



Watu Nominees Company Limited v Kituku & Maingi (Suing as the Administrators of the Estate of The Late Hellen Muthoki Maingi) & 2 others (Miscellaneous Civil Application E133 of 2024) [2024] KEHC 14796 (KLR) (21 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14796 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS CIVIL APPLICATION E133 OF 2024
FN MUCHEMI, J
NOVEMBER 21, 2024**

BETWEEN

WATU NOMINEES COMPANY LIMITED APPELLANT

AND

RAPHAEL MAINGI KITUKU & PATRICIA NZILANI MAINGI (SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE HELLEN MUTHOKI MAINGI)RAPHAEL MAINGI KITUKU & PATRICIA NZILANI MAINGI (SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE HELLEN MUTHOKI MAINGI) 1ST RESPONDENT

DAVID MUTHAMA KURIA 2ND RESPONDENT

MONICA WANGARI MUGAMBI 3RD RESPONDENT

RULING

Brief facts

1. The application dated 29th August 2024 seeks for orders of leave to file an appeal out of time against the judgment in Thika CMCC No. 720 of 2021 delivered on 12th March 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. In opposition to the application, the 1st respondents filed a Replying Affidavit dated 9th September 2024.



Appellant/Applicant's Case

3. The applicant states that on 12th March 2024, the CM court Thika CMCC No. 720 of 2021 entered judgment against the applicant and the 2nd respondent jointly and severally for Kshs. 8,311,080/- together with interest at court rates from the date of judgment and costs of the suit.
4. The applicant states that it was represented by its insurer and instructions were given to the insurer to appeal against the whole of the said judgment but the insurer failed to act upon the said instructions leading to its goods been proclaimed by M/s Mbusera Auctioneers.
5. The applicant argues that the execution of the judgment is imminent and in the event of such execution, its appeal will be rendered nugatory considering the 1st respondents are persons of straw who will not be able to refund the decretal sum should the appeal succeed.
6. The applicant states that it has an arguable appeal as it shall call upon the appellate court to determine whether a relationship between a financier and borrower is one of principal and agent and whether a financier is vicariously liable of the actions of a borrower who has caused an accident with the chattel. The applicant further states that the appellate court shall be called upon to decide on the type of ownership a financier has over a secured chattel.
7. The applicant states that it is ready and willing to provide reasonable security for the due performance of the decree. Further, the applicant states that it has applied for certified copies of the trial proceedings and judgment vide its letter dated 28th August 2024.

The 1st Respondents' Case

8. The 1st respondents oppose the application on the premise that it is unmerited, misleading, malicious, an unsanctioned retrial and an abuse of the court process. The 1st respondents state that their daughter died on 1st September 2021 following a road traffic accident caused by the applicant and the 2nd respondent. A claim was filed whose judgment was delivered on 12th March 2024 in the presence of the applicant's advocates and in the absence of their advocates.
9. The 1st respondents argue that the applicant was represented by counsel in the primary suit and therefore had all the benefit and advantage, being an international company with both internal and external counsel.
10. The 1st respondents argue that the delay to lodge an appeal is inordinate and the applicant is guilty of laches since 12th march to 30th August 2024, over 5 months and 21 days have lapsed.
11. The 1st respondents state that their advocates and the applicant have been negotiating whereby the applicant had undertaken to pay Kshs. 3 million in September after the insurance company had paid the statutory limit in the first week of August. The applicant thereafter went silent despite several reminders prompting them to issue a proclamation notice. Upon proclamation, the 1st respondents state that the applicant issued an undertaking on 29th August 2024 promising to pay the balance within 5 days.
12. The 1st respondents argue that the applicant had no intention of filing an appeal but is simply ill advised and forum shopping with the intent of wasting judicial time. Further, the 1st respondents state that the applicant has not attached the instructions to the insurer to appeal and neither is the insurer a party to the suit.



