



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**MISCELLANEOUS APPLICATION NO 424 OF 2018**  
**KELPA LIMITED.....APPLICANT**  
**VERSUS**  
**BANCY KALEKYE KISELI.....RESPONDENT**  
**RULING**

**INTRODUCTION**

1. The Applicant's Notice of Motion application dated and filed on 8<sup>th</sup> August 2018 was filed pursuant to the provisions of Order 22 Rule 22, Order 10 Rule 11, Order 19 Rule 2, Section 79G, Section 1A, 1B and 3A of the Civil Procedure Act (Cap 21) Order 50 Rule 6 and 51 Rule 1 of the Civil Procedure Rules 2010, and all other enabling provisions of the law). Prayer No (1) was spent. It sought the following orders:-

**1. Spent.**

**2. THAT the Honourable court be pleased to order interim stay of any further execution of the judgment and decree of the Chief Magistrates Court and stay the garnishee proceedings already commenced in Milimani CMCC 7577/2017 and/or other consequential orders pending hearing and determination of this application inter partes and/or further orders of the court.**

**3. THAT the Honourable Court be pleased to grant the Applicant leave to appeal against the Ruling of 21 June 2018 out of time.**

**4. THAT the costs of this application be provided for.**

2. The said application was dismissed by Githua J on 16<sup>th</sup> October 2018 and the interim orders for stay of execution issued on 9<sup>th</sup> August 2018 automatically lapsed. Notably, Njuguna J referred the Applicant's Notice of Motion application dated and filed on 19<sup>th</sup> October 2018 to this court in the mistaken belief that it was this court that dismissed the said application. Be that as it may, on 28<sup>th</sup> November 2018, parties recorded a consent reinstating the Applicant's Notice of Motion application dated and filed on 8<sup>th</sup> August 2018.

3. The Applicant's Written Submissions were dated 7<sup>th</sup> December 2018 and filed on 11<sup>th</sup> December 2018 while those of the Respondent's were dated and filed on 15<sup>th</sup> October 2018.

4. Parties requested the court to render its decision based on its Written Submissions which it relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

### **THE APPLICANT'S CASE**

5. The Applicant's present application was supported by the Affidavit of its Managing Director, Patrick Kamunya, that was sworn on 8<sup>th</sup> August 2018. He swore his Further Affidavit on 10<sup>th</sup> September 2018. It was filed on 2<sup>nd</sup> September 2018.

6. It stated that in December 2017, *ex parte* judgment was entered against it whether the Respondent commenced execution proceedings by getting a garnishee order nisi that was subsequently made absolute on 7<sup>th</sup> August 2018. It filed an application dated 23<sup>rd</sup> January 2018 seeking a stay of execution and setting aside of the *ex parte* judgment but on 21<sup>st</sup> June 2018, the said application was dismissed in its advocates absence as they had misdiarised the date when the Ruling was to be delivered.

7. He pointed out that it was unaware that its bank account had been frozen as it and its advocates were not aware of the Ruling that was delivered on 21<sup>st</sup> June 2018 but upon having knowledge of the same, it could not file the appeal within the time stipulated in the law.

8. It was its contention that its defence had raised triable issues. It also averred that it had an appeal with high chances of success and it was only fair that its application be allowed. It pointed out that it was willing to have monies held in its account deposited in court pending the hearing and determination of the intended Appeal.

9. It stated that the Respondent would not be prejudiced if it was allowed to have its day in court and that it was therefore in the interests of justice that its application be allowed because the Respondent had not even served its advocate with the application to take out garnishee proceedings.

### **THE RESPONDENT'S CASE**

10. In response to the present application, the Respondent swore her Replying Affidavit on 6<sup>th</sup> September 2018 on 13<sup>th</sup> September 2018.

11. She asserted that her advocates had proceeded procedurally by activating garnishee proceedings but that on 25<sup>th</sup> July 2018, her advocates learnt that the Applicant withdrew the entire amount in his account leaving a balance of Kshs 886.35. It was her contention that the Applicant only participated in this matter after the court issued an order directing the garnishee to freeze its account.

12. The garnishee was directed to pay her the decretal sum of Kshs 694,181/= within forty eight (48) hours as it had allowed the Applicant to overdraw his account when freezing orders were still in place. The garnishee complied and issued her with a Bankers' cheque for the said amount. However, the said cheque was suspended from clearance.

13. She stated that the Applicant had misled the court that there were monies in his account and termed his application as an academic exercise as it would not suffer any loss as all its money in its account had been withdrawn.

14. It therefore urged this court to dismiss the Applicant's application.

### **LEGAL ANALYSIS**

15. In its Witness Submission, the Applicant submitted the Respondent was seeking to recover over half a million shillings from an *ex parte* judgment which would cause it substantial loss as it would not be able to recover the same if its intended Appeal was successful which demonstrated that he had met the first condition.

16. It relied on the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR where the court held that:-

**“I am of the view that substantial loss would befall the Applicant if another execution is levied at this stage. The judgment being executed was in default of appearance and on formal proof. Without making a decision, it is desirable that cases are heard between the parties.”**

17. It also pointed out that it filed its application seeking a stay of execution less than three (3) months after its application seeking leave to defend was dismissed and hence submitted that it had met the second limb of Order 42 Rule 6 (2) of the Civil Procedure Rules.

