



**Onyango v Spear (Miscellaneous Civil Application E167 of 2021)
[2021] KEHC 209 (KLR) (Commercial and Tax) (5 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 209 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX**

MISCELLANEOUS CIVIL APPLICATION E167 OF 2021

MW MUIGAI, J

NOVEMBER 5, 2021

BETWEEN

HARRISON MBOYA ONYANGO APPLICANT

AND

TIERON WAMAE SPEAR RESPONDENT

RULING

1. The Applicant filed a Notice of Motion Application dated 15th February 2021 for orders that;
 1. The Court grants interim stay of execution of the Judgment in the Chief Magistrates Court at Milimani Commercial Courts in Nairobi, Civil Case No. 3099 of 2014 on the 6th November 2018 and Decree issued on 28th February 2019 pending the hearing of this application inter-parties or further orders of this Court.
 2. The Court issues an order of stay of execution of the Judgment in the Chief Magistrates Court at Milimani Commercial Courts in Nairobi, Civil Case No.3099 of 2014 on the 6th November 2018 and Decree issued on 28th February 2019 against the Applicant pending the hearing and determination of this Application.
 3. The Court allows the Application to appeal the Judgment in the Chief Magistrates Court at Milimani Commercial Courts in Nairobi Civil Case No. 3099 of 2014 on the 6th November 2018 and Decree issued on 28th February 2019 out of time.
 4. The Court issues an order of stay of execution of the Judgment in the Chief Magistrates Court at Milimani Commercial Courts in Nairobi, Civil Case No. 3099 of 2014 on the 6th November 2018 and Decree issued on 28th February 2019 against the Applicant pending the hearing and determination of the intended appeal.



2. Which Application was supported by the sworn Affidavit of Harrison Mboya Onyango dated 15th February 2021 and based on the grounds that; -
 1. The matter was mentioned on 1st August 2018 where the court informed the parties that the judgment would be delivered on 6th November 2018 and upon subsequent attendance on the scheduled date, the Court informed the parties that the judgment would be delivered on notice.
 2. The Applicant's Advocates on record had made several unsuccessful attempts in following up on the delivery of Judgment with the court registry as they were informed that the file was still in the Honorable Magistrate's chambers.
 3. The Court delivered its Judgment on 6th November 2018 against the Applicant awarding the Respondent the sum of Kshs.4, 976, 635/=, costs and interests of the suit without the presence of the Applicant being or his Advocates on record.
 4. The Applicant was only aware that the said judgment was delivered upon being served by Principal Auctioneers instructed by the Decree Holder, a Notice to Show Cause why Execution by way of personal arrest and committal to civil jail should not be issued against him was given by the court on 13th November 2020 scheduled for 26th November 2020 which had been rescheduled for hearing on 27th January 2021.
 5. In view of the foregoing the Applicant was not aware that the judgment was delivered against him and/or that a Decree was issued thereafter for his perusal and to enable him to instruct his Advocates on record to file an appeal thereto.
 6. The Court has the inherent powers to enlarge and extend the time to file an appeal by an Applicant who is aggrieved by a court's decision and intends to prefer an appeal. The Applicant has since prepared a draft Memorandum of Appeal which raises serious triable issues thus the need for the Court to admit the draft Memorandum of Appeal and allow the hearing and determination of the appeal on merit.
 7. The Respondent and the Applicant were Directors of Mboya Spears International Limited-hereinafter referred to "the Company"-which produced, distributed and sold bottled drinking water popularly known as "Uzima" in various parts of the country and the Applicant's sole source of income was derived from the proceeds thereto.
 8. Due to the suit filed by the Respondent and the management issues of the Company; the Company ceased its operation and thereafter closed down as the Company as it was operating below its financial capacity and could not meet its financial obligations.
 9. The Applicant was married to Mary Anyango Abongo and around October 2020 she fell ill and was admitted at Kenyatta National Hospital where she met her demise on 3rd December 2020 and due to the collapse of the business, the Applicant used his meagre savings to cater for his wife's medical expenses as well burial expenses for the total sum of Kshs.197, 495/=.
 10. The Applicant is currently the sole breadwinner and provider for his children's welfare and by sheer good luck and through a lot of difficulty, including borrowing money from friends and relatives, the Applicant managed to pay my children's school fees.
 11. As depicted in the Auctioneers report and correspondence to the Respondent's Advocates, the Principal Auctioneers have been unable to find any assets under the Applicant's name to satisfy the Decretal amount.