13. The 1st respondents state that the applicant has not demonstrated the reason for delay and failure to file the appeal in time. The 1st respondents further state that the chances of success of the intended appeal are null and void as the applicants never raised the issue of ownership in the primary suit. Furthermore, the 1st respondents state that the applicant was the sole registered and beneficial owner of the subject motor vehicle and thereby not a financier as alleged.
14. The 1st respondents state that they are prejudiced by the existing interim stay of execution as no security has been given and by the time the application will be heard, the warrants of attachment will have expired and the applicant may transfer property to a 3rd party so as to frustrate the court order.
15. The 1st respondents argue that litigation must come to an end and the suit having been filed in December 2021, it would only be fair if the application is dismissed with costs.
16. The applicant filed a Supplementary Affidavit dated 15th October 2024 stating that it had already procured the certified copies of the typed proceedings from the trial court in readiness for preparing the record of appeal.
17. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

18. The applicant relies on Order 42 Rule 6 of the Civil Procedure Rules and the case of Carter & Sons Ltd vs Deposit Protection Fund Board & 2 Others Civil Appeal No. 291 of 1997 and submits that it has met the requirements for the grant of the orders of stay of execution pending appeal. The applicant submits that it stands to suffer substantial loss as the appeal shall be rendered nugatory if execution is completed as the 1st respondents are persons of straw and have no means of refunding the sum of Kshs. 6,032,534/-. The applicant argues that the 1st respondents have not explained their financial capabilities and further the amount is colossal. Further, the 1st respondents pleaded in their witness statements that they were parents of the deceased who was the sole bread winner as they were both unemployed. The applicant thus argues that the burden of proof lies upon the 1st respondents to demonstrate that they are not persons of straw. To support these contentions, the applicant relies on the cases of Osman & another vs Mwarialie (Civil Appeal E201 of 2018) [2022] KEHC 16671 (KLR) (20 December 2022) (Ruling) and Oraro & Rachier Advocates vs Co-operative Bank of Kenya Ltd Civil application No. NAI 358 of 1999.
19. The applicant further relies on the case of Kenya Commercial Bank Limited vs Sun City Properties Limited & 5 Others [2012] eKLR and submits that it is ready and willing to provide security for the due performance of the decree as directed by the court.
20. Relying on the case of Jaber Mohsen Ali & another vs Priscillah Boit & Another E & L No. 200 of 2021 [2014] eKLR, the applicant submits that its insurer did not lodge an appeal despite express instructions to do so. Furthermore, the insurer simply paid out the maximum payment for a fatal injury of Kshs. 3 million thereby selfishly protecting its own interest leaving the applicant high and dry. The applicant submits that despite that procedure lapse, it still has an arguable appeal and seeks an opportunity to ventilate its case.
21. The applicant further relies on the case of Entertainer Trucks Co. Ltd vs Paul Macharia Nduati [2021] eKLR and submits that an applicant has a right to appeal after the insurer has already paid the maximum amount of Kshs. 3million. The applicant further submits that it has already procured the certified copy of the typed proceedings of the trial court and is therefore ready to fast track the preparation of the record of appeal to avoid any further delays.



22. The applicant argues that in the court exercising its discretion it ought to consider the special circumstances of the case as the 1st respondents have already received part of the decretal sum of Kshs. 3 million thereby partly enjoyed the fruits of the judgment. The applicant further argues that it seeks to have the appellate court determine whether a financier of the 2nd respondent can be held vicariously liable for an accident caused by the borrower. The applicant submits that even though the court allows the application and the intended appeal, the 1st respondents will still be left with a judgment against the 2nd respondent.

