

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
MACHAKOS LAW COURTS
MISC APPLICATION NO. E331 OF 2024

FLORENCE
APPELLANT/APPLICANT

MUTISO

MUTINDA.....INTENDED

-VERSUS-

ALEX NZIOKA
RESPONDENT

KIOKO.....

RULING

1. This ruling is on the Applicant's application dated 5th December, 2024 seeking for the following Orders:

a) Spent

b) THAT this Honourable Court be pleased to extend time and grant leave to the Applicant/ Intended Appellant to lodge his Memorandum of Appeal out of time against the Judgement and/or Decree entered against him by the Honourable C.N. Ondieki (PM) in Civil Suit No. 330 OF 2020 Machakos Law Courts delivered on 3rd September, 2024.

c) THAT this Honourable Court be pleased to grant a stay of execution of the Judgment and/or Decree issued by Honourable C.N. Ondieki (PM) on 3rd September, 2024 at Civil Suit No. 330 OF 2020 Machakos Law Courts pending the hearing and determination of this Application.

d) THAT this Honourable Court be pleased to grant a stay of execution of the Judgment and/or Decree issued by Honourable C.N. Ondieki (PM) on 3rd September, 2024 at Civil Suit No. 330 OF 2020 Machakos Law Courts pending the-full hearing-and-determination-of-the-intended-Appeal

e) THAT the warrants of attachments and proclamation of any form or the sale of the Applicant's proclaimed properties be set aside and/or stayed.

- f) THAT this Honourable Court allow the Applicant to furnish the Court with security in the form of a Bank Guarantee from a reputable Bank, up to the statutory limit of Kshs.3M pending the full hearing and determination of this Appeal.

g) THAT The costs of this Application abide the outcome of the Appeal.

2. The application is supported by the supporting affidavit sworn by the Applicant on 5th December, 2024 and premised on the grounds on the face thereof. The Applicant's case is that the judgement he seeks to appeal was delivered on 3rd September, 2024 where the Applicant was held 100% liable. The Respondent was awarded Kshs.2,800,000/= in general damages, Kshs.1,600,000/= for loss of future/diminished earning capacity and being dissatisfied with the said judgement he has preferred an appeal on quantum. That the appeal has high chances of success. The delay in lodging the appeal was occasioned by the fact that after judgement was delivered on 3rd September 2024, by the time the Applicant got back to his Advocates on record in regard to the same after the extraction of the judgement the time to lodge the appeal had already expired.
3. The Applicant further states that he is apprehensive that the Respondent may proceed to levy execution against him. The judgement is of substantial amount and the Applicant is apprehensive that if the Respondent is paid, he may deal with the same in a manner prejudicial to the Applicant and if the appeal is successful, he might not be able to recover the same from the Respondent. That the Respondent has not disclosed nor furnished the court with any documentary evidence too prove his financial standing. Unless stay of execution is granted, and the Respondent levy and/or executes the said judgment of 3rd September, 2024 the Applicant's appeal will be rendered nugatory and the Applicant will suffer-irreparable loss and damage. The Applicant's Insurer is ready, willing and able to furnish the court with a Bank Guarantee as security. That the Respondent will not be prejudiced in any way if the Application is allowed. Lastly, that the application has been brought without unreasonable or undue delay.

4. The application is opposed by **ALEX NZIOKA KIOKO** the Respondent vide her Replying Affidavit sworn in January 2025 2024. The Respondent avers that the application lacks merit and is an abuse of the court process and the same ought to be dismissed with costs the application herein is a delay tactic employed by the applicant to protract this matter and frustrate the respondent and the court should not be misdirected and denying the respondent from enjoying the fruits of their judgment.
5. The Respondent urges the court to read into the mischief of the Applicant's unsubstantiated allegations that there was a delay in obtaining the court's judgment and communicating to the respondent a fact which is false as counsel for the Applicant herein was present when the judgment date was given in court. That after the judgment was delivered on 3/9/2024, The Applicant's advocates were made aware by the Respondent's Advocates of the terms of the judgment via a letter dated 5/9/2024 in which a draft decree was forwarded to the Applicant's counsel as per the Respondent's annexure "ANK I(a) and I(b) "
6. That the Applicant and her Advocates have all along been aware of the judgment having been served with a draft decree via their counsel's email which in fact the Applicant's counsel has not refuted to be their official email address. Annexure ANK2 is a copy of the email forwarding the draft decree. The decree having been served , the Applicant had all the time to seek stay of execution and thereafter lodge an appeal but chose to sit on their hands and cannot turn around and claim that they only came to know of the judgment after service of the warrants of attachment and sale. The averments that there was a delay in obtaining a copy of the judgment are without basis and should be treated with the contempt they deserve. It is trite law that he alleges must prove and in the absence of any supporting evidence, the applicant falls short of this principle. Nevertheless, the Applicant's counsel has not provided proof of their efforts to obtain the judgment. It is noteworthy that the Applicant has not attached a letter requesting for the said judgment.

