Naivas Limited v Nyaga (Civil Appeal E055 of 2025) [2025] KEHC 14072 (KLR) (9 October 2025) (Ruling)

Neutral citation: [2025] KEHC 14072 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E055 OF 2025

E OMINDE, J

OCTOBER 9, 2025

BETWEEN

NAIVAS LIMITED .... APPLICANT

AND

NAHASHON MAINA NYAGA .... RESPONDENT

RULING

1. By way of notice of Motion dated 24th March 2025 the Applicant seeks the following orders;

   a. Spent

   b. Spent

   c. That upon hearing and determination of the Application herein, a stay of execution do issue against the Judgment delivered in Eldoret MCCC No. 1308 of 2017; Nahashon Maina Nyaga vs. Naivas Limited and all consequential orders and/or proceedings arising therefrom pending the hearing and determination of the Appeal filed herein.

   d. That the Applicant be and is hereby granted an extension of time to lodge and serve a Memorandum of Appeal against the Judgment delivered in Eldoret MCCC No. 1308 of 2017; Nahashon Maina Nyaga vs. Naivas Limited.

   e. That the Memorandum of Appeal lodged and served by the Applicant against the Judgment in Eldoret MCCC No. 1308 of 2017; Nahashon Maina Nyaga vs. Naivas Limited be deemed to have been lodged and served within time and this Honourable Court be pleased to extend the duration for such lodging and service accordingly.

   f. That the costs of the application be provided for.

2. The Application is expressed to be brought under Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Order 22 Rule 25. Order 42 Rule 6. Order 51 Rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of the law.

3. The Application is premised on the grounds on the face of it and the averments in the affidavit of Thuita Kiiru. In his affidavit, he deponed that the Plaintiff instituted the instant suit sometime in December 2017 seeking inter alia, general damages, special damages of Kshs. 6,000/= and cost of the suit. That the matter proceeded for hearing and the trial court slated the matter for delivery of the Judgement on diverse dates, to wit, 19th February, 2025 and 20th February, 2025 but on both dates the Judgement was not ready. The court stated that the Judgement would be delivered on notice but the Applicant did not receive a notice for the delivery or a Notice of Entry of Judgement from the Respondent as mandated by the Law.

4. The deponent averred that the Appellant's Advocates became wary and perused the e-file on the CTS then realized that Judgement was delivered on 19th February. 2025 and further, that on the same day, the court had indicated that the Judgement was not ready. Judgement was delivered in favour of the respondent and he was awarded Kshs. 1,579,500/=. He annexed and marked a copy of the said Judgement as TK-1. He urged that he is alive to the fact that an Appeal ought to be lodged within thirty (30) days from the date of the decision and that the delay of 10 days was due to the fact that they were unaware that the Judgement had been delivered.

5. The deponent averred that they have filed a Memorandum of Appeal dated 24th March, 2025 which he annexed and marked as "TK 3a". Further, that they have requested for typed proceedings and their advocates are in the process of filing their Record of Appeal to challenge the Judgement rendered by the Trial Court. He Annexed and marked as "TK-4a" & "TK4b" a copy of the letter and Judiciary receipt respectively. He urged that the Appeal is meritorious and raises triable issues. He stated that the Appellant is ready and willing to abide with conditions that might be imposed by this Court. He urged the court to allow the Application as prayed.

Replying Affidavit

6. The Respondent filed a Replying affidavit dated 27th March 2025. He deponed that it is true that the Appellant's Advocate was not in Court when the Judgement was delivered in this matter o 19th February, 2025. Further, that on 20th February, 2025, upon delivery of the Judgement, his Advocates wrote to the Appellant's Advocate notifying them of the Terms of the Judgement and enclosed the Respondents Party and Party Bill of Costs for their consideration. He annexed and marked the same as annexure NN1. He stated that the letter dated 20th February, 2025 was sent to the Appellants' advocate by way of Registered Post, annexing and marking as NN2 proof of the same. Upon the advocates for the Appellant not responding to the Bill of Costs, it was assessed by the civil registry and a Certificate of Costs issued in the Sum of Kshs 211,420. His Advocates notified the Appellant of the Assessment of the Costs by way of email through a Letter of 27th February, 2025 which he annexed and marked as NN3.