The 1st Respondents' Submissions

23. The 1st respondents rely on Section 79G of the *Civil Procedure Act* and the cases of Edward Kamau & Another vs Hannah Mukui Gichuki [2015] eKLR and Joseph Kangethe Kabogo vs Michael K. Ngari HCCC No. 944 of 2011 and submit that the delay is inordinate and inexcusable as the application has been filed over 5 months and 21 days after judgment was delivered in the trial court on 12th March 2024.
24. The 1st respondents further rely on the case of Union Insurance Co. Kenya Ltd vs Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998 and submit that the applicant was given an opportunity to be heard, was notified of the judgment and undertook to pay its share of the excess. The 1st respondents argue that the applicant is seeking preferential treatment on account of its being a financial institution while at the same time no evidence at all has been supplied to support the said allegation. The 1st respondents submit that they continue to be prejudiced as there is an orphan to be educated and justice delayed is justice denied.
25. The 1st respondents submit that the applicant is the sole registered owner of the suit motor vehicle and it did not provide any evidence to support its contentions that it was a financier. Furthermore, the 1st respondents submit that the issue of being a financier was never raised in the primary suit and thus it would be too late to raise new issues at the current appellate stage.
26. The 1st respondents argue that although the applicant raised a ground of appeal on the ownership of the suit motor vehicle, the applicant in the primary suit admitted to ownership and the court did not have to elaborate on the issue as it was conceded. The 1st respondents thus submit that the appeal is a general traverse and raises no triable issues.
27. Relying on the case of Sankale Ole Kantai t/a Kantai & Co. Advocates vs Housing Finance Co. (K) Ltd [2014] eKLR, the 1st respondents submit that the applicant has not denied that it had initially committed to pay Kshs. 3 million by September neither has it denied that it issued an undertaking on 29th August 2024 to pay the outstanding balance in 5 days. Thus the stay is not warranted as a period of 6 months has lapsed and execution commenced. The 1st respondents further submit that the applicant has not shown any that it stands to suffer irreparable loss or damage. Furthermore, the applicant has not offered any security for the due performance of the decree.
28. The 1st respondents argue that in the event the court be inclined to grant stay of execution, it ought to direct that the applicant pays half of the decretal sum of Kshs. 5,727,634/- within 14 days and the other half be deposited in the advocates joint interest earning account within 14 days.

The Law

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

29. 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.

30. It is clear from the wording of section 79G of the *Civil Procedure Act* that before the court considers extension of time, the applicant must satisfy the court that that he has 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.
31. 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.

32. 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.”

33. Judgment herein was delivered on 12th March 2024 and the applicant filed the current application on 29th August 2024. This is approximately five (5) months outside the time limited for filing an appeal. The applicant has stated in its affidavit that the delay was caused by its insurance failing to lodge an



appeal despite being given express instructions to do so. From the record, judgment in Thika CMCC No. E720 of 2021 was delivered on 12th March 2024 in the presence of counsel for the applicant and 2nd respondent. Furthermore, the trial court granted the applicant forty five (45) days stay of execution. On further perusal of the record, the applicant has not annexed the express instructions to appeal it claims that its insured was given. Furthermore, the applicant was not truthful in its affidavit as it failed to mention that its insured had paid the decretal sum to its maximum amount of 3 million. The court came to learn of that through the 1st respondents' affidavit. That notwithstanding, the applicant has not annexed any evidence as to when its insured paid the sum of Kshs. 3 million. Thus this court is not convinced that the delay was occasioned by the applicant's insured. The applicant was represented by legal counsel in the lower court suit and therefore this court is not convinced that the applicant was not aware of the decretal sum. Furthermore, the 1st respondents provided emails by its advocates and the applicant's advocates negotiating on settling the claim. The said emails go back to 14th June 2024 whereby the advocates for the applicant propose to compromise the matter at 6 million with the insured paying 3 million and the applicant paying 3 million thus this court is not convinced that the delay was occasioned by the applicant's insured as the applicant has not given any plausible explanation on the reasons for delay.

34. I have further perused the draft Memorandum of Appeal and noted that the grounds of appeal raised do not raise any arguable issues. To the contrary, the grounds raise entirely new issues which were not canvassed before the Magistrate's court. The applicant in the lower court only filed a defence but did not call any witnesses or lead any evidence. Furthermore, the issue of ownership in terms of being a financier has only been raised at the appellat stage. Therefore, it is my considered view that the intended appeal has very limited chances of success. Accordingly, I find that the applicant has not established to the satisfaction of the court a case for enlargement of time to file an appeal.
35. In my considered view, the prayer for admitting the appeal out of time having failed, the prayer for stay of execution automatically fails. Grant of orders for stay of execution must be based on an existent appeal. I reach a conclusion that the application dated 29th August 2024 lacks merit and is hereby dismissed with costs.
36. It is hereby so ordered.

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

F. MUCHEMI
JUDGE