7. Further, the Applicant has not advanced sufficient reasons to warrant grant of orders of stay of execution. That the Applicant was simply jolted into action by the service of warrants of attachment and sale and such is not deserved of any orders on account of their indolence.
8. The Respondent implores this Court to take notice that it has been well over three months (90 days) since the judgment in this matter was entered thus the Applicant is guilty of laches having not demonstrated sufficient reasons for delaying in moving the court to appeal the judgment.
9. The Respondent contends that the intended appeal is a sham, mischievous and contemptuous and is solely engineered for the purpose of denying the Respondent the fruits of her judgment and delaying the execution proceedings.
10. That when this matter came up for hearing, the Applicant failed to call any witness and as such the Respondent's case was uncontroverted. Thus, the Respondent has proved their case to the required standards and therefore, the Applicant cannot turn around and claim that the judgment sum was excessive. The award by the trial court was fair and within the range applied by most courts hence the appeal is a waste of time.
11. That the application does not meet the threshold for grant of stay pending appeal as no substantial loss has been demonstrated by the Applicant.
12. The Respondent objects to the use of a Bank Guarantee since the copy of the same attached by the Applicant has a duration of only 12 months and there is no evidence that at the lapse of the said duration the guarantee will have been renewed. That other than the Applicant stating that the Bank Guarantee is from a reputable financial institution, the Applicant has failed to establish or explain her relationship with Directline Assurance. The parties to this application are FLORENCE MUTISO MUTINDA and ALEX NZIOKA KIOKO. It is not for this court to speculate the relationship between the aforementioned applicant and Directline Assurance Company Limited. That it is imperative for this court to note that the

Applicant herein is not a party to the said agreement and that there is no evidence that the said guarantee is for the benefit of this matter specifically. There is a possibility of a bank that had given a Bank Guarantee not honouring the same. Further, the bank not being a party to this suit would make it difficult for a successful party to enforce any orders he or she might get concerning such a Bank Guarantee.

13. That it is trite law that litigation must come to an end and therefore it is the wider interest of justice that execution of the judgment delivered on 3/9/2024 be allowed to proceed. This Court is a court of law aimed at upholding justice and cannot be manipulated to invoke its inherent jurisdiction under Section 3A of the Civil Procedure Act to aid the Applicant rubberstamp a blatant disregard of court rules and procedure. The Applicant and her counsel were at all times aware of the judgment and failed to lodge an appeal within the stipulated time therefore are not entitled to a grant of order of extension of time.
14. That the Respondent stands to suffer prejudice as he holds a valid judgment and the actions of the Applicant herein are aimed at denying her the fruits of her judgment.
15. Directions were given for the application to be heard by way of written submissions. Both parties complied.

Analysis and determination

16. I have considered the application, the supporting affidavit, the replying affidavit and the rival submissions filed by the Parties' counsel as well as the judicial decisions relied upon. In my view, the issues for determination are as follows:-
 - a. *Whether the court should exercise its discretion to grant the applicant leave to file their appeal out of time;*
 - b. *Whether the applicant has met the prerequisite for grant of stay of execution pending appeal;*

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

17. 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.

18. It is clear from the wording of Section 79G of the Civil Procedure Act that before the court considers extension of time, the Applicants must satisfy the court that that they have 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** that 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.

19. 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.*

20. 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.”

21. Applying the above principles to the present case, the judgment herein was delivered on **03.09.2024** and the appeal ought to have been filed by **03.10.2024**. The Applicant filed the current application together with the annexed Memorandum of Appeal on **05.12.2024**. This is about two (2) months outside the time limited for filing an appeal. The Applicant has attributed the delay in lodging the appeal was occasioned by the fact that after judgement was delivered on 3rd September 2024, by the time the Applicant got back to his Advocates on record in regard to the same after the extraction of the judgement the time to lodge the appeal had already expired.

22. It is my view that the decree having been served as indicated by the Respondent, the Applicant and her Advocate had all the time to seek stay of execution and thereafter lodge an appeal but chose to sit back with their hands folded and cannot turn around and claim that they only came to know of the judgment after service of the warrants of attachment and sale. I find the explanation that there was a delay in obtaining a copy of the judgment to be without any basis. It is trite law that he alleges must prove and in the absence of any supporting evidence, the Applicant falls short of this principle. Nevertheless, the Applicant's counsel has not provided proof of their efforts to obtain the judgment. It is noteworthy that the Applicant has not attached a letter requesting for the said judgment from the court.

23. This court considers the two (2) months delay to be inordinate delay and the reasons for the delay not to have been satisfactorily explained to the court as required by the law. In my view, the Applicant has not given any plausible reasons for the delay in filing the appeal.

