



Techspa General Supplies & 2 others v Onyango (Civil Application E393 of 2021) [2023] KECA 270 (KLR) (17 March 2023) (Ruling)

Neutral citation: [2023] KECA 270 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E393 OF 2021
AK MURGOR, JA
MARCH 17, 2023**

BETWEEN

**TECHSPA GENERAL SUPPLIES 1ST APPLICANT
WILLIUM KURIAH JOSIAH 2ND APPLICANT
JENNIFER NJERI KURIA 3RD APPLICANT**

AND

STEVE ONYANGO RESPONDENT

((Being an application for extension of time to file an intended Appeal out of time and stay execution from a ruling and order of High Court (Mabeya, J.) delivered on 2nd September 2021))

RULING

- 1 This Notice of Motion dated November 12, 2021 is brought pursuant to rules 5 (2) (b), 4, 41 and 42 (1) of the [Court of Appeal Rules](#) and order 22 rule 54 of the [Civil Procedure Rules](#) 2010. In the motion, the applicants, seek orders;
- i. That the Warrants of attachment dated October 27, 2021 issued to Nextgen auctioneers be stayed pending hearing and determination of this application.
 - ii. That there be a temporary injunction restraining Nextgen Auctioneers or agents from harassing, intimidating attaching the 1st, 2nd and 3rd applicants' property.
 - iii. That this court grant the 1st, 2nd and 3rd applicants extension of time to file the appeal out of time;
 - iv. That warrants of attachment dated October 27, 2021 be stayed pending hearing and determination of appeal.



- 2 The motion is brought on the grounds on its face and supported by the affidavit of William Kuriah Josiah sworn on November 12, 2021 where it was deponed that the ruling was delivered on September 2, 2021 vacating an order of stay of execution issued by the trial court; that a Notice of appeal was filed on September 8, 2021, and thereafter the applicants' advocate requested to be supplied with the certified typed proceedings on the same day; that despite pursuing the proceeding, they have been unable to obtain them, which delay had delayed the filing of their appeal; that as a consequence they seek time to be extended to file the appeal out of time.
- 3 It was further deponed that the auctioneer, Nextgen Auctioneers had taken out new warrants of attachment after the stay orders were vacated, and it is for this reason that they seek orders of stay of execution from this Court to stop the auctioneer from forcing them to close their shop; that their appeal is merited, and has a high chance of success.
- 4 The respondent did not file any replying affidavit or submissions despite being served with the hearing notice.
- 5 It is common ground that sitting as a single Judge of this court, I lack jurisdiction to entertain an application under rule 5(2)(b) of this Court's rules, I therefore decline the invitation to entertain it.
- 6 It is therefore only the prayer to extend time to file the appeal out of time under rule 4 of this Court's Rules, that, therefore falls for my consideration.
- 7 Under rule 4 of this Court's rules, it is settled that, the court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously, and not frivolously having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent will suffer prejudice if extension of time was granted. See the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* – Civil Application No Nai 251 of 1997.
- 8 The impugned ruling was delivered on September 2, 2021, and the Notice of appeal was filed on September 8, 2021 and served on the respondent's advocate on the November 2, 2021. As such, though the Notice of appeal was properly filed, its service on the respondent's advocate was effected 53 days after the Notice was lodged. No explanation was provided for the delayed service.
- 9 As concerns the record of appeal, the applicants requested for the certified proceedings on September 8, 2021. They claim that they have been unable to obtain the typed proceedings which delay they claim has been occasioned by the registry. By the time of hearing this application on November 2, 2022, they had yet to obtain the proceedings, and a certificate of delay specifying the time taken to prepare the certified proceedings. It is also worthy of note that no supplementary affidavit providing a recent picture on the progression of their appeal was filed.
- 10 Given this state of affairs, the application for extension of time to file an appeal out of time is premature, and unwarranted at this stage. It is accordingly dismissed.

It is so ordered.

Dated and delivered at Nairobi this 17th day of March, 2023

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is



a true copy of the original

Signed

DEPUTY REGISTRAR

