



**Matunda (Fruits) Bus Services Limited & another v Omwenga (Miscellaneous Civil Application E119 of 2024) [2024] KEHC 15268 (KLR) (4 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15268 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS CIVIL APPLICATION E119 OF 2024  
PN GICHOHI, J  
DECEMBER 4, 2024**

**BETWEEN**

**MATUNDA (FRUITS) BUS SERVICES LIMITED ..... 1<sup>ST</sup> APPLICANT**

**NAIROBI BUS UNION ..... 2<sup>ND</sup> APPLICANT**

**AND**

**PHANICE KWAMBOKA OMWENGA ..... RESPONDENT**

**RULING**

1. By a Notice of Motion dated 15<sup>th</sup> April, 2024 brought under Article 159 (2) (d) of *the Constitution* of Kenya 2010, Sections 1A, 1B, 3A, 79G and 95 of the *Civil Procedure Act*, Order 42 Rule 6 (1) (2) and (7), Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules 2010, the Applicants seek Orders that: -
  1. Spent.
  2. This Honourable Court be pleased to grant the Applicant leave to Appeal out of time in respect to the judgement/ decree delivered in Nakuru CMCC No. E891 of 2021 by Hon. B Ochieng (CM).
  3. Spent
  4. This Honourable Court be pleased to grant an order of stay of execution of the judgement and or decree delivered on or about 21/02/2024 and all consequential orders arising therefrom pending the hearing and determination of the intended Appeal.
  5. The Honourable court be pleased to issue an Order for provision of a bank Guarantee of the entire sum awarded by the trial Court of Kshs. 258,790 plus costs and interest only as security pending the hearing and determination of the intended Appeal.



6. This Honourable Court be pleased to issue any other order as it may deem just, appropriate and expedient in the interest of justice.
7. Costs of this Appeal be provided for.
2. The application is based on the grounds on the face of it and the Supporting Affidavit sworn on 15<sup>th</sup> April, 2024 by Cherotich Faith in her capacity as Advocate practicing in the firm of Kimondo Gachoka & Co Advocates on record for the Applicant.
3. She states that judgment was delivered by the trial court in CMCC No. E839 of 2021 in favour of the Respondent against the Applicants at 100 % liability, general damages of Kshs 250,000/= and special damages of Kshs. 8,790/= plus costs of the suit and interest at court rates.
4. It is her averment that stay of execution for 30 days was also granted by the trial court but the instructing client, that is, Directline Assurance Limited, was unable to issue instruction on lodging the Appeal on time because the officer who was in charge of the legal department had left their employment.
5. Further, she stated that the Appeal raises various triable issues as indicated in the draft Memorandum of Appeal and that unless leave is granted to Appeal out of time, they will not be able to articulate their Appeal before this court.
6. She depones that the from the proceedings before the trial court, the Respondent's source of income remains unknown and therefore, the Applicants are apprehensive that the Respondent will commence execution proceedings to their detriment, when the Respondent's source of income remain unknown and thus, she might not be able to refund the decretal sum in the event the Appeal succeeds.
7. On security for due performance of the decree, the Applicants state that they are ready and willing to furnish a bank guarantee for the entire decretal sum pending hearing and determination of the intended appeal.
8. It is further stated that the intended appeal will be rendered nugatory if the application is not allowed.
9. Though served, the Respondent did not respond and therefore, the application herein is unopposed.

### **Determination**

10. Having heard the Applicants, the issues for determination are: -
  1. Whether this Court should enlarge time for Applicants to file Appeal out of time.
  - {2. Whether they should be granted stay of execution.
11. On the first issue, Section 79G of the Act provides that: -

“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 to the appellant 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.”
12. Further, it is settled law that the Court has discretion to grant application for extension of time under Sec. 79G of the *Civil Procedure Act* if the Applicant satisfies the court that he had good and sufficient cause for not filing the appeal on time.



13. Regarding extension of time, the Court of Appeal in *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR had this to say: -

“Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance, in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, (Civil Application No Nai 255 of 1997) (unreported), the Court expressed itself thus:

“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”.

14. Further still, the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others* [2014] eKLR held: -

“...It is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

1. 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;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

15. In this case, judgement which is the subject of this application was delivered on 21<sup>st</sup> February, 2024. A stay of execution for 30 days granted by the trial court expired and this application was filed on 16<sup>th</sup> April, 2024. The reason given for delay is that the officer who was in charge of the legal department and who could have given instruction had left employment of M/S Directline Assurance Ltd before giving



- such instructions. In the circumstance surrounding this application only, that is accepted as sufficient cause for delay.
16. On the second issue, the conditions to be satisfied under Order 42 rule 6 of the Civil Procedure Rules, 2010 are well settled that: -
    1. The application must be brought without unreasonable delay.
    2. The Applicant must demonstrate that they will suffer substantial loss unless the order sought is granted.
    3. The Applicant must furnish 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.
  17. This application herein was filed about two months after the judgment was delivered. That will not be considered inordinate delay in the circumstances herein.
  18. On substantive loss, it is settled that substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. Substantial loss is that, which has to be prevented. Indeed, the Court of Appeal in *Kenya Shell Limited vs. Kibiru* [1986] KLR 410, held that;

“It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”
  19. There is a Draft Memorandum of Appeal. There is no response herein to the Applicants’ apprehension that the Respondent may not be in a position to refund the decretal sum and it is not expected that the Applicant herein would know the Respondent’s financial standing in the circumstances stated herein.
  20. There is a likelihood of execution at any time. There is nothing to show that the Respondent is in a position to refund the decretal sum. There is nothing to show that the Respondent will suffer any prejudice if stay is granted. It is noted that loss and prejudice will be occasioned on the Applicants if stay of execution is not granted.
  21. The Applicants have proposal to offer a bank guarantee as security for due performance of the decree. The Court of Appeal in *Nduhiu Gitahi & another (supra)* adopted the remarks by Lord Justice Parker in *Rosengrens Ltd v Safe Deposit Centres Ltd* [1984] 3 All ER 198 that: -

“The process of giving security in one which arises constantly ... So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way which is the least disadvantageous to the party giving that security.

It may take many forms. Bank guarantee and payment into court are but two of them... so long as it is adequate, then the form of it is a matter which is immaterial.”
  22. This Court has noted the contents of the Bank Guarantee herein between Family Bank and the directors of Direct Line Assurance Company Limited. However, in the circumstances herein, this court does not consider that security as adequate.
  23. In the circumstances, this Court allows the application but on conditions and in the following terms: -



1. There shall be stay of execution of the decree herein pending the hearing and determination of the intended Appeal on condition that the Applicant deposit the entire decretal in Court.
2. Leave be and is hereby granted to the Applicants to file their Appeal out of time on condition that he files a Memorandum of Appeal and the Record of Appeal within 30 days from today.
3. Costs of this application to abide the outcome of the Appeal.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 4<sup>TH</sup> DAY OF DECEMBER, 2024.**

**PATRICIA GICHOHI**

**JUDGE**

In the presence of:

Mr. Ombeo for Ms Rotich for Applicants

N/A for Respondent

Ruto, Court Assistant