24. I have perused the intended Memorandum of Appeal and noted that the appeal faults the trial court on assessment of damages which they claim to be excessively high. It is trite law that for an Appellant Court to interfere with an award of damages, it must be shown that the trial court in awarding damages, took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that the wrong principle of law was applied. In the case of **Maraga V Musila (1984) 1 KLR 251**, the Court of Appeal when addressing its mind to this issue expressed itself thus;

“The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate

of the damage suffered. The question is not what the appellate court would award but whether the lower judge acted on the wrong principles”.

25. The approach taken by courts in the assessment of damages is that comparable injuries should as far as possible be compensated by comparable awards although the court should bear in mind that no two cases are exactly the same. The court will also consider factors such as the state of the economy and the rate of inflation in its assessment of damages. (See ***Stanley Maore v Geoffrey Mwenda [2004] eKLR*** and ***Ugenya Bus Service v Gachoki [1982] eKLR***).
26. Having given due consideration to the injuries sustained by the Respondent, the comparable decisions relied upon by the Trial Court and the awards made which were in any event not challenged by the Applicant, I find no error on the part of the trial court that would warrant the appeal to be heard on quantum in the circumstances of this case.

b. Whether the Applicant has met the prerequisite for grant of stay of execution pending appeal;

27. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-

1. “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is

preferred may apply to the appellate court to have such orders set aside.

2. *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 1st 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.*

28. Thus, under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:

- 1. Substantial loss may result to him/her unless the order is made;**
- 2. That the application has been made without unreasonable delay; and**
- 3. 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.**

29. Substantial loss was clearly explained in the case of **James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR:-**

“No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...the issue of substantial loss is the

cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”

30. The Applicant contend that she is apprehensive that following the judgment and/or Decree entered against him by the Honourable C.N. Ondieki (PM) in Civil Suit No. 330 OF 2020 Machakos Law Courts delivered on 3rd September, 2024, the Respondent is likely to proceed with execution of the said judgment against the Applicant. The judgement is of substantial amount and the Applicant is apprehensive that if the Respondent is paid, he may deal with the same in a manner prejudicial to the Applicant and if the appeal is successful, he might not be able to recover the same from the Respondent. That the Respondent has not disclosed nor furnished the court with any documentary evidence too prove his financial standing. Unless stay of execution is granted, and the Respondent levy and/or executes the said judgment of 3rd September, 2024 the Applicant’s appeal will be rendered nugatory and the Applicant will suffer-irreparable loss and damage.
31. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The Applicants are required to show the manner in which execution will irreparably affect them or will alter the status quo to their detriment therefore rendering the appeal nugatory. The Applicant has failed to demonstrate substantial loss in my considered view.
32. On whether the application has been made without unreasonable delay. Judgment at the trial court was delivered on 03.09.2024 and the appeal ought to have been filed by 03.10.2024. The Applicants filed the current application together with the annexed Memorandum of Appeal on 05.12.2024. This is about two months outside the time limited for the application. This period is inordinate and inexcusable, and as already observed the Applicant’s explanation that there was a delay in obtaining a copy of the judgment to be without

any basis and not a plausible reason for the delay in filing the appeal.

33. On the issue of security for costs, the purpose of security was explained in the case of **Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR** the court stated:-

“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 the 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.

34. Evidently, the issue of security is discretionary and it is upon the court to determine it and set its terms. The Applicant seeks to furnish the Court with security in the form of a Bank Guarantee from a reputable Bank, up to the statutory limit of Kshs.3M pending the full hearing and determination of this Appeal. This proposal is objected to by the Respondent for the reasons advanced by the Respondent hereinabove.
35. This Court’s careful perusal at the attached Bank Guarantee which by Family Bank shows that the same is for a period of only 12 months from 6th July 2023 showing it had long expired at the time of filing this application on 5th December 2024 and that means that the same expired on 6th July, 2024, There is no proof that the same has since been renewed or that there is absolutely guarantee that the same will be renewed and yet there is no party that is aware how long the intended appeal will take to be heard and determined. Further, the said Bank Guarantee does not apply strictly to this matter and the Bank is not a party to these proceedings in order for it to be bound by

whatever orders that this court gives. I find the Bank Guarantee not to be proper and adequate security.

36. It is imperative that the right of appeal must be balanced against an equally weighty rigid right of the Plaintiff/Claimant to enjoy the fruits of the judgment delivered in his/her favour. In the case of **Samvir Trustee Limited vs Guardian Bank Limited [2007] eKLR** the court stated:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”

37. In the premises, this court finds the Applicant's Notice of Motion dated 5/12/2024 to be without merit and the same is dismissed with costs to the Respondent assessed at Kshs.30,000/=.

It is hereby so ordered.

RULING WRITTEN, DATED & SIGNED AT MACHAKOS THIS 3RD MARCH 2026

**NOEL I. ADAGI
JUDGE**

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 3RD MARCH 2026

In the presence of:-