12. The Applicant is unable to raise the decretal amount and therefore urges that the Court exempt him from depositing the said decretal amount as security for costs.
13. The Respondent will not suffer any prejudice if the orders sought are granted save that the correct position of law and proper dispensation of justice shall be done.
14. It is trite that any consequence of administrative lapse or mistake on the part of the Advocates on record for the Applicant should not be visited upon the Client.
15. It is imperative for the Court to grant stay of execution of the Judgment and Decree as the Respondent in the process of executing the said Judgment and Decree, and the absence of the stay orders by the Court will render the Applicant's appeal nugatory.
16. Unless the court grants the orders sought the Applicant stands to suffer irreparable harm and/or prejudice and more so an irreversible miscarriage of justice will be carried.
17. The Court has jurisdiction to grant the orders sought and it is in the interest of justice and imperative that the orders sought are granted.

GROUPS OF OPPOSITION

3. The Respondent opposed the Application on the following grounds;
 1. No sufficient cause has been shown to warrant a grant of the orders sought in the application.
 2. The Application for leave to appeal has been brought with undue delay. The delay in unexplained and is inexcusable.
 3. The Applicant has not met the test for a grant of an order of stay of execution as
 - a. The application has been brought with unreasonable delay.
 - b. The applicant has not demonstrated what substantial loss he will suffer if the application is not allowed.
 - c. The Applicant has not provided or offered to provide any security as a condition for the grant of an order of stay of execution.
 4. The Application is meant to circumvent the orders and directions made in Milimani CMCC 3099 of 2014 Tieron Wamae Spear versus Harrison Onyango Mboya.
 5. The Application is without merit and constitutes an abuse of the court process.

APPLICANT'S SUBMISSIONS

4. It was the Applicant's submission that he received a Judgment Notice as having been earlier indicated by Court. The Applicant only came to learn of the delivery of the said Judgment when he was served with a Notice to Show Cause by way of personal arrest and Committal to Civil Jail against him, dated 13th November 2020. The Judgment therein had been delivered without the Plaintiff's Advocate's knowledge on 6th November 2018 awarding the Respondent the sum of Kshs.4, 976, 635/=, costs and interests of the suit. It is trite that any consequence of administrative lapse or mistake on the part of the Advocates on record for the Applicant should not be visited upon the Client. The Applicant was sincerely unaware of the ongoing therein, having instructed his advocates to act on his behalf and trusting that his interests would be fully represented.



5. The Applicant argued that he had demonstrated that he has an arguable appeal with very high chances of success vide their Memorandum of Appeal. In the case of *Kenya Tea Growers Association & Another versus Kenya Planters & Agricultural Workers Union [2018] eKLR* the Court addressed what is considered to be an arguable appeal thus,

“He (the applicant) need not show that such an appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the Court should pronounce its decision”, despite the dispute over ownership of the subject property still subsisting in Court ”

6. On whether the Court should issue interim Stay of Execution Orders pending the hearing and determination of the intended appeal - the Applicant submitted that he was married to Mary Anyango Abongo and around October 2020 she fell ill and was admitted at Kenyatta National Hospital where she met her demise on 3rd December 2020 and due to the collapse of the business, the Applicant used his meagre savings to cater for his wife's medical expenses as well burial expenses for the total sum of Kshs.197, 495/= and their union was blessed with five children.

