



**Gakui v Golden Gate Cargo Company Limited (Environment and Land Appeal E027 of 2023) [2024] KEELC 4211 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4211 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E027 OF 2023**

**JA MOGENI, J**

**MAY 9, 2024**

**BETWEEN**

**PHOEBE WANGUI GAKUI ..... APPELLANT**

**AND**

**GOLDEN GATE CARGO COMPANY LIMITED ..... RESPONDENT**

**RULING**

1. By Notice of Motion dated 21<sup>st</sup> June, 2021 the Applicant sought from the following orders: -
  - a. Spent
  - b. That pending the hearing and determination of this Application inter partes, this Honorable Court be pleased to grant a stay of all further proceedings in Nairobi MCOMMSU/E1291/2021 *Golden Gate Cargo Company Limited v Phoebe Wangui Gakui*:
  - c. That this Honorable Court be pleased to grant the Applicant leave to adopt the Appeal filed out of time against the Ruling and Orders of the Honorable Court Becky Cheloti Mulemia (PM) delivered and issued on 23<sup>rd</sup> June, 2023 in Nairobi MCOMMSU/E1291/2021 *Golden Gate Cargo Company Limited v Phoebe Wangui Gakui*:
  - d. That upon grant of prayer (3) above the Honorable Court be pleased to grant a stay of all further proceedings in Nairobi MCOMMSU/E1291/2021 *Golden Gate Cargo Company Limited v Phoebe Wangui Gakui* pending the hearing and determination of the intended Appeal against the Ruling and Orders of the Honorable Becky Cheloti Mulemia (PM) delivered and issued on 23<sup>rd</sup> June 2023 in Nairobi MCOMMSU/E1291/2021 *Golden Gate Cargo Company Limited v Phoebe Wangui Gakui*:
  - e. That this Honorable Court be pleased to issue any such further orders as it may deem appropriate in the interests of justice and



- f. That the costs of this Application be provided for.
2. The application is based on the grounds thereof and the Supporting Affidavit sworn by Phoebe Wangui Gakui dated 5/10/2023. The applicant avers that she wrongly diarized the ruling date in the matter in Nairobi MCOMMSU/E1291/2021 *Golden Gate Cargo Company Limited v Phoebe Wangui Gakui* as coming up for ruling on 23/08/2023 whereas the date was 23/06/2023. That she only realized the ruling had been delivered on 23/06/2023 when she went to court on 23/08/2023 in person to take the ruling and was informed that it had been delivered on 23/06/2023.
  3. Being aggrieved and dissatisfied with the ruling the applicant intends to appeal against the said decision and seeks to be granted leave to appeal out of time for the reasons particularized in the Memorandum of Appeal annexed to this application with annexures which include the impugned ruling.
  4. She states that the respondent sued her in the Magistrate's court in Nairobi MCOMMSU/E1291/2021 *Golden Gate Cargo Company Limited v Phoebe Wangui Gakui* for what she purports to be an expired lease and she contends that they sued her in a court without jurisdiction.
  5. It is her contention that the said lease agreement expired and there is no subsisting agreement between her and the respondents. Further that the person she had entered into a lease agreement with is not the one who sued her and that the respondents are forcefully sitting on her premises without her consent. She has annexed copies of her replying affidavit, further affidavit and submissions filed in the lower court over the matter before the lower court.
  6. She subsequently, filed an Application seeking the stay of proceedings in Nairobi MCOMMSU/E1291/2021 *Golden Gate Cargo Company Limited v Phoebe Wangui Gakui* pending the hearing and determination of the instant application seeking leave to file an Appeal out of the statutory period.
  7. The Applicant attributed the reason for the delay to the misdiarization of the ruling date on 23/08/2023 instead of the date issued by the trial court on 23/06/2023. The applicant as a result went to court on the wrong date which is two months (60) days after the ruling was delivered. The statutory timelines of 30 days within which an appeal should be lodged had already lapsed.
  8. That the plaintiff has earlier made an application for typed proceedings in December 2022 and sought to know the status of the same vide a letter dated 23/08/2023 to the Executive Officer since she wanted to lodge the appeal.
  9. She is apprehensive that the intended appeal is arguable and has overwhelming chances of success and has attached a draft copy of the memorandum of appeal. Further, she deposed that the Respondent would not suffer any prejudice should the leave be granted to file the intended Appeal.
  10. It was deposed that after the discovery of the delivery of the Ruling, she gave an explanation that the further delay to lodge the instant Appeal was due to her advanced age and since she is acting in person the technological processes adopted by the court are sometimes a challenge for a person of her advanced age being a senior citizen of over 70 years.
  11. The Applicant is also apprehensive that the Respondent is also keen to swindle her of the suit property and wanting to continue trespassing on her suit property and to proceed with the hearing and determination in the matter and which proceedings would no doubt render the appeal nugatory.
  12. The respondent opposed the appeal and filed a Replying Affidavit sworn on 6/11/2023. It is the Respondent's assertion that the Application is misconceived, bad in law and an abuse of the court process. That the Applicant was properly served with the court process for pre-trial directions on 29/06/2023 for this he attached a copy of the affidavit of service marked as AAAO3.



13. He further contended that the intended appeal is frivolous and does not lie and the same is merely an afterthought meant to delay and frustrate the Respondent and that the applicant/appellant chooses to hide behind her age to seek the court's sympathy.
14. The Application was canvassed by way of written submissions. The court granted leave for the parties to file their written submission on 08/11/2023 and reserved a ruling date. Applicant filed her submissions dated 24/11/2023, at the time of writing this ruling the respondent had not filed their submissions.
15. I have read and considered the submissions by the Applicant and the various authorities cited in support of her case and I have taken the same into account in arriving at my decision.

## **B. Analysis and Determination**

16. The issue for determination which arise therefrom are: -
  - a) Whether leave can be granted to appeal out of time.
  - b) Whether an order for stay of proceedings can issue in Nairobi MCOMMSU/E1291/2021 *Golden Gate Cargo Company Limited v Phoebe Wangui Gakui*.
17. On the first issue, Section 79G of the [Civil Procedure Act](#) provides that appeals originating from the subordinate court should be filed within thirty (30) days from the date of the decree or order appealed against. Section 95 of the said Act gives the court discretion to extend the time as it deems fit even if the time originally fixed has expired.
18. Section 79G of the [Civil Procedure Act](#) 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 good and sufficient cause for not filing the appeal in time.”
19. Section 95 of the [Civil Procedure Act](#) provides thus: -

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this [Act](#), the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”
20. The principles to be considered in exercising the court's discretion on whether or not to enlarge time to file appeal were set out in the case of *Leo Sila Mutiso v Rose Hellen Wangeri Mwangi* Civil Appeal 255/ 1997, the court, in considering the exercise of discretion to extend time, held as follows: -

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are first, the length of the delay. Secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”



21. These principles were also reiterated in *First American Bank of Kenya Ltd v Gulab P. Shah & Others* HCC 2255/2000 [2002] IEA 65 as follows: -
  1. The explanation if any, for the delay;
  2. The merits of the contemplated action, whether the appeal is arguable;
  3. Whether or not the respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the applicant.
22. I will therefore proceed to address each of the limbs outlined in the above mentioned cases and establish whether the Applicant has satisfactorily met each of the said principles. The length of the delay and the explanation if any. The present Application was filed on the 5/10/2023, after the trial court delivered its ruling on 23/06/2023 for the Notice of Motion Application dated 13/03/2023. The Applicant has also given an explanation of the 3-months and 12 days delay since the delivery of the Ruling was on 23/06/2023 as already stated above.
23. The Applicant contends that the delay was caused by her own mistake of misdiarization of the ruling date. She was therefore not aware of the ruling date and only came to find out about the same when she went to court on the date she had indicated in her diary to be the date when the ruling would be delivered. Further, she has also explained that when she discovered that the ruling was already delivered and being of advanced age and representing herself she embarked on the process of seeking support to draft her application for leave to lodge an appeal out of time.
24. Even though there is no maximum or minimum period of delay set by the law, anyone seeking this relief must satisfactorily explain the cause of the delay. This was enunciated in the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR.
25. I have noted that from the delivery of the ruling to the filing of the instant Application is about 3 months' delay. This in my view does not amount to inordinate delay further, the explanation given by the Applicant is sufficient and I therefore find that the Application was filed without undue delay.
26. On the issue of Chances of success of the intended Appeal. I am alive to the fact that in deciding an application of this nature, the court must be careful not to delve into the merits of the case at this stage. Having that in mind, I wish to state that from the Draft Memorandum of Appeal, one of the issues the Applicant intends to raise is on the validity of the lease agreement in respect of the suit property and the failure to consider the preliminary objection raised in relation to the matter before the court regarding the jurisdiction of the court.
27. This court has taken the unusual liberty to peruse the Ruling delivered on 23/06/2023 and I have noted that the said Ruling does not in any way address the issue of the lease nor the issue of jurisdiction thus I find the reasons advanced by the Applicant to be true.
28. The third limb is whether the Respondent can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the Applicant. The answer is in the affirmative, I find that no prejudice will be caused to the Respondent that cannot be compensated by an award of costs if the Application is allowed.
29. The principles laid down by the Supreme Court in *Nicholas Kiptoo Korir Arap Salat v. IEBC & 7 Others* [2014] eKLR are pertinent in this case; namely:

“(T)he underlying principles a court should consider in exercise of such discretion include:



1. 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;
  2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
  3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case to case basis;
  4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
  5. Whether there will be any prejudice suffered by the Respondent if the extension is granted;
  6. Whether the application has been brought without undue delay.
  7. ....”
30. Guided by the above principles, the upshot of the foregoing is that the orders sought by the Applicant; for leave to be granted to adopt the Appeal filed out of time is merited and for that reason Prayer no. (3) in the Notice of Motion dated 05/10/2023 is allowed.
31. On the second issue whether an order for stay of proceedings can issue in Nairobi MCOMMSU/E1291/2021 *Golden Gate Cargo Company Limited v Phoebe Wangui Gakui*, the principles to be considered in application for stay of proceedings are well settled. The same was well espoused *In Re Global Tours and Travels Ltd: Winding Up Cause No.43 of 2000* as follows:
- “Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously.”
32. Essentially, stay of proceedings pending appeal is purely a matter of judicial discretion that is exercised in the interests of justice on a case to case basis and the same ought to be exercised with caution. At this stage, I am careful not to comment on the merits of the draft/intended appeal, however, I am also alive to the fact that should the intended appeal be allowed, without having stayed the proceedings in Nairobi MCOMMSU/E1291/2021 *Golden Gate Cargo Company Limited v Phoebe Wangui Gakui* then the same would amount to a waste of the valuable judicial time.
33. Applying the above considerations, I would say that the applicant’s draft appeal is not a frivolous one. It is one which is arguable and triable. An arguable appeal is not one that, prima facie, has overwhelming chances of success; but one which raises contestable and triable issues. The Applicant also gave a satisfactory explanation as to the almost 4month delay between the period when the ruling was delivered and the filing of the Application. Further, this court is of the considered view



that it is in the interest of justice to have the lower court proceedings in Nairobi MCOMMSU/E1291/2021 *Golden Gate Cargo Company Limited v Phoebe Wangui Gakui* stayed, in the spirit of optimum utilization of the scarce judicial time.

34. In the end, I find that the Application for stay of proceedings in Nairobi MCOMMSU/E1291/2021 *Golden Gate Cargo Company Limited v Phoebe Wangui Gakui* has merit and proceed to stay the proceedings pending hearing and determination of the intended Appeal. I will therefore proceed to allow prayer no. (3) and (4) in the Application.
35. Given the foregoing, I accordingly find that the Application dated 05/10/2023 merited and I allow it on the following conditions: -
- a. That this Honorable Court grants the Applicant leave to adopt the Appeal filed out of time against the Ruling and Orders of the Honorable Court Becky Cheloti Mulemia (PM) delivered and issued on 23<sup>rd</sup> June, 2023 in Nairobi MCOMMSU/E1291/2021 *Golden Gate Cargo Company Limited v Phoebe Wangui Gakui*:
  - b. That this Honorable Court grants a temporary stay of all further proceedings in Nairobi MCOMMSU/E1291/2021 *Golden Gate Cargo Company Limited v Phoebe Wangui Gakui* pending the hearing and determination of the intended Appeal against the Ruling and Orders of the Honorable Becky Cheloti Mulemia (PM) delivered and issued on 23<sup>rd</sup> June 2023 in Nairobi MCOMMSU/E1291/2021 *Golden Gate Cargo Company Limited v Phoebe Wangui Gakui*:
  - c. The Applicant to file and serve a Record of Appeal within 45 days from the date of this Ruling failure to which prayer (b) above will stand vacated.
  - d. That there shall be maintained peace and tranquility by all the parties and their agents at the suit premises at all times during the pendency of this Appeal until it is heard and determined.
  - e. Cost of this application will abide the appeal.

It is so ordered

**DATED, SIGNED AND DELIVERED THIS 9<sup>TH</sup> DAY OF MAY 2024.**

**MOGENI J**

**JUDGE**

In the virtual presence of:-

Ms. Phoebe Wangui in person Appellant

No appearance for Respondent

Caroline Sagina ..... Court Assistant