18. It added that it had fulfilled the third condition as it was willing to have the decretal sum deposited in court without any delay.

19. It also urged this court to grant it leave to file an appeal out of time as it ought not to be punished for the blunders of its lawyers. In this regard, it relied on the case of Veronica Gathoni Mwangi & Another vs Samuel Kagwi Ngure & Another [2016] eKLR where P. J Otieno J stated that the doors of justice should not be shut to a litigant who desires to be heard.

20. It was emphatic that the proper procedure was for it to seek leave to appeal out of time, even as it sought an order for a stay of execution it had annexed to its application, the draft Memorandum of Appeal

21. This was in response to the Respondent’s submission that a stay of execution pending appeal could not be granted unless an appeal had been filed.

22. In this regard she relied on the cases of Abraham Lenavia Lenkeu vs Charles Katekeyo Nkaru [2016] eKLR, Gerald M’limbune vs Joseph Kangangi [2008] eKLR amongst other cases to buttress her argument that an appeal must have been filed before an order for stay of execution can be granted.

23. She also added since the Applicant had withdrawn all the monies from its account, it was not entitled to the orders for stay of execution as its application was an abuse of the court process.

24. Notably, every person is entitled, as envisaged under Article 50 of the Constitution of Kenya, 2010 to have a fair trial. The said Article 50 of Constitution of Kenya provides as follows:-

**“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”**

25. It therefore follows that every person ought not to be shut out from accessing court or having his day in court. Indeed, the right of a party to enjoy the fruits of his judgment must be weighed against the right of a party to access court to have his dispute heard and determined by a court or tribunal of competent jurisdiction.

26. Appreciably, **“equity aids the vigilant and not the indolent.”** However, it was the view of this court that a delay of about two (2) months in bringing the application seeking leave to file an appeal out of time was not inordinate. This court did not see the prejudice the Respondent suffered. If she suffered any prejudice, then she did not demonstrate the same.

27. Accordingly, having considered the parties affidavit evidence, their respective Written Submissions and the case law they each relied upon, this court came to the firm conclusion that there would be more injustice in the Applicant being denied an opportunity to ventilate its case on merit.

28. Turning to the second prayer for a stay of execution, this court considered the question of whether an order for stay of execution could be granted where an applicant had not yet filed a Memorandum of Appeal.

29. Order 42 Rule 1 of Civil Procedure Rules, stipulates that:-

**1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.**

**2. The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.**

30. The understanding of this court was that a court appealed from could grant an order for stay of execution. Notably, at this stage, an appeal would not have been filed in the appellate court.

31. In fact Order 42 Rule 6 (5) provides that:-

**“An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.”**

32. In the same breathe, this court took the view that an order for a stay of execution could also be granted in the High Court even where no Memorandum of Appeal has been filed. This court did not therefore agree with the Respondent but was more persuaded by the Applicant’s submissions in this respect.

33. Going further, Order 42 Rule 6 (2) of the Civil Procedure Rules provides as follows:-

**“No order for stay of execution shall be made under subrule (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.”**

34. An applicant seeking a stay of execution must demonstrate:-

**a. That he will suffer substantive loss if the order for stay is not granted;**

**b. That he had filing his application for a stay of execution timeously; and**

**c. That he was willing to provide security.**

35. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “and”. It connotes that all three (3) conditions must be met simultaneously.

36. Notably, the Respondent did not attach any Affidavit of Means to demonstrate that if he was paid the entire decretal sum and the Applicant succeeded in its Appeal, he would be able to refund the same.

37. It was the considered view of this court that any difficulties in recovering decretal sum upon an appeal succeeding could be deemed to amount to substantial loss. As it was not clear how the Respondent herein, would repay the decretal sum in the event the Applicant herein succeeded in its appeal, this court was satisfied that the second limb under Order 42 Rule 6 (2) of the Civil Procedure Rules had been satisfied.

38. In respect of the third condition, the Applicant submitted that it was ready and willing to abide by any conditions given by the court. This court therefore found and held that the third condition herein had been satisfied.

## **DISPOSITION**

39. For the foregoing reasons, the upshot of this court's Ruling was that the Applicant's Notice of Motion application dated and filed on 8<sup>th</sup> August 2018 be and is hereby granted in terms of Prayer No (3) therein. The Applicant is hereby directed to file its Memorandum of Appeal within fourteen (14) days from today.

40. Prayer No (2) is hereby allowed in the following terms:-

**1. THAT the Applicant to deposit the entire decretal sum of Kshs 636,931.50/= into court within thirty (30) days from today.**

**2. For the avoidance of doubt, in the event, the Applicant shall default on Paragraph 40 (1) hereinabove, the conditional stay of execution shall automatically lapse.**

**3. The Applicant is hereby directed to file and serve its Record of Appeal within sixty (60) days from today i.e by 17<sup>th</sup> July 2019.**

**4. The Deputy Registrar High Court of Kenya Milimani Law Courts is hereby directed to facilitate the placing of the typed certified proceedings and lower court file to enable the Applicant comply with Para 40 (3) hereinabove.**

**5. Costs of the application herein shall be in the cause.**

**6. Either party is at liberty to apply.**

41. It is so ordered.

**DATED and DELIVERED at NAIROBI this 16<sup>th</sup> day of May 2019**

**J. KAMAU**

**JUDGE**