7. Further, the Applicant is currently the sole breadwinner and provider for his children's welfare and by sheer good luck and through a lot of difficulty. The court enjoys discretion to grant stay of execution of decree pending appeal as was held in *Reliance Bank Limited (in liquidation) versus Norlake Investments Limited, Civil Application No. Nai. 93 of 2000*, the Court of Appeal held;

“We think that in the circumstances disclosed in this case, it would be too onerous to require the liquidator of the applicant to deposit the money in Court or to comply with any of the orders made by the learned judge. As we said earlier in this ruling, it was conceded that the applicant has an arguable appeal. To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicant's appeal to be heard and determined.”

9. The Applicant is unable to raise the decretal amount and therefore urges the Court to exempt him from depositing the said decretal amount as security for costs.

RESPONDENT'S SUBMISSIONS

10. The Respondent submitted that the factors to be considered in an application to extend time to file an appeal were set out in the case of *Dilpack Kenya Limited versus William Muthama Kitonyi (2018] eKLR* as follows -

- a) The explanation for the delay.
- b) The merits of the contemplated action and whether matter is not frivolous
- c) Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favorable exercise of discretion in favor of the applicant.

11. The explanation for the delay – It is not true that on 6th November 2018, the Court informed the parties that judgment would be delivered on notice. Judgment was actually delivered on that day. The judgment itself is dated 6th November 2018. It is also not true that the Applicant's representative attended court on that day as alleged. This explains why the Applicant's version of what transpired in court on that day is not correct.

12. Further, the Applicant has not tendered any evidence to support the contention that when the matter came up on 6th November 2018, the court informed the parties that judgment would be delivered on



notice. There is no attendance docket from the Applicant's advocate's firm to show what transpired in court or even an affidavit sworn by the advocate who allegedly attended court on 6th November 2018 to show what transpired in court on that day.

13. The merits of the contemplated action and whether matter is not frivolous – the Respondent submitted that other than the annexed draft of the intended memorandum of appeal and the allegation that it raises arguable issues, the Applicant has not shown what these arguable issues are. The Applicant has not set out even briefly, the shortcomings in the judgment and how these form the basis of an appeal.
14. On whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favorable exercise of discretion in favor of the Applicant – it was the Respondent's submission that it is not fair to now stop the Respondent from enjoying the fruits of his judgment due to the Applicant's indolence. No amount of costs will compensate the Respondent who has been kept waiting over 7 years now to get justice by getting back funds that he entrusted on the Applicant and which the Applicant failed to account for as was found by the Magistrate court. Justice delayed is justice denied.
15. On whether the Applicant has met the conditions for the grant of an interim order of stay of execution pending the hearing and determination of the intended appeal. The Respondent argued that this Application was brought with undue delay of over two and a half years and the delay has not been satisfactorily explained. The Applicant has not made any attempts whatsoever to show the substantial loss he is likely to suffer if the order of stay of execution is not granted. All the applicant has stated is that the sum is colossal and due to other financial commitments, he is not able to pay the decretal sum. In addition to the foregoing, the Applicant has not offered any security for the performance of the decree and has merely instead stated that he cannot raise the decretal sum.
16. Marked HMO10 is a letter dated 14th November 2019 from Principal Auctioneers who were instructed by the defendant/respondent to carry out investigations into the means and assets of the Applicant. The letter shows that the applicant is still selling bottled water under the brand name Uzima® through another entity called Waterworks Technologies Limited. The allegation by the Applicant that he stopped operating water business after the alleged closure of Mboya Spear International Limited is therefore not true. There is therefore no reason why the applicant should not furnish security.
17. The Applicant has not met the conditions for the grant of the two orders that it has sought and the Application is not merited.

DETERMINATION

18. After considering the pleadings and submissions the issues for determination are;
 1. Whether Stay of execution pending appeal should be granted?
 2. Whether court should grant the Applicant leave to file an appeal out of time?

Whether Stay of execution pending appeal should be granted?

19. The principles guiding the grant of stay of execution pending appeal are well settled. Order 42 Rule 6(2) CPR provides that an Applicant should satisfy the Court that: -
 - a) Substantial loss may result to him unless the order is made;
 - b) The Application has been made without unreasonable delay; and



- c) The Applicant has given such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him.