7. The deponent averred that vide a letter of 7th March, 2025 the Appellant requested the Court for proceedings and judgement delivered on 19th February, 2025. He annexed and marked the same as NN4. That the Appellants' advocate, vide an email of 27th February 2025, made a request to his advocates enquiring on the most favourable form of payment of the Decretal sum which he annexed and marked as NN5. He further deponed that from the foregoing, the Appellant was aware of judgement within time but never lodged the Appeal within the requisite period specified in law, it was

negligent, indolent and did not take any proactive steps to file the appeal within time. Further, that the reasons given by the applicants were not convincing to warrant the orders sought.

8. The deponent stated that there is no appeal upon which the court can grant a stay and further, that the Application offends the mandatory provisions of Order 42 Rule 6 of the *Civil Procedure Act*. Urging that it is necessary that the Appellants allow him enjoy the fruits of his judgement, he prayed the court dismiss the Application.

9. The parties filed submissions on the Application with the Applicant filing submissions dated 12th May 2025 through the firm of Messrs Thuita Kiiru & Co Advocates whereas the Respondents filed submissions dated 9th April 2025 through the firm of Messrs Mwinamo Lugonzo & Company Advocates.

Appellants' Submissions

10. Counsel submitted that the Application is anchored on Order 42 Rule 6 of the Civil Procedure Rule 2020. He cited the case of RWW v EKW [2019] KLR where the court considered the purpose of stay of execution order pending appeal and urged that from the case, the grounds the Applicant must establish for an order of stay execution to issue are; It will suffer substantial loss unless the order is made; the application has been made without unreasonable delay; and it is ready to deposit such security as the court may order.

11. On unreasonable delay, counsel submitted that the application was filed without unreasonable delay. The Judgement was delivered on 19th February, 2025 and the Application was filed on 24th March, 2025, 34 days after the judgement. He cited the case of Gitaru v Kagiri & another Civil Appeal 314 of 20230 (2024) KEHC 6320 (KLR) (6 June 2024) (Ruling) in in this regard.

12. On substantial loss, the counsel urged that the Applicant is apprehensive that the Respondent will proceed to execute for the decretal sum whilst the instant Appeal is pending, which execution will render the instant Appeal nugatory. He cited the case of Tropical Commodities Suppliers Ltd & others vs. International Credit Bank Ltd. (in liquidation) (2004) 2 EA 331 in this regard. Counsel submitted that the Applicant has demonstrated by affidavit that immediate execution would expose it to irreparable financial harm. The Applicant has employed hundreds of citizens, and execution would cripple its business resulting to layoffs which is highly unfair in the face of tough economic times. He cited the case of Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007 in this regard. He submitted that the Applicant has satisfied this court that it will suffer substantial loss should the Claimant proceed to execute the decree before the appeal is heard and determined.

13. Counsel submitted that the Applicant is ready to deposit such security as the court may order. That in compliance with Order 42 Rule 6(2)(b) of the Civil Procedure Rules, the Applicant expresses readiness to furnish such security as the court may deem fit for the due performance of any decree that may ultimately be binding upon them. He placed reliance on the case of Gianfranco Manenthi & Another v African Assurance Co. Ltd (2019) eKLR.

14. On grant to file and serve the Memorandum of Appeal, Counsel urged that grant of leave is governed by Section 79G of the *Civil Procedure Act*, which empowers the Court to admit an appeal out of time if sufficient cause is shown. That the test for granting such leave has been laid down in a number of decisions including Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others [2014] eKLR and further, that the delay on filing the appeal was not deliberate, and occasioned by circumstances beyond its control. Counsel prayed the court allow the Application as prayed.

Respondents' submissions

15. Learned Counsel for the Respondent reiterated the averments in the replying affidavit and urged that there is no appeal upon which the Court can exercise its discretion and grant a stay and the Court does not have the requisite jurisdiction to grant the orders sought. Having failed to file an Appeal within time the Application offends the Mandatory Provisions of Order 42 Rule 6 of the *Civil Procedure Act* and the Rules thereof. He stated that the Application is incompetent as no leave has been sought by the Appellant for enlargement of time to file an Appeal out of time for the Courts consideration. He prayed the Court dismiss the Application with costs.

Analysis & Determination

16. Having considered the pleadings and the submissions, it is my considered opinion that two issues arise for determination as follows;

    1. Whether stay of execution orders should issue

    2. Whether leave to file appeal out of time should be granted

17. The principles guiding the grant of a stay of execution are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides:

    " No order for stay of execution shall be made under sub rule (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.

