paul Kipkorir Kibet [2018] eKLR; Inuka Afrika vs Iguanya (Civil Appeal E011 of 2023) [2023] KEHC 27003 (KLR) (19 December 2023) (Ruling) and Charles Ngugi vs ASL Credit Limited (no citation given) and submits that the law does not set out any minimum or maximum period of delay but any delay ought to be satisfactorily explained.
21. Relying on the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR, the applicant submits that it is a financial institution and it shall suffer substantial loss if stay is not granted as it shall affect all other cases before courts in various geographical areas in the country and it will also render the appeal nugatory. Furthermore, the applicant submits that the 1st respondent has not shown any evidence that she is able to cater for the full decretal amount in the event the appeal succeeds.
22. The applicant submits that they are ready and willing to deposit the entire decretal sum in a joint interest earning account in the names of both advocates.
23. The applicant submits that the failure to file an appeal first before seeking for an extension to file the appeal out of time does not affect the core issue of extending time.

The 1st Respondent's Submissions

24. The 1st respondent submits that pursuant to Section 79G of the *Civil Procedure Act*, the applicant ought to have filed the intended appeal before seeking leave to extend time for filing an appeal. As such, the 1st respondent argues that the instant application is incompetent and ought to fail since the applicant failed to file a substantive appeal first. To support her contentions, the 1st respondent relies on the case of Evans Kiptoo vs Reinhard Omwonyo Omwoyo (2021) eKLR. The 1st respondent further reiterates what she deposed in her affidavit and submits that the delay is inordinate and the appeal is not arguable thus the applicant should not be granted leave to file the intended appeal out of time.
25. The 1st respondent relies on the cases of Adah Nyabok vs Uganda Holding Properties Limited (2012) and Daniel Chebutul Rotich & 2 Others vs Emirates Airlines Civil Case No. 368 of 2001 and submits that the applicant has not demonstrated what substantial loss it is likely to suffer in the event of satisfaction of the decree. The 1st respondent argues that the decretal sum is Kshs. 55,475/- and she has demonstrated that in the unlikely event of the appeal being allowed, she is capable of repaying the



decretal sum. Further, the 1st respondent submits that an appeal cannot be said to have been rendered nugatory by execution of the judgment and decree issued by the court.

26. The 1st respondent further relies on the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR and submits that execution of a decree does not amount to substantial loss as the same is a lawful process. The 1st respondent further submits that it is upon the applicant to show how execution will create a state of affairs that will irreparably affect or negate the success of the appeal.
27. The 1st respondent submits that the intended appeal does not raise any serious issues for consideration and has no chances of success as the trial court correctly applied the law and interpreted all the guiding principles when making its decision. The 1st respondent further submits that the application is a delaying tactic meant to frustrate her in enjoying the fruits of her judgment.
28. Relying on the case of Kenya Commercial Bank vs Sun City Properties Ltd & Others (no citation given), the 1st respondent urges the court to balance the two competing interests. The 1st respondent further relies on the case of R.W.W vs E.K.W [2019] eKLR and submits that she should not be deprived of the fruits of the judgment due to the time value of money, which depreciation is directly prejudicing her.

The Law

Whether the applicant was required to file a substantive appeal and seek orders to have it admitted out of time.

29. The respondent maintains that the present application is incompetent and ought to fail since the applicant failed to file a substantive appeal first.
30. In Charles N. Ngugi vs ASL Credit Limited [2022] eKLR, the court held that:-

From the provisions above, it is noteworthy that the phrase used is “appeal may be admitted out of time.” This therefore means that an appeal may indeed be admitted out of time. However the intended appeal ought to have already been filed before or together with an application seeking leave to extend time for filing an appeal. In Mugo & Others vs Wanjiru & Another [1970] EA 482 the court stated as follows:-

Clearly, as a general rule the filing and service of the notice of appeal ought to be regularized before or at least at the same time as an application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused.

31. The learned judge further held that-

...nevertheless, I am inclined to allow the applicant leave to file his intended appeal noting that two (2) months is not inordinate. In my view whether one files the appeal first and seeks extension of time or files the application for extension of time contemporaneously with the Memorandum of Appeal amounts to the same thing. The appeal cannot be heard until time is enlarged. These are just semantics which do not affect the core issue of extending time.

32. From the above, what is paramount is that the law permits that time be enlarged. Furthermore, courts are enjoined to render substantive justice and thus, it is my considered view that the application is properly before the court.



Whether the court should exercise its discretion to grant the applicant leave to file its appeal out of time;

33. Section 79G of the *Civil Procedure Act* states:-

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.

34. It is clear from the wording of section 79G of the *Civil Procedure Act* that before the court considers extension of time, the applicants must satisfy the court that they have good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of *Diplack Kenya Limited vs William Muthama Kitonyi* [2018]eKLR an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.

35. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that:-

“The underlying principles a court should consider in exercise of such discretion should include:-

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
- f. Whether the application has been brought without undue delay.

36. Similarly in the case of *Paul Musili Wambua vs Attorney General & 2 Others* [2015]eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-

“.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay,



the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

37. The applicant has faulted the trial court for the delay in filing its appeal because it received no judgment notice from the court registry. From the record, the trial court delivered its judgment on 26th June 2024 in the absence of both parties. The counsel for the 1st respondent emailed Counsel for the applicant informing them of the judgment and attached the decree on 16th July 2024. The applicant’s counsel responded to the said email on 17th July 2024 and requested for payment details which the 1st respondent’s counsel responded to. On 22nd July 2024, Counsel for the applicant emailed the 1st respondent’s counsel informing them that they had obtained stay of execution from the trial court for 30 days. From the correspondence of the parties it is evident that the applicant was aware of the judgment on 17th July 2024. Thus, the applicant was within the statutory period to file an appeal. Furthermore, the applicant proceeded to the trial court and obtained stay of execution for 30 days on 22nd July 2024 which was still within the statutory period to file an appeal. Thus the applicant cannot fault the court registry for failing to file the appeal in time. Furthermore, judgment in the trial court was delivered on 26th June 2024 and the applicant filed the present application on 20th August 2024. It is therefore my considered view that the applicant has not given any plausible explanation on the reasons for delay considering a delay of about two months is not inordinate and inexcusable.
38. Accordingly, I find that the applicant has not established to the satisfaction of the court why time should be enlarged to enable them file their appeal.
39. On the perusal of the intended Memorandum of Appeal and the judgment of the trial court and noted that the appeal does not raise pertinent issues of law. Furthermore, an appeal from the Small Claims Court to the High Court is only allowed on matters of law pursuant to Section 38 of the *Small Claims Court Act*. The grounds of appeal as set out in the memorandum of appeal pertain to points of fact. Thus, it is evident that the chances of the appeal succeeding if the instant application is granted are not high by any standards. In the circumstances it is my considered view that the applicant has not established to the satisfaction of the court why time should be enlarged to enable them file their appeal.
40. Therefore having declined to grant the prayer for admitting the appeal out of time, the prayer for stay of execution of the trial court’s judgment and decree automatically fails since there is no existent appeal as required by Order 42 of the Civil Procedure Rules.
41. It is thus my considered view that the application dated 16th August 2024 lacks merit and is hereby dismissed with costs.
42. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 21st DAY OF NOVEMBER 2024.

**F. MUCHEMI
JUDGE**