20. The Court of Appeal in *Butt versus Rent Restriction Tribunal [1982] KLR 417* gave guidance on how a court should exercise discretion and held that:

“1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.

3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

Substantial loss may result to him unless the order is made.

21. The Applicant argued that he is currently the sole breadwinner and provider for his children’s welfare and by sheer good luck and through a lot of difficulty. The Applicant also stands to suffer irreparable harm and/or prejudice if committed to civil jail.

The Application has been made without unreasonable delay.

22. The judgment was given by the court on 6th November 2018. It was the Applicant’s contention that he was only aware that the said judgment was delivered upon being served by Principal Auctioneers instructed by the Decree Holder, a Notice to Show Cause why Execution by way of personal arrest and committal to civil jail should not be issued against him was given by the court on 13th November 2020 scheduled for 26th November 2020 which had been rescheduled for hearing on 27th January 2021. The reasons advanced for this delay are to be considered alongside this period of delay.

The Applicant has given such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him.

23. The Applicant stated that he is unable to raise the decretal amount and therefore urged that the Court exempt him from depositing the said decretal amount as security for costs. In addition, there were no assets to be attached by the auctioneers.

Whether court should grant the Applicant leave to file an appeal out of time?

24. Appeals from a subordinate Court to the High Court ought to be filed within thirty (30) days of the making of the impugned decision. The Applicant having been locked out by this timeline seeks to have this time extended.



25. It was the Respondent's contention that it is not true that on 6th November 2018, the court informed the parties that judgment would be delivered on notice. Judgment was actually delivered on that day. The judgment itself is dated 6th November 2018. It is also not true that the Applicant's representative attended court on that day as alleged. This explains why the Applicant's version of what transpired in court on that day is not correct. (See: Affidavit of Winnie Songok sworn and filed on 7th May 2021)
26. Section 79G of the *Civil Procedure Act*, which section 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 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”
27. The case of *Keshvaji Jethabhai & Bros Limited versus Saleh Abdulla [1959] EA 260* laid down the principles that should guide the court in exercising its discretion:
- a) “Whilst creditors’ rights must be considered each case must be considered on its own merits and discretion exercised accordingly;
 - b) The mere inability of a debtor to pay in full at once is not a sufficient reason for exercise of the discretion;
 - c) The debtor should be required to show his bona fides by arranging prompt payment of a fair proportion;
 - d) Hardship of the debtor might be a factor, but it is a question in each case whether some indulgence can fairly be given to the debtor without prejudicing the creditor.”
28. In the instant case the Applicant has indicated that he has financial hardship and is unable to raise the decretal sum or even part of it. The Applicant also argued that he only became aware of the judgment when served with the Notice to Show Cause why Execution by way of personal arrest and committal to civil jail should not be issued against him and which had been rescheduled for hearing on 27th January 2021. The Advocates mistake should not be visited upon the Applicant for failure to file the Appeal in good time.
29. Given the circumstances of this case the Respondent will not suffer any prejudice if the orders sought are granted while the Applicant on the other hand risks going to jail and will thus not be in a position to make good the debt in the said circumstances.
30. The Court takes into account the Applicant's circumstances, untimely demise of his wife, outstanding debt and a young family to cater for. The joint business, the Applicant & Respondent ran collapsed. In spite of these compelling circumstances, the Respondent's rights must also be recognized pending the appeal, the Respondent has a valid judgment since 2018 and has not obtained fruits of the judgment.

DISPOSITION

31. Therefore, to militate each party's right and allow the applicant exercise the right of appeal, the Court grants the Application subject to following conditions;**
- a) Deposit ½ decretal amount in an interest earning account with advocates on record for both parties within 60 days OR



- b) Obtain Bank Guarantee for ½ decretal amount and deposit with DR Commercial & Tax Division within 60 days OR
- c) Deposit Logbook or Title Deed with DR Commercial & Tax Division within 60 days
- d) The Memorandum of Appeal be deemed as filed thereafter.

DELIVERED SIGNED & DATED IN OPEN COURT ON 5TH NOVEMBER 2021 (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