18. On whether the applicant shall suffer substantial loss, the court is guded by the decision of the Court of Appeal in the case of Tropical Commodities Supplies Ltd & others v International Credit Bank Limited (in Liquidation) [2004] EALR 331, where the court rendered itself thus;

    " ...substantial loss does not represent any particular mathematical formula, rather, it is a quantitative concept. It refers to any loss, great or small, that is of real worth or value and as distinguished from a loss without value or loss that is merely nominal..."

19. Further, Platt, Ag. JA (as he then was) in Kenya Shell Limited vs. Kibiru [1986] KLR, pronounced himself as follows:

    " It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money".

20. On his part, Gachuhi, Ag. JA (as he then was) in the same case, stated as follows:

    " 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."

21. In considering this issue of substantial loss in the instant case, the Applicant has deposed that the Applicant has employed hundreds of citizens, and that if execution is allowed to proceed, it would cripple its business and thereby resulting to layoffs which would be highly unfair to these employees in the face of the tough economic times the country is facing. The court notes that this deposition has not been controverted, rebutted and/or denied in any way by the respondents. This being the case, I am satisfied that substantial loss has been demonstrated.

22. The purpose of security was clearly enunciated in Arun C. Sharma vs. Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 others [2014] eKLR, where the court stated thus;

> " The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose."

23. The court notes that the Applicant herein has stated that he is ready to deposit security upon any conditions that the court may impose. Further, the court in considering the reasons given by the Applicant on how and when the impugned judgement was delivered such that they were not able to take note of it in good time, much as the court finds that these reasons are not entirely convincing, the court has taken note of the fact that the Respondent himself has deposed that the Applicant's Counsel was not in court on the date of the delivery of judgement. This deposition by the Respondent is a more sensible explanation in my view and find that this is what transpired on the date of the delivery of the judgement.

24. That said, the court takes into consideration the fact that for a judgement delivered on 19th February 2025, the window for filing an appeal lapsed on 19th March 2025 and the Applicant moved the court on 24th March 2025. The delay therefore was for 5 days or thereabouts and in my considered opinion, the same is not inordinate

25. On whether the Applicant should be granted Leave to Appeal out of time, the relevant provision of the law is Section 79G of the *Civil Procedure Act* and it provides as follows:

> " 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 a good and sufficient cause for not filing the appeal in time." [Emphasis added].

26. On whether the memorandum of appeal should be deemed as duly filed, this issue was discussed by the Court of Appeal in Charles Karanja Kiiru vs. Charles Githinji Muigwa [2017] eKLR where the court decided thus

> “ Having expressed ourselves as herein above the other issues that falls for considered is whether the appeal filed out of time on 24th October 2014 could be deemed as being properly on record. There is a plethora of authorities from the High court which interpret the proviso to Section 79G of the *Civil Procedure Act* to mean that an appeal filed out of time can be admitted as being properly on record once extension of time is granted.

27. Emukule J in addressing himself to the same said issue, in Gerald M’Limbine vs. Joseph Kangangi [2009] eKLR hels as follows;

> “ My understanding of the proviso to Section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal and at the same time seek leave of court to have an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the court’s permission to admit a non-existent appeal out of the stipulated period

28. In associating myself fully with these two decisions and having found in favour of the Applicant on all the three principles that a party must satisfy to qualify for an order of stay of execution as set out in Order 42 Rule 6(2) of the Civil Procedure Rules, I find merit in the Application by the Applicant. The same is therefore granted in its entirety as hereunder;

    1. That a stay of execution of the Judgment delivered in Eldoret MCCC No. 1308 of 2017 viz Nahashon Maina Nyaga vs. Naivas Limited and all consequential orders and/or proceedings arising therefrom is now hereby issued in favour of the Applicant and against the Respondent pending the hearing and determination of the Appeal herein filed.

    2. That the Memorandum of Appeal lodged and served by the Applicant against the Judgment in Eldoret MCCC No. 1308 of 2017; Nahashon Maina Nyaga vs. Naivas Limited shall be deemed to have been properly filed and served within the requisite time period and the Applicant is to file and serve their Record of Appeal within 60 days from today’s date.

    3. That the Applicant is to deposit half the decretal sum into a joint interest earning account in the name of the Advocates for both parties within the next 45 days’ failure to which the stay orders shall be deemed to have lapsed and the Respondent is at liberty to proceed with execution for the entire decretal sum

    4. That the applicant shall bear the costs of this Application.

READ DATED AND SIGNED AT ELDORET ON 9TH OCTOBER 2025

E. OMINDE

JUDGE