



**Treadsetters Tyres Limited v Omondi (Miscellaneous Case  
E068 of 2024) [2024] KEELRC 2440 (KLR) (2 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2440 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
MISCELLANEOUS CASE E068 OF 2024  
NZIOKI WA MAKAU, J  
OCTOBER 2, 2024**

**BETWEEN**

**TREADSETTERS TYRES LIMITED ..... APPLICANT**

**AND**

**GEORGE BENEDICTO OMONDI ..... RESPONDENT**

**RULING**

1. The Applicant, in the main, seeks the following orders on its notice of motion application dated 31<sup>st</sup> May 2024:-
  - a. The court be pleased to enlarge time and grant the applicant leave to file an appeal out of time against the judgment of Hon. D. O. Onyango delivered on 22<sup>nd</sup> November 2023 in Civil Suit No. 422 of 2016 – George Benedicto Omondi v Treadsetters Tyres Limited.
  - b. That pending the hearing and determination of the applicant’s appeal, the Honourable Court be pleased to order stay of execution.
2. The application was disposed of by way of submissions and Ruling reserved for delivery on a day the Court was not sitting hence the delivery today.

**Applicant’s Submissions**

3. The Applicant submits that it is entitled to the orders sought in the interest of preserving the substratum of the appeal. It reiterates the importance of granting stay by restating the provisions of Order 42 Rule 6 of the [Civil Procedure Rules 2010](#). In expounding on the principles enunciated by Order 42 Rule 6 above the Applicant draws this court’s attention to the case of [Butt v Rent Restriction Tribunal](#) [1979] eKLR where the court stated the following:-



- a. The power of the court to grant or refuse an application for a stay of execution is discretionary, and the discretion should be exercised in such a way as not to prevent an appeal.
  - b. The general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.
  - c. A judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
  - d. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.
4. Additionally, the Applicant cites the case of *RWW v EKW* [2019] eKLR where the court opined that the purpose for stay of appeal is to safeguard the rights of the appellant and to ensure a successful appeal is not rendered nugatory. Regarding the issue of sufficient cause for grant stay of execution, the Applicant submits that it has adequately demonstrated justification for preservation of the subject matter. It asserts that it has filed an appeal with a high chance of success, and that there are doubts as to the Respondent's ability to repay the decretal amount of Kshs. 972,800/-.
5. It was submitted that in defining 'sufficient cause' the Applicant cites the case of *Congress Rental South Africa v Kenyatta International Convention Centre & 2 others* [2019] eKLR and submits that it is described as the reason that must be demonstrated by the Applicant to justify the preservation of the subject matter, failure to which the appeal would be rendered nugatory. In urging the court to exercise its discretion in its favour the Applicant submits it will suffer irreversible harm if the decretal amount is paid to the Respondent and he fails to refund it. The Applicant underscores the importance of recognizing the concept of "substantial loss" by citing the case of *Masisi Mwita v Damaris Wanjiru Njeri* [2016] eKLR in which the court stated that substantial loss pertains to tangible material damage an appellant may suffer. The Applicant submits that it has moved court timeously as judgment was delivered on 22<sup>nd</sup> November 2023 and the application was filed on 31<sup>st</sup> May 2024, having received instructions on 29<sup>th</sup> May 2024. It further submits that the time taken between the judgment and filing of the application was not intended to obstruct justice but was caused by the delay in receiving instructions.
6. On the strength of the foregoing, the Applicant submits that it is entitled to leave to file an appeal out of time, taking into consideration of the: period of delay, the reasons for the delay and the degree of prejudice to the Respondent. He cites the case of *Edithe Gichungu Koine v Stephen Njagi Thoithi* [2014] eKLR. On the issue of security, the Applicant submits that it is not necessary in the circumstances of this case. It states that its willingness to furnish security, coupled with the Respondent not suffering any prejudice and the Respondent's inability to repay the decretal amount, tilts discretion in its favour.
7. The Applicant urges the court to allow it to ventilate its case in court in the spirit of Article 48 of the *Constitution* on access to justice and Article 50(1) on a fair hearing.

### **Respondent's Submissions**

8. The Respondent submits that there has been an inordinate delay of more than six months in filing the application. He asserts that there is no plausible reason for the delay as the Applicant's counsel was present in court on the date of judgment. Additionally, the Respondent contends that the reason of late receipt of instructions is merely a ploy to delay settlement of the decretal sum. The Respondent draws this court's attention to the fact that appeals are supposed to be filed within 30 days as provided by section 79G of the *Civil Procedure Act*. The Respondent further submits that there is no "good cause"



for extension of time. He restates the fact that there has been inordinate delay in filing the application. It is his affirmation that the Applicant has not provided sufficient material to tilt the court's discretion in its favour. He cites the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others* [2015] eKLR. The Claimant also cites the Court of Appeal decision in the case of *Mwangi v Kenya Airways Ltd* [2003] KLR where the factors aiding court in exercising discretion to extend time were outlined as follows:

- a. The period of delay; which in this case has been inordinate and way past the time provided for in the *Civil Procedure Act* Section 79 G.
  - b. The reason for the delay; The applicant has not provided sufficient and tangible reasons to warrant the extension of time sought herein.
  - c. The arguability of the appeal; the same has not been demonstrated by the applicant herein.
  - d. The degree of prejudice which could be suffered by the Respondent if the extension is granted; if the orders sought by the applicant herein were to be granted the same would amount to delaying justice and respondent's entitlement to his fruits of litigation.
  - e. The importance of compliance with time limits to the particular litigation or issue; and the effect if any on the administration of justice or public interest if any is involved.
9. Additional reliance is placed on the case of *R v Permanent Secretary Ministry of Transport, Attorney General (interested party) Ex parte Fanuel Inzira Misango* [2019] eKLR where the court underscored the need for balancing the rights of the unsuccessful party to appeal with the rights of the successful party to enjoy the fruits of the judgment. The Respondent further submits that the Applicant has not proven that he is a man of straw. In conclusion the Respondent asserts that should the court be persuaded to allow the application, it should issue strict timelines for filing the appeal and order for the deposit of the decretal amount in a joint interest earning account.
10. The Court is invited to make a determination as to the intended appeal and proposed stay pending execution. The Applicant has moved the Court some 6 or so months from the date of the decision they seek to appeal from. The decision was rendered on 22<sup>nd</sup> November 2023 and the application seeking leave to appeal out of time coupled with stay of execution was filed on 31<sup>st</sup> May 2024. There is nothing that has been placed before the Court to demonstrate why discretion should be exercised in respect to an indolent litigant. Appeals from such a decision as the one rendered in the Court below are to be preferred within 30 days of the delivery of the decision. There is nothing to show any peculiar reasons to warrant a variation of the time-honoured principle that *vigilantibus non dormientibus aequitas subvenit* – equity aids the vigilant, not the indolent. No reasonable explanation has been proffered for the late attempt to halt the progression of the suit. Having failed to surmount the first hurdle, there is no need for the court to consider any other aspect of the stay application. Nevertheless, there is even no plausible argument presented as to why there should be an order of stay. The Applicant only harps on the provisions of Article 50(1) on the right to hearing. That is not a factor to consider on arguability of an appeal or even for stay. The foregoing is ample to demonstrate there is nothing other than an attempt to delay the day of reckoning as far as the judgment is concerned. Since no demonstrable right is to be articulated as far as the intended appeal goes, the most appropriate order to issue is one dismissing the application for stay with costs. Should the Respondent be so minded he can proceed to execute the decree.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF OCTOBER 2024**

**NZIOKI WA MAKAU**



**JUDGE**